Dispelling the Myths: Florida's Non-Ad Valorem Special Assessments Law

Henry Kenza van Assenderp
Andrew Ignatius Solis

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DISPELLING THE MYTHS: FLORIDA'S NON-AD VALOREM SPECIAL ASSESSMENTS LAW

HENRY KENZA VAN ASSENDERPE & ANDREW IGNATIUS SOLIS

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SPECIAL ASSESSMENTS

DISPELLING THE MYTHS: FLORIDA'S NON-AD VALOREM SPECIAL ASSESSMENTS LAW

HENRY KENZA VAN ASSENDERP* & ANDREW IGNATIUS SOLIS**

I. INTRODUCTION

Confusion, myths, and uncertainty exist in Florida among practitioners, courts, citizens, property owners, taxpayers, and government officials about special assessments or "non-ad valorem special assessments." It has been the authors' experience that this confusion and uncertainty reaches all aspects of the nature, use, levy, collection, and enforcement of special assessments. This confusion also causes many local governments to gamble on the reaction of property owners and courts to the imposition of special assessments.

This Article examines factors that influence local governments to use special assessments to fund basic infrastructure needs such as road paving, solid waste collection, or drainage. The authors believe that the difficulty in satisfying infrastructure needs is compounded by decades of neglecting these needs. This Article seeks to shed light on a subject that is misunderstood but, in view of growing local government revenue needs, is becoming increasingly important to all local governments, especially small, rural counties.

1. In this Article, the authors use the term "non-ad valorem special assessments" as the broadest and most descriptive name for what are commonly referred to as "special assessments." See also infra text accompanying notes 8-9. In the context of taxation, the term levy is defined as "the legislative function and declaration of the subject and rate or amount of taxation." BLACK'S LAW DICTIONARY 907 (6th ed. 1990). The authors emphasize that the key to special assessments for purposes of this Article is the legislative function of declaring the property subject to an assessment, either based on a percentage of the appraised value of property or because of the determination of special benefits to the property and reasonable apportionment of the duty to pay. See, e.g., FLA. STAT. §§ 170.03, 192.001(9), 197.3632(1)(a), 200.065(2)(d) (1991). The word "impose" is sometimes used as a synonym for levy.

2. FLORIDA TAX’N & BUDGET REFORM COMM’N, FLORIDA’S FISCAL FUTURE: BALANCING NEEDS AND TAXES 76 (1991). The Commission found that:

[Counties and cities in Florida (in the aggregate) will experience their first collective revenue shortfall by the year[s] 1995 and 1996 respectively. By the year 2000, accumulated revenue shortfalls for counties are estimated to reach $4.6 billion. Cities are estimated to reach a $1.2 billion revenue shortfall. Small counties are experiencing fiscal crisis immediately.

Id.
guishes non-ad valorem special assessments from other property-related local government funding sources, analyzes the authority of local governments to levy these assessments, clarifies terminology and procedures that relate to the levy and collection of special assessments, and offers some conclusions and suggestions.

II. TAXES AND SPECIAL ASSESSMENTS: A DISTINCTION AND DISCUSSION

Both taxes and non-ad valorem special assessments are compulsory levies of local governments. Both are legally enforceable against property owners—even against homestead property. Because special assessments are compulsory and enforceable against real property, taxpayers, local officials, and courts may regard them as "taxes." For example, the bottom line to taxpayers is that they stand to lose their real property—even homesteads—if they fail to pay either taxes or special assessments. Thus, taxpayers understandably confuse the two. This confusion has arguably blinded many people, including judges, to the distinctions between taxes and special assessments. Not surprisingly, many misunderstandings and myths have evolved. The

3. FLA. CONST. art. VII, § 6(a).
4. The authors have noticed this confusion in discussions with members of these groups. See infra note 5.
5. The authors have conferred at length during recent years with individual property owners; county, municipal, and special district officials; Florida Department of Revenue officials; tax collectors and property appraisers; attorneys; and consultants.

The authors have identified a number of misconceptions about non-ad valorem special assessments. Common misconceptions include that the constitutional and statutory requirements the law provides for levying a property tax must also be used to levy a special assessment, including referenda; that if a valid special assessment results in a general benefit to the community, it is automatically invalid unless it meets the constitutional and statutory requirement of a property or other tax; that "special assessments" and "non-ad valorem assessments" are two different things; that special districts are special assessments; that homestead property may not be lost for nonpayment of special assessments; that a taxpayer may choose to pay only property taxes when special assessments are on the annual official tax bill; that municipal service taxing or benefit units are special districts; that the only way a county may levy a special assessment is through a municipal service taxing or benefit unit; and that the levy is lienable as long as the term "special assessment" is used to describe a charge.

Other common misconceptions the authors have found are that the provision of services and the funding of specifically related operational expenses may not be funded by special assessments; that exactions and impact fees are special assessments; that the sale of a tax certificate for nonpayment of special assessments on the annual tax bill results in an immediate and automatic loss of property and therefore special assessments should not be levied; that the burden imposed on each parcel of property to pay the assessment must be precisely equal to the special benefit received; and that the amount of funding from property taxes and special assessments is interchangeable.

The most prevalent and consequential myth, however—one perpetuated even by courts, attorneys general, and practitioners—is the continual characterization of special assessments as "like" a tax, in the "nature" of a tax, or levied through the power of taxation. See, e.g., Swan-
similarities between taxes and special assessments are important, but the distinctions are increasingly more important.

A. Similarities and Distinctions

1. Definitions

The Legislature first defined "non-ad valorem assessment" in 1988 in section 197.3632(1)(d), Florida Statutes. The statute did not, however, invent or create a new or different type of local government levy on property. The statute defines "non-ad valorem" broadly to cover all lienable levies assessed by local governments and not based on real property value, including those lienable on homestead property under article X, section 4 of the Florida Constitution.\(^6\) This term also distinguishes lienable special-benefit assessments from lienable general, value-based (ad valorem) assessments.\(^7\)

The term "non-ad valorem" denotes something other than levies from cost-based charges and regulatory-based fees or exactions. "Non-ad valorem" is by definition different from a value-based property tax. A "special" levy can be distinguished from a "general" levy, which is a uniformly applied property tax benefitting the general community.\(^8\) The terms "non-ad valorem" and "special" are sometimes used interchangeably, but each has a significant and factually descriptive emphasis.\(^9\) "Non-ad valorem assessment" emphasizes the distinction between ad valorem and non-ad valorem levies. "Special assessment" places the emphasis on the special benefit theory, rather than on the general nature of a tax. The authors therefore conclude that the broadest form of the synonymous terms is "non-ad valorem

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\(^{6}\) son v. Therrell, 150 So. 634, 636 (Fla. 1933) ("Special or local assessments . . . are burdens in the form of taxation. . . .''); Klemm v. Davenport, 129 So. 904, 907 (Fla. 1930) ("A 'special assessment' is like a tax . . . .''); Atlantic Coast Line R.R. v. City of Lakeland, 115 So. 669, 676 (Fla. 1927) ("[A]ssessments for local improvements are a part of the system of taxation . . . .'’). The Florida Supreme Court clarified this issue last year when it held that special assessments are not taxes. City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992) ("A legally imposed special assessment is not a tax."). Although Boca Raton is a municipality, the authors believe the case should apply to all local governments.

\(^{7}\) See id. § 197.3632(1)(e), which defines non-ad valorem assessments as "those assessments not based upon millage . . . ." (emphasis added).

\(^{8}\) See infra notes 21-27 and accompanying text for a brief discussion of general levies.

special assessment” and thus use this phrase throughout the Article.

Resolutions, ordinances, and statutes have used a variety of names for local levies, such as “service charge,” “maintenance special assessments,” or “benefit special assessments.” Ultimately, choosing one term over the others should have no legal relevance. What is relevant is whether the levies are used to pay for a system, facility, or service that results in a reasonably apportioned special benefit to property. The levy is presumptively constitutional if the local government ascertains that the systems, facilities, or services it funds pass the legal tests for a special assessment—meaning that the levy has an ascertainable special benefit to property and is a reasonable apportionment.

2. Defining and Distinguishing Property Taxes and Special Assessments

(a) The Confusion with Taxes

As a practical matter, it may be difficult to distinguish property taxes from special assessments. First, there is general confusion because both levies are like “taxes” in that they relate to property, are compulsory, and provide local government revenues. The second major point of confusion arises in determining the generic nature of the levy. When a property tax is levied, the major issues are the property appraiser’s valuation of the property, the determination of millage rates, and the budget. There is no issue regarding the generic nature of the levy: It is always a property tax. This is not true with non-ad valorem special assessments because, in many instances, the generic nature of the levy is presumptive and subject to challenge as an issue of fact because there must be a special benefit to the property assessed and the burden must be reasonably and fairly apportioned.

11. Florida’s Second District Court of Appeal said the term “special assessment” is a broad one and may embrace various methods and terms of charges collectable to finance usual and recognized municipal improvements and services. Among such charges are what are sometimes called “fees” or “service charges,” when assessed for special services. Moreover, these may take the form (at least for lien purposes) of “special assessment.” Charlotte County v. Fiske, 350 So. 2d 578, 580 (Fla. 2d DCA 1977) (emphasis in original).
12. See infra notes 169-226 and accompanying text for a discussion of valid non-ad valorem special assessments.
13. See generally supra note 5.
14. See infra notes 169-226 and accompanying text (discussing valid non-ad valorem special assessments).
There is, however, no issue of property value, and the assessment rate is usually a secondary issue.

The courts have struggled with the fact that both property taxes and special assessments are compulsory levies and have had continuing difficulty distinguishing these two types of lienable local government assessments on property. In attempting to define “special assessments,” the courts have tried to analogize them to—and, at the same time, differentiate them from—ad valorem or property taxes. For example, in *Atlantic Coast Line Railroad v. City of Lakeland*, a case involving a special assessment for street paving, the Florida Supreme Court defined the word “tax” and stated that “assessments for local improvements are a part of the system of taxation.”

In 1941 the court attempted to clarify the distinction between taxes and non-ad valorem special assessments when it stated in *Board of Supervisors v. Caldwell* that:

> assessment[s] or charges . . . provide means to accomplish the purposes set out in these acts, and [are] a peculiar species of taxation distinct from the general burden imposed for state, county, and municipal purposes, in that it is a local or special charge placed upon the land . . . to pay for public improvements proposed to be made therein, on the theory that such property thereby derives a special benefit . . . .

According to the court in *Jackson v. City of Lake Worth*, “[i]t is true that an assessment for benefit is not, strictly speaking, a tax, but it is a burden levied under the power of taxation.”

Until 1992 the closest the supreme court came to stating that special assessments technically are not—and never have been—taxes was in *Klemm v. Davenport*, where the court noted that previous case law had not found that special assessments are taxes *per se*.

The Florida Supreme Court, in *City of Boca Raton v. State*, finally liberated us from the unfortunate and counter-productive mischaracterization of non-ad valorem special assessments as taxes that was
caused by focusing upon the compulsory-levy and enforced-contribution aspects of all assessments by local governments.\textsuperscript{20} By making it clear in \textit{City of Boca Raton} that special assessments are not taxes, the court may have eliminated blinders that will allow the public to focus on the presumptive nature of local government decisions to levy a special assessment.

\textit{(b) Taxes Defined}

"Taxation" is a generic term that applies to general levies of the state and local governments, including both direct taxes (i.e., property taxes) and indirect taxes (i.e., sales taxes and use taxes).\textsuperscript{21} Through taxation, "government distributes the burdens of its cost among those who enjoy its benefits."\textsuperscript{22} This power to impose a burden on a person or property for the maintenance of the government is an inherent sovereign right.\textsuperscript{23}

The benefits from taxes are general,\textsuperscript{24} community-wide,\textsuperscript{25} and serve at least one of these functions: (1) governmental support, (2) administration of the law, or (3) execution of the functions of the sovereign.\textsuperscript{26} Property or "ad valorem" taxes serve all of these functions. Property taxes are general assessments that are uniformly levied and are based on property value.\textsuperscript{27}

\textit{(c) The Distinction and Difference}

The major error in defining special assessments in terms relevant to taxation is that ad valorem taxes have unique constitutional limitations and requirements. First, taxes must be levied for a lawful public purpose.\textsuperscript{28} Second, "our constitutional set-up" requires taxes to be

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{20} 595 So. 2d 25, 29 (Fla. 1992).
\item \textsuperscript{21} See generally American Can Co. v. City of Tampa, 14 So. 2d 203 (Fla. 1943).
\item \textsuperscript{22} Welch v. Henry, 305 U.S. 134, 144 (1938).
\item \textsuperscript{23} See, e.g., Blake v. City of Tampa, 156 So. 97, 99 (Fla. 1934).
\item \textsuperscript{24} Miller v. Higgs, 468 So. 2d 371, 376 (Fla. 1st DCA 1985).
\item \textsuperscript{25} Many non-ad valorem special assessments also result in general community-wide benefits to people and property. If these special assessments also provide a special ascertainable benefit to the property, then the fact that there is also a general benefit does not undermine the special assessment—as long as the assessment is reasonably apportioned. See Charlotte County v. Fiske, 350 So. 2d 578, 581 (Fla. 2d DCA 1977). See, e.g., Klemm v. Davenport, 129 So. 904, 907 (Fla. 1927). See infra notes 29-30.
\item \textsuperscript{26} City of Daytona Beach v. King, 181 So. 1, 5 (Fla. 1938); Burnett v. Greene, 122 So. 570, 577 (Fla. 1929); City of Bradenton v. State, 102 So. 556, 558 (Fla. 1924). See also Dundee Corp. v. Lee, 24 So. 2d 234, 235 (Fla. 1945). For a general discussion of what constitutes a lawful public purpose, see 50 FLA. JUR. 2D \textit{Taxation} §§ 2:1-7 (1983).
\end{itemize}
\end{footnotesize}
levied equally among all classes. Finally, article VII, section 2 of the *Florida Constitution* requires ad valorem taxes to be levied at a uniform rate throughout each taxing unit.

These limitations, characteristics, and requirements do not apply to non-ad valorem special assessments. Even though both property taxes and special assessments are compulsory and enforceable, there are important differences.

Special assessments are burdens imposed on property by local governments for funding particular services, systems, and facilities. They confer a special benefit to the burdened property and are reasonably and fairly apportioned. They are neither general nor uniform revenue-generating mechanisms. However, an otherwise valid special assessment is not rendered invalid if it also results in a general benefit to the property or community.

Special assessments, like taxes, may also be imposed on homestead property. The owner of homestead property could lose the property for nonpayment of special assessments, even though the property is exempted from taxation because its value is less than the $25,000 homestead exemption. As discussed in Section IV, whether homestead property should be lost for nonpayment of some or all of a valid special assessment is not a legal issue, but a matter of constitutional and legislative policy.

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29. See, e.g., *Dundee Corp.*, 24 So. 2d at 235.
30. *Fla. Const.* art. VII, § 2. There is a minor exception for intangible personal property.
31. Id.
33. *Board of Supervisors v. Caldwell*, 35 So. 2d 642, 644 (Fla. 1948); *Blake v. City of Tampa*, 156 So. 97, 99 (Fla. 1934); *Klemm v. Davenport*, 129 So. 904, 907 (Fla. 1930); *City of Ft. Myers v. State*, 117 So. 97, 104 (Fla. 1928); *Lainhart v. Catts*, 75 So. 47, 52 (Fla. 1917).
34. *Fla. Const.* art. VII, § 6. Homestead property "shall be exempt from taxation thereon, except assessments for special benefits." *Id.* This wording in the 1968 revision to the constitution carried over the wording from the 1938 amendment to the 1885 constitution. The key wording is "except for assessments for special benefits" (emphasis added). *Id.* art. X, § 7. The original wording was a special assessment for benefits.
35. *Id.* art. VII, § 6(c). See also *id.* art. X, § 4. Homestead property "shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon." *Id.* (emphasis added). The terms "taxes" and "assessments" are subject to interpretation. First, the term "taxes" is not limited to property taxes. Theoretically, homestead property may be lost for nonpayment of a tax not based on property value, i.e., any general assessment. Second, the term "assessment" could mean a general ad valorem assessment, a property tax, or a non-ad valorem special assessment. The authors believe that both such levies are contemplated.
(d) The Confusion About Collection and Enforcement of General and Special Assessment Levies

The Florida Statutes add to the confusion about special assessments. Chapter 197, which governs tax collections, tax rolls, tax certificates, and tax deed sales, includes numerous references to special assessments, non-ad valorem assessments, and, to muddy the waters further, "service charges." To add to the confusion, "special assessment" is also defined in the Florida Condominium Act.

Another source of confusion is the timing and billing for collecting special assessments. There are two ways to collect these assessments. Property taxes and non-ad valorem special assessments both may be collected on the tax notice (the bill) that property owners receive each November from the tax collector. Special assessments also may be collected on a separate bill from either the tax collector or from the levying local government.

Property owners have a right to clear and helpful information about both property taxes and special assessments. Their concerns are important because nonpayment of either can result in loss of real property, including their homesteads. Accordingly, the fairness, accountability, and efficiency with which both ad valorem taxes and non-ad valorem special assessments are noticed, collected, and enforced have legal and political consequences.

Local governments might not levy non-ad valorem special assessments because they do not know and sometimes fear the consequences of how they will collect or enforce them. Some problems or "disadvantages" in the history of the use of special assessments in Florida

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36. See, e.g., supra note 10 and accompanying text.
38. Id. §§ 197.3631, .3632, .3635.
39. Section 197.363, Florida Statutes, provides that "special assessments" may, but "service charges" shall not, be put on a property appraiser's tax roll. This section, with its references to special assessments and non-ad valorem assessments, has probably resulted in an emphasis on the label of a particular levy over its generic nature because it refers to an optional method of collection for special assessments that does not apply to service charges.
40. Id. § 718.103(21). The confusion surrounding the levy and collection of special assessments versus "service charges" has been so great that the Florida Advisory Council on Intergovernmental Relations, the Florida Taxation and Budget Reform Commission, and the Florida Tax Collectors, Inc. have addressed their use and authorization. See Florida Advisory Council on Intergovtl. Rel., supra note 9, at 7; van Assenderp & Cook, supra note 9, at 29. See generally Florida Tax'n & Budget Reform Comm'n, supra note 2.
43. Florida Advisory Council on Intergovtl. Rel., supra note 9; van Assenderp & Cook, supra note 9, at 16-17.
44. Florida Advisory Council on Intergovtl. Rel., supra note 9, at 18-19.
can be significantly minimized through a proper understanding and use of the collection and enforcement methodologies.\(^\text{45}\) The county, municipality, or special district may collect and enforce special assessments by hiring and paying for its own employees or collection agents.\(^\text{46}\) However, the governing body of the county, municipality, or special district may also contract with the tax collector to collect its non-ad valorem special assessments either on a separate bill or on the official tax notice.\(^\text{47}\)

There are two procedures for a local government to ensure that the tax collector collects non-ad valorem special assessments on the official tax notice in November and makes them subject to tax certificate and tax deed methodology. The first method is to place the non-ad valorem special assessment on the tax roll of the property appraiser, then to certify it to the tax collector for collection and enforcement.\(^\text{48}\) The second method is the so-called "ad valorem" or "uniform method" under section 197.3632, *Florida Statutes*,\(^\text{49}\) with its two noticed hearings.\(^\text{50}\)

\(^{45}\) *Id.* at 19.

\(^{46}\) Authority for this approach is the general authority under home rule in article VIII, § 6 of the *Florida Constitution* and also under § 197.3631, *Florida Statutes* ("Non-ad valorem assessments may also be collected pursuant to any alternative method authorized by law, but which shall not require the tax collector or property appraiser to perform those services as provided for in [the traditional alternatives].").

\(^{47}\) *See generally* Fla. Stat. § 197.363-.3635 (1991). The tax collector may collect the special assessment, but the assessment often is not on the official tax notice sent out every November for collecting local government ad valorem taxes. Only special assessments that fall under the special statutory provisions of § 197.3632(1)(d) or § 197.363 may be on that tax notice. *Id.* § 197.3631.

\(^{48}\) This procedure using the property appraiser occurs in two ways:

First, some statutes or special acts require the property appraiser to put the assessment on the property appraiser's tax roll. *See, e.g.*, id. §§ 190.021(2), (3) (for special districts).

Second, a county, municipality, or special district may also ask the property appraiser to enter into an agreement—solely at the option of the property appraiser—to put any special or non-ad valorem assessment on the property appraiser's tax roll. *See id.* § 197.363. This method is allowed only if the property appraiser (or the property appraiser's predecessor) agreed before January 1, 1990, to put the assessment on the tax roll. Fla. Admin. Code Ann. r. 12D-18.008(1)(a) (1992). There must always be two agreements: one before January 1, 1990, and one after January 1, 1990, both at the sole option of the property appraiser. *Id.* This provision applies to a "special assessment" specifically labeled as such. *Id.*

\(^{49}\) Under this methodology, as also spelled out in rule 12D-18 of the *Florida Administrative Code Annotated* (1992), the local government must prepare and certify the roll to the tax collector, thus bypassing the property appraiser's tax roll. Fla. Stat. § 197.3632(5) (1991).

\(^{50}\) The two noticed hearings in § 197.3632(3) and (4) are used only to trigger the uniform collection method. Moreover, even if a particular general law authorizing the levy of a non-ad valorem special assessment provides a specific lien foreclosure collection methodology, this section is still available as an alternative methodology. *Compare* lien recording and foreclosure provisions for municipalities, Fla. Stat. §§ 170.09-.10 (1991), and counties, *id.* § 153.05, *with* the alternative use of tax certificates and tax deed. *Id.* § 197.3632. Additional details, including
If non-ad valorem special assessments are not collected on the tax collector’s official and annual tax notice, enforcement may only be by lien foreclosure in circuit court brought by the county, municipality, or district. The authors have observed that local governments faced with a lien foreclosure may choose not to seek foreclosure for political reasons, resulting in lost revenue. The authors have also observed that some local governments hesitate to use the various methods available to put special assessments on the tax bill because of a misconception that the use of tax certificates and tax deeds results in automatic loss of homestead property. The authors believe that the tax certificate methodology found in chapter 197, Florida Statutes, is fairer than lien foreclosure because the property may not be lost for a minimum of two years.

Notice of the levy of ad valorem taxes comes from the August notice of truth in millage (TRIM) and the official tax notice mailed each November by the tax collector. Each special assessment, however, is noticed, not necessarily annually, by the levying local government pursuant to the requirements and authority of the applicable authorizing or enabling statute. For each non-ad valorem special assessment, there is no notice analogous to the TRIM notice for property taxes. The only requirement is a small disclaimer required to be on the TRIM notice, but that does not distinguish between special assessments already levied and those yet to be levied. Only special as-

specialized variations, are included in regulations. See generally Fla. Admin. Code Ann. r. 12D-18 (1992). The use of the uniform method is strictly an option. Fla. Stat. § 197.3632 (1991) ("a local government . . . which elects to use the uniform method of collecting such assessments . . . ") (emphasis added). The statute also provides that the election can only be made if the non-ad valorem assessment is levied for the first time, id. § 197.3632(4)(a), or if it is a capital project, "whether or not such assessment . . . has previously been collected by another method." Id. § 197.3632(9)(a).

51. Fla. Stat. § 197.3631 (1991). Section 197.363 provides that only special assessments, and not service charges, can be on the property appraiser’s roll for certification to the tax collector for collection on the tax notice. The statute does not allow tax certificates and tax deeds to be issued for nonpayment of service charges. Id. § 197.363(5). This statutory terminology left room for abuse by labeling a levy a special assessment without any showing of a special benefit and reasonable apportionment. Nomenclature is not determinative and a service charge can be a special assessment if a special benefit is found. See Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977).


54. Id. § 197.3635.


sessments that have been authorized to be included on a tax collector's November tax notice give a taxpayer the benefit of the additional information on that notice.57

B. The Trend in Florida

The use of non-ad valorem special assessments to fund systems, facilities, services, works, and improvements to real property is increasing in Florida counties, unlike in the rest of the country.58 The number of Florida counties levying special assessments has increased from thirty-one counties in 1985 to forty-nine in 1990.59 The use of special assessments by municipalities in Florida also has increased, from ninety-six in 1985 to 116 in 1990.60 The Florida Advisory Council on Intergovernmental Relations61 (ACIR), for example, relying on a survey conducted by the Florida Comptroller's office, found that local governments collected $349,277,777 in revenue by levying special assessments in fiscal year 1989-90. This constituted an increase of $183,362,633 from 1985-86.62 The Comptroller's survey found:

—Florida counties accounted for $232,325,368 or 66.52% of the 1989-90 total.63

—Special districts accounted for $76,823,359 in 1989-90 or 21.99% of all special assessment revenues, down from 34.58% in 1985-86.64

57. See generally id. §§ 197.3631, .3632, .3635.

58. Florida Advisory Council on Intergovtl. Rel., supra note 9, at 10-11. The estimates of revenue collected from non-ad valorem special assessments differ. See Florida Tax'n & Budget Reform Comm'n, supra note 2; see also infra notes 66-70 and accompanying text.

59. Florida Advisory Council on Intergovtl. Rel., supra note 9, at 12. The importance of special assessments to rural counties is even more evident. Id. at 13-14. For example, rural counties have the highest percentages of total revenues provided by special assessments: Indian River, 16%; Gilchrist, 12%; Hendry, 11%; Jefferson, 9%; Madison, 9%; Columbia, 8.7%; Charlotte, 8%; Lafayette, 8%; and Polk, 7%. Id. at 14.

60. Id. at 12.

61. Section 163.703, Florida Statutes, created the Advisory Council on Intergovernmental Relations in 1977. One of its purposes is to "[a]nalyze the structure, functions, revenue requirements, and fiscal policies of Florida and its political subdivisions; conduct studies of economic, administrative, tax, and revenue matters for all levels of state government; and make recommendations for improvement." Fla. Stat. § 163.705(1)(c) (1991).

62. Total special assessment revenues in 1985-86 were $165,915,144. Florida Advisory Council on Intergovtl. Rel., supra note 9, at 11. "[I]t is important to note that the category for reporting special assessments to the Comptroller includes, for some jurisdictions, impact fees. The level of distortion of the figures submitted by local governments as an indication of special assessment are unknown." Id. at 11 n.28. While the figures may be distorted, the data is still relevant to illustrate the growing trend in the use of special assessments and other property-related financing. Furthermore, as will be seen later, the name given certain non-ad valorem levies is not dispositive. Levies or charges labeled "service charges," for example, may actually be special assessments. See supra note 51.

63. Florida Advisory Council on Intergovtl. Rel., supra note 9, at 11.

64. Id.
Florida municipalities accounted for $40,129,050 of special assessment revenues (11.49%) in 1989-90. Although the use of special assessments by Florida municipalities and special districts as a percentage of the total use of such assessments by all local governments from 1985-86 to 1989-90 has decreased, the actual numerical amounts have increased significantly. By comparison, the use of ad valorem taxes by the same types of local governments as a source of revenue has increased proportionally; therefore, the percentage of total revenues has remained approximately the same.

While the percentage of total local government revenues in Florida from special assessments hovers around two to three percent of all revenues, the amount of revenue collected through special assessments is substantial. According to another ACIR survey, which, unlike the Comptroller's data above, did not include impact fees, the total amount collected in 1989-90 by counties responding to the survey was $71.9 million. This ACIR survey estimates that special assessment collections for 1990-91 for the same counties would reach $93.7 million. During these years, Florida's "growth management law" was enacted. Its impact on these trends is unknown.

65. Id. The survey indicated that this percentage actually decreased from 14.20% in 1985-86. Id. However, the amount of revenue collected from special assessments by municipalities almost doubled between 1985-86 and 1989-90. Id.

66. Id. For municipalities, the increase was $16,564,418. For special districts, the increase was $19,450,434.

67. Id. The following results from the ACIR survey show local government use of ad valorem taxes:

<table>
<thead>
<tr>
<th>Counties</th>
<th>1985-86</th>
<th>1989-90</th>
</tr>
</thead>
<tbody>
<tr>
<td>(collections)</td>
<td>$1,855,184,020</td>
<td>$3,030,990,652</td>
</tr>
<tr>
<td>(% of total revenues)</td>
<td>63.19%</td>
<td>63.16%</td>
</tr>
<tr>
<td>Municipalities</td>
<td>$790,851,285</td>
<td>$1,215,378,189</td>
</tr>
<tr>
<td></td>
<td>26.94%</td>
<td>25.33%</td>
</tr>
<tr>
<td>Special Districts</td>
<td>$289,827,746</td>
<td>$552,492,299</td>
</tr>
<tr>
<td></td>
<td>9.87%</td>
<td>11.51%</td>
</tr>
<tr>
<td>All Local Governments</td>
<td>$2,935,863,051</td>
<td>$4,798,861,140</td>
</tr>
<tr>
<td></td>
<td>100.00%</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

68. Id. at 13.

69. Id. at 12. These numbers vary greatly from those found by the Comptroller, but they are still helpful in illustrating the trend in Florida.

70. Id.

71. See Local Government Comprehensive Planning and Land Development Regulation
Local governments are also focusing on the potential of special assessments as revenue sources for financing basic infrastructure through the issuance and amortization of local government bonds. This trend is the product of several factors that have caused local governments—especially counties—to look for alternative revenue sources, preferably those that are lienable.

First, the constitutional homestead exemption limits the amount of local ad valorem revenues, especially in rural counties. The Florida Taxation and Budget Reform Commission examined the state’s existing tax system in light of the state’s projected revenue needs. In its examination of the fiscal conditions of Florida’s local governments, the Commission found that the incremental increase in the homestead exemption from $5,000 in 1980 to the current $25,000 eased the impact of rising property values for many homeowners; “however, it has, to some extent, undermined the viability of the property tax as the major revenue source for local government, especially in areas experiencing slow economic growth.” The Commission found that the $25,000 homestead exemption has taken many homes in rural counties completely off the tax rolls, thereby reducing the available tax base and increasing the burden on nonexempt property. The Commission


Generally, counties, municipalities, and special districts are authorized to issue bonds to fund certain systems, facilities, services, and improvements. Fla. Stat. §§ 159.02(1), (2), .03, 189.404(3)(h) (1991). The bonds are amortized—that is, paid back—by particular funding sources with which they correlate. Generally, service charges or other non-lienable revenues are used to amortize revenue bonds. See, e.g., id. § 159.02(6). Property taxes are used to amortize general obligation bonds. See, e.g., id. § 215.84(2)(b)1. Non-ad valorem special assessments are used to amortize special assessment bonds. See, e.g., id. § 215.84(2)(b)5. Special assessments may also be used to amortize so-called revenue bonds. Id. § 190.016(8)(a).

Article VII, § 6(d) of the Florida Constitution provides that, as of 1982, homestead property shall be free of taxation up to the assessed value of $25,000. This provision was adopted in 1980 and increased the exemption in three incremental steps from the original $5,000 exemption in § 6(a). Fla. Const. art. VII, § 6(d). Cf. Fla. Const. art. VII, § 6(a) (1968). We note that article VII, § 4 of the Florida Constitution was amended in November 1992 to provide for the “just valuation” of homestead property. The amendment’s impact on local government ad valorem tax revenues is unknown.

The Taxation and Budget Reform Commission was established in 1988 by the Florida Constitution to evaluate and recommend reforms in Florida’s tax and budgeting system. Fla. Const. art. XI, § 6(a), (d).

See generally Florida Tax’n & Budget Reform Comm’n, supra note 2.

Id. at 34.

Id.
also found that 15.9% of all property in Florida was exempt from taxation in 1990 because of the homestead exemption.78 Furthermore, in 1990, sixteen of Florida's sixty-seven counties had more than thirty percent of their property exempt from taxation.79

Second, the ad valorem millage caps in article VII, section 9(b) of the Florida Constitution and sections 200.071-.081, Florida Statutes, also induce local governments to use special assessments.80 By limiting a local government's ability to levy ad valorem taxes, these caps pressure local governments to use alternate revenue sources for funding systems, facilities, services, and improvements.

Florida Department of Revenue reports indicate that in 1990, twenty-two counties were at or within one mill of the constitutional millage cap and thus were already under fiscal constraints.81 The Commission estimated that the number of counties approaching the millage cap by the year 2000 will increase to more than thirty-nine, or fifty-eight percent of all counties.82 Compounding this problem is the fact that in twelve of the thirteen counties already levying at the ten-mill cap in 1990, the homestead exemption accounted for 52.18% to 74.81% of the total residential property value.83

Municipalities are under similar fiscal constraints. In 1990 the Commission found that only five Florida municipalities84 out of 394 were within one mill of the ten-mill cap for municipalities.85 By the turn of the century, the Commission predicts that ninety-two municipalities will have reached this level of millage.86 Though not constitutionally

78. Id. at 34-35.
79. Id. In 1990, 54.3% of the property in Holmes County was exempt. Id. at 35. This was the greatest percentage of all of Florida's counties. Id.
80. Id. A mill is equal to one one-thousandth of a U.S. dollar and is the unit in which ad valorem taxes are imposed. FLA. STAT. § 192.001(10) (1991). The term applies only to ad valorem taxes.
81. This data, compiled by the Department of Revenue, is inconsistent with figures compiled by the Florida Taxation and Budget Reform Commission. The Commission found that 19 counties fell into this category, while Department of Revenue data indicate that 22 counties, not counting Duval County, fell into this category. The Commission found that being within one mill of the constitutional cap constituted fiscal constraint. Compare Florida Dep't of Rev., Florida Ad Valorem Valuations and Tax Data 140-41 (1990) with Florida Tax'n & Budget Reform Comm'n, supra note 2, at 76.
83. Florida Tax'n & Budget Reform Comm'n, supra note 2, at 35.
84. Id. at 76.
86. Florida Tax'n & Budget Reform Comm'n, supra note 2, at 76.
limited, some independent special districts also have statutory caps on millage. 87

A third factor inducing general purpose local governments to use alternate revenue sources is the state’s attempts to manage the fiscal affairs of counties and municipalities. 88 The Commission’s report states:

Traditionally, states have compensated for tax restrictions on local governments by sharing state-generated revenues with them. Florida does share revenues from several tax sources with cities and a still greater number with counties. In 1982-83 the state shared 12.7% of its own-source revenue with cities and counties. By 1989-90 the percentage had declined to 8.8%. Counties now get more of their revenue from User Fees, 27.6% in 1989-90 compared to 16.2% in 1979-80. Cities make an even greater use of User Fees which constitute 30% of total revenue, much higher than the national average which rose from 18.8% in 1980 to 23.2% in 1989. 89

The Commission also found that counties and municipalities have “lost all federal revenue sharing, experienced reductions in other grant programs, and lost virtually all federal programs which in previous decades funded up to 90% of the capital costs of sewer and water plants.” 90

The Commission further found that during the 1980s the Legislature passed more than 300 state mandates requiring local governments to “perform an activity, provide a service or facility, or restricting a local government’s revenues or revenue generating capacity.” 91 Although it is difficult to determine the actual costs of these mandates, the Commission pointed out that one mandate requiring an increase in pensions for police and firefighters would cost local governments

87. Article VII, § 9 of the Florida Constitution provides that special districts may not levy in excess of “a millage authorized by law approved by vote of the electors who are owners of the freeholds therein not wholly exempt from taxation.” Some special districts are limited to a millage that is specified in general law. See, e.g., Fla. Stat. § 190.021(1) (1991) (limiting independent community development districts to levy of three mills, with an exception provided). It is not clear whether some of the county data includes dependent or independent district data.

88. Florida Tax’n & Budget Reform Comm’n, supra note 2, at 35.

89. Id. A user fee is a fee charged to a person for the use of some benefit provided by public-derived funds. It is distinct from a special assessment, which is a charge to property based on a special benefit to that property. A key difference is that a special assessment is an enforceable lien and a user fee is voluntary and not lienable.

90. Id. at 76.

91. Id. at 35; see also Florida Ass’n of Counties, Inc. v. Department of Admin., 595 So. 2d 42 (Fla. 1992).
more than $200 million annually. These mandates obviously create a need for revenue.

The authors have observed that political, economic, and social policy factors also induce local governments to use non-ad valorem special assessments because these assessments may be perceived to be more appropriate, flexible, and locality-oriented than a general property tax and are viewed as "user" or "benefit" related. In addition, local governments have turned to non-ad valorem special assessments because growth management laws have imposed the duty on counties and municipalities to eliminate the chronic backlog of basic community infrastructure while providing new infrastructure concurrent with the impacts of development.

Other inducements include (1) the preservation of county, city, and special districts' power to provide and finance projects by taxes; (2) the ability to expand basic community infrastructure, both to cure the backlog and to provide for new development, while preserving and protecting general borrowing capacity; and (3) the ability to fund basic improvements over time that would otherwise be unfundable because of the substantial costs involved.

C. Constitutional Authority for Levying Non-Ad Valorem Special Assessments

The misconceptions about special assessments are best dispelled by understanding the legal authority under which local governments may levy and collect non-ad valorem special assessments. Under the 1885 Florida Constitution, the Supreme Court of Florida recognized that there was no express constitutional provision relating to or authorizing special assessments. In Lainhart v. Catts the court established that the legislative power was supreme and that the policy underlying a validly enacted statute that "does not violate the federal or state Constitution" is not subject to review.

This judicial authorization stands in stark contrast to the taxing authority of the state, which was expressly limited under the Florida

92. Florida Tax'n & Budget Reform Comm'n, supra note 2, at 35.
95. Lainhart v. Catts, 75 So. 47 (Fla. 1917).
96. Id. at 52 (quoting State v. Atlantic Coast Line Ry., 47 So. 969, 984 (Fla. 1908)); see also Whitney v. Hillsborough County, 127 So. 486, 490-91 (Fla. 1930) ("no express provision in our State Constitution as to the imposition of special assessments"); Bannerman v. Catts, 85 So. 336, 342-43 (Fla. 1920) (special assessment statute upheld as proper exercise of legislative power and not constrained by any constitutional provision).
Constitution of 1885. It would have better served the state and local governments if the courts, when interpreting the 1885 constitution, had followed the United States Supreme Court in describing the nature of non-ad valorem special assessments as flowing from the "power of the state to require local improvements to be made which are essential to the health and prosperity of any community within its borders." Distinguishing a local government's authority to levy non-ad valorem special assessments from its authority to levy taxes would have avoided much of the confusion about the nature of special assessments.

1. General Purpose Local Governments: Counties

(a) The Constitutional Context

After the constitutional revision in 1968, article VIII of the Florida Constitution was amended to provide broad "home rule" powers for charter and non-charter counties and for municipalities. This was a fundamental change from the 1885 constitution. The 1885 constitution had based all powers of taxation in the state and provided that these powers could be delegated to the counties only by general or special legislation. Under the current constitution the opposite is the case because there is no delegation of taxing powers to counties, but rather there are limitations on county home rule powers. The constitution gives charter counties inherent powers of self-government, including enactment of ordinances, as specified in their charters, as long as the charters are not inconsistent with general or special law. Non-charter counties also have powers of self-government. However, a non-charter county's powers are authorized by state law, not by charter. A non-charter county may enact ordinances as long as they are not inconsistent with chapter 125 or any special act. The key point is

97. Fla. Const. art. IX, §§ 3, 5 (1885) (requiring the state to impose a uniform and equal rate of taxation).
100. Article III, § 20 of the 1885 constitution provided: "The Legislature shall not pass special or local laws in any of the following enumerated cases . . . for assessment, and collection of taxes for State and county purposes." Article IX, § 3 of the 1885 constitution provided: "No tax shall be levied except in pursuance of law." Article IX, § 5 of the 1885 constitution provided: "The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation."
101. Fla. Const. art. VIII, § 1(g).
102. Id. § 1(f).
103. Id.
that the 1968 constitution, authorizing laws, and applicable general or special laws are limitations on the inherent home rule powers of counties.

(b) Non-Charter Counties

The general authorizing law implementing non-charter home rule is chapter 125, Florida Statutes, which enumerates the powers and duties of non-charter counties. Its list is not exclusive. In Taylor v. Lee County, for example, the appellants challenged the "county's proposed issuance of transportation facility revenue bonds" and the imposition of "tolls on bridges, causeways, and expressways within the county, with the toll revenue to be used to repay the bonds and to maintain, repair and operate the transportation facilities." Among other things, the appellants argued that because chapter 159, Florida Statutes, specifically authorized the bonds, that provision "must be used because chapter 125, by itself, is insufficient authority for the issuance of these revenue bonds." Writing for a unanimous court, then-Chief Justice McDonald explained that chapter 159 provided supplemental and additional authority to issue revenue bonds and was not a mandatory source of authority. The court held in a subsequent case that the effect of the Taylor holding is that, in matters on which a non-charter county has authority to act, "it may choose between adopting an ordinance pursuant to its home rule power or adopting it pursuant to another statutory authority."

(1) Non-Charter Implementing Provisions and Alternatives for the County

A non-charter county that wants to levy non-ad valorem special assessments must be aware of statutory limitations and alternative levying authority. There are several statutory alternatives that allow non-charter counties to levy non-ad valorem special assessments. Because no statutes or cases give preference to any of these alternatives, each alternative would seem to be equally valid if properly implemented.

104. See Taylor v. Lee County, 498 So. 2d 424, 425 (Fla. 1986) ("because Lee is a home rule county, chapter 125 gives it the power and authority"); Speer v. Olson, 367 So. 2d 207, 211 (Fla. 1978) (county government had "full authority to act through the exercise of home rule power" unless the Legislature has preempted a particular subject).
105. 498 So. 2d at 425.
106. Id.
107. Id. at 425-26.
There are three independent sources of authority for a non-charter county to levy non-ad valorem special assessments: (1) inherent authorization under the constitution and chapter 125, Florida Statutes; (2) express authorization in section 125.01(1); and (3) express authority tied to a nonexclusive list of specific municipal purposes in section 125.01(1). The authors have found that most counties primarily opt for municipal financing units or dependent districts expressly authorized under sections 125.01(1)(q) and 125.01(5)(a), respectively.

One alternative allows the Board of County Commissioners to adopt an ordinance levying a non-ad valorem special assessment. This authority comes from chapter 125, Florida Statutes, which allows the county to levy "and collect taxes . . . and special assessments." The reference to "taxes" in this subsection is modified by language requiring that the taxes be "for county purposes and for the providing of municipal services within any municipal service taxing unit." Although that language modifies the power to levy and collect taxes, it does not modify the power to levy and collect non-ad valorem special assessments. Subsection (r) does not contain any language modifying the power to levy and collect special assessments by the non-charter county.

Additionally, certain enumerated governmental functions may be provided for by special assessments. Non-charter counties may further levy by ordinance special assessments for the funding of such munici-

110. Section 197.3631, Florida Statutes, contains a supplemental alternative and express stand-alone statutory power, not inconsistent with other law, to levy non-ad valorem special assessments. Any applicable and inconsistent special act would have to be determined on a county-by-county basis. Section 125.01(3)(b), Florida Statutes, provides that the powers of non-charter home rule counties shall be construed liberally, including all necessary and implied powers.

111. The boards of county commissions of both charter and non-charter counties must search the remaining provisions of chapter 125, Florida Statutes, a general law, any other general law, and any applicable special law to determine if there is any provision with which the proposed assessments would be inconsistent. If there is no inconsistency, the authors believe there is no limit on inherent power, and an otherwise valid special assessment may be enacted simply by the passage of an ordinance to cover both the unincorporated and incorporated areas of the county. In other words, there is, in the authors' opinion, an inherent power in a non-charter county to levy special assessments because (1) section 125.01, Florida Statutes, expressly provides that its list of powers is not exclusive; (2) no express or implied language in constitutional, statutory, or case law to the contrary exists; and (3) section 125.01(3)(b), Florida Statutes, states that "[t]he provisions of the [powers and duties] section shall be liberally construed." In effect, ordinances are the legal equivalent in each county of a special act. This is the essence of home rule.

112. Fla. Stat. § 125.01(1)(r) (1991). If acting pursuant to its authority under subsection (r), the exercise of a county's levying power applies county-wide, including the incorporated areas of the county as long as it is not in conflict with a municipal ordinance. Fla. Const. art. VII, § 1(f) (1968).

113. Id.
pal services as fire protection, ambulance service, and waste collection and disposal through additional expressed powers set forth in section 125.01(1), *Florida Statutes*, which authorizes home rule municipal power for non-charter counties.\textsuperscript{114}

(2) Non-Charter Implementing Provisions and Alternatives: Dependent Special Districts\textsuperscript{115}

Non-charter counties may also establish a dependent special district pursuant to section 125.01(5)(a), *Florida Statutes*, to levy and collect special assessments. These districts may be established only to accomplish a special purpose,\textsuperscript{116} although this special purpose may include the provision of a municipal service.\textsuperscript{117} The county may establish a dependent special district as long as the establishment does not conflict with general or special law.\textsuperscript{118} The dependent district may include incorporated and unincorporated areas of the county if the governing body of the affected municipality approves.\textsuperscript{119} A non-charter county may also create or establish dependent districts pursuant to other general laws as a way to levy special or non-ad valorem assessments.\textsuperscript{120}

Under section 125.01(5)(a), the county may authorize the district to provide municipal services and facilities from funds that the district may derive from three sources: service charges, special assessments, or taxes. The district's use of these three sources of revenue is limited to the boundaries of the district.\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{114} \textit{Id.} §§ 125.01(1)(d), (e), (k).
\item \textsuperscript{115} Section 189.403(2), *Florida Statutes* (Supp. 1992), defines dependent special districts as:
\begin{itemize}
\item (a) The membership of its governing body is identical to that of the governing body of a single county or a single municipality.
\item (b) All members of its governing body are appointed by the governing body of a single county or a single municipality.
\item (c) During their unexpired terms, members of the special district's governing body are subject to removal by the governing body of a single county or a single municipality.
\item (d) The district has a budget that requires approval through an affirmative vote or can be vetoed by the governing body of a single county or a single municipality.
\end{itemize}
\item \textsuperscript{116} FLA. STAT. § 125.01(5)(a) (1991).
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{E.g.}, \textit{id.} §§ 153.05, 189.4041, 336.01-66; \textit{see also id.} § 125.01(5)(a).
\item \textsuperscript{121} If the dependent district chooses to levy ad valorem property taxes, it must comply with an additional set of expressed provisions which govern the levy of those taxes found in § 125.01(5)(c). In that case, all constitutional, statutory, and relevant case law governing ad valorem taxes would apply. \textit{See FLA. CONSTR. art. VII, § 9.}
Non-Charter Implementing Provisions and Alternatives: Municipal Financing Units

Another method by which non-charter counties may levy special assessments is through establishing municipal service taxing units (MSTUs) or municipal service benefit units (MSBUs), also referred to as "financing units." This mechanism does not involve establishing a dependent special district or levying a special assessment by county ordinance under the inherent or expressed home rule powers. MSTUs and MSBUs are not local governments and they are not, therefore, special districts; they are merely specialized financing mechanisms uniquely available to counties.

The county may use a MSTU or MSBU to levy either a special assessment, a service charge, or a tax. Section 125.01(1)(q) expressly offers counties a choice of these three funding sources to pay for the listed municipal services or for "other essential facilities and municipal services."

Therefore, if the county deems it "appropriate and essential," a non-ad valorem special assessment may be imposed through the use of MSTUs or MSBUs for a variety of non-specified "other" municipal services. The statutes do not require counties to use MSTUs or MSBUs as the exclusive or essential way to levy special assessments for municipal purposes. If a county does not use an MSTU or MSBU, it may set up either a dependent district or exercise its inherent or expressed power through home rule.

It remains the subject of debate and litigation whether counties that wish to provide municipal services in unincorporated areas of a county must create an MSTU or MSBU or must establish a dependent district to levy special assessments. However, the authors believe that the broad home rule power given to counties under the constitution and applicable statutes, in addition to the express language in sec-

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122. Fla. Stat. § 125.01(1)(q) (1991). Neither this statutory provision nor any other provision in chapter 125 or any other general law addresses the difference, if one exists, between an MSTU and an MSBU. However, the authors suggest that the distinction to draw here is that an MSTU is the financing mechanism available for use by the county to levy ad valorem taxes, whereas an MSBU is the financing mechanism available for use by the county to levy benefit or non-ad valorem special assessments.
123. Id. § 125.01(1)(q) (1991).
124. The phrase "appropriate and essential" is not defined. Presumably, no levy should be legally inappropriate because it is a matter of policy. That which is either "appropriate" or "essential" varies from community to community as defined by the local government comprehensive plan. See chapter 163, Florida Statutes, for statutory requirements necessary for local government comprehensive plans.
125. See Foxx v. Madison County, No. 90-161-CA (Fla. 3d Cir. Ct. 1990), and Dryden v. Madison County, No. 90-198-CA (Fla. 3d Cir. Ct. 1990). Author Ken van Assenderp is cocounsel for Madison County in these cases. Andrew Solis is not involved in either case.
tion 125.01(1)(r), implies that neither the creation of an MSTU or MSBU nor the establishment of a district is required in unincorporated areas.126 This poses the question of whether a county is required to set up either special financing units or dependent districts to levy special assessments within a municipality with the affirmative written concurrences of affected municipalities. An appeal pending in the First District Court of Appeal raises this question.127

(c) Charter Counties

Charter counties may specifically provide within their charters for the power and authority to levy special non-ad valorem assessments by alternatives including dependent special districts and financing units.128

2. General Purpose Local Governments: Municipalities

Under the 1885 Florida Constitution, municipalities had only the power granted to them by the Legislature.129 This reservation of authority, known as the "Dillon Rule,"130 was observed until the 1968 constitutional revision.

The 1968 revision granted municipalities home rule powers, including a broad grant of authority to levy special assessments. Article VIII, section 2(b) of the 1968 Florida Constitution provides that "[m]unicipalities shall have governmental, corporate, and proprietary

126. Statutory language, though dealing with a different subject, substantiates the notion that special assessments may be levied by a county for certain "service areas," "unincorporated areas," or "program areas" other than through the use of the municipal service taxing or benefit units. Fla. Stat. § 125.01(7) (1991). The statute imposes the "real and substantial" benefit limitation on county levies but then excepts levies derived specifically from, or on behalf of, a series of different locations or processes, such as a "municipal service taxing unit," "service area," program area, or unincorporated area. The implication of this statutory exception is that a county may levy assessments in a service area, unincorporated area, or program area as an alternative to levying them through the use of financing mechanism called a "municipal service taxing unit." If the MSTU were exclusive, this statutory language should not exist.

127. Madison County v. Foxx, Case No. 91-04119 (Fla. 1st DCA 1991). Ken van Assenderp is co-counsel for Madison County in this case; Andrew Solis is not involved. The DCA heard oral arguments on this case on March 24, 1993. See also supra note 112.

128. As with non-charter counties, this authority is inherent in a charter county's home rule powers under article VIII, § 1(g) of the Florida Constitution and under chapter 125, Florida Statutes.

129. Article VIII, § 8 of the 1885 Florida Constitution provided: "The legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time."

powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.\textsuperscript{131}

Shortly after the adoption of the 1968 revision to the \textit{Florida Constitution}, the Florida Supreme Court held that municipalities needed specific legislative authority to act.\textsuperscript{132} In 1973 the Legislature passed the \textit{Municipal Home Rule Powers Act}, which gave municipalities this authority.\textsuperscript{133}

In \textit{State v. City of Sunrise}\textsuperscript{134} the State challenged the city's innovative use of "double advance refunding bonds" on the grounds that neither the \textit{Florida Constitution} nor chapter 166, \textit{Florida Statutes}, specifically authorized the financing scheme. In upholding the financing scheme, the supreme court acknowledged the breadth of municipal home rule power when it said:

\begin{quote}
Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." \textit{It would follow that municipalities are not dependent upon the Legislature for further authorization.} Legislative statutes are relevant only to determine limitations of authority.\textsuperscript{135}
\end{quote}

Therefore, as with counties, municipalities may take action as long as the action constitutes a valid municipal purpose and is not specifically prohibited by section 166.021(3)(a)-(d), \textit{Florida Statutes}.\textsuperscript{136}

In \textit{City of Boca Raton v. State} the Florida Supreme Court recently analyzed a municipality's home rule powers regarding its authority to levy special assessments.\textsuperscript{137} The majority stated that "it would appear that the City of Boca Raton can levy its special assessments unless it is expressly prohibited by law—section 166.021(1), expressly prohibited by the constitution—section 166.021(3)(b), or expressly preempted to the state or county government by the constitution or by general

\textsuperscript{131} (Emphasis added).
\textsuperscript{132} City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972) (holding that the city was powerless to enact a rent control ordinance without statutory authorization).
\textsuperscript{133} FLA. STAT. §§ 166.011-.411 (1973).
\textsuperscript{134} 354 So. 2d 1206 (Fla. 1978).
\textsuperscript{135} Id. at 1209 (emphasis added).
\textsuperscript{136} City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992) ("municipality may now exercise any governmental, corporate, or proprietary power" except in areas described in chapter 166).
\textsuperscript{137} Id. at 28.
The second issue in *City of Boca Raton* was whether, in light of specific language in chapter 170, *Florida Statutes*, the Legislature had preempted a municipality's ability to impose special assessments under other circumstances. The second issue in *City of Boca Raton* was whether, in light of specific language in chapter 170, *Florida Statutes*, the Legislature had preempted a municipality's ability to impose special assessments under other circumstances. Chapter 170, *Florida Statutes*, entitled *Supplemental and Alternative Methods of Making Local Municipal Improvements*, specifically states that municipalities may provide municipal services pursuant to their home rule powers. However, section 170.01 also provides:

(1) Any municipality of this state may, by its governing authority: ...  
  (g) Provide for the payment of all or any part of costs of any such improvements by levying and collecting special assessments on the abutting, adjoining, contiguous, or other specially benefitted property.  
(2) Special assessments may be levied only for the purposes enumerated in this section and shall be levied only on benefitted real property at a rate of assessment based on the special benefit accruing to such property from such improvements when the improvements funded by the special assessment provide a benefit which is different in type or degree from benefits provided to the community as a whole.

The *City of Boca Raton* court resolved the apparent conflict by finding chapter 170 is only, as its title suggests, an alternative and supplemental method by which municipalities may levy special assessments.

138. *Id.* The sole dissenting vote in this case was Justice McDonald, who wrote: *Id.* at 32 (McDonald, J., concurring and dissenting) (emphasis added). Therefore, the court was unanimous as to the municipality's authority to levy a special assessment.

139. *Id.* at 29. The court found that the Legislature did not intend to limit a municipality's ability to impose special assessments because "it is evident that chapter 170 is not the only method by which municipalities may level a special assessment." *Id.*

140. *FLA. STAT.* § 170.01(1)(g), (2).

141. 595 So. 2d 25, 29-30 n.3 (Fla. 1992). Although this intent is clear from the chapter's title, the statute expressly states that chapter 170 (as amended by session law 92-156) is a limitation of the home rule powers of municipalities. The Legislature should resolve this inconsistency.
3. Special Purpose Local Governments: Dependent and Independent Districts and Authorities

There are several types of special purpose local governments known as special districts. Essentially, the power and authority of such districts to levy and collect special assessments derive from the Legislature. As provided in section 189.403(1), Florida Statutes:

"Special district" means a local unit of special-purpose, as opposed to general-purpose, government with a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet. The special purpose or purposes of special districts are implemented by specialized functions and related prescribed powers.

The districts may not exceed the specific functions enumerated by the act or statute governing their creation or establishment.142 Special districts exist only to serve one or more special purposes with a variety of limited and special powers.143

There are two types of special districts: dependent and independent. Section 189.403(2), Florida Statutes, defines "dependent special district" as one that meets at least one of these criteria:

(a) The membership of its governing body is identical to that of the governing body of a single county or a single municipality.
(b) All members of its governing body are appointed by the governing body of a single county or a single municipality.

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142. See Walters v. City of Tampa, 101 So. 227 (Fla. 1924) (recognizing legislative authority to create or authorize special taxing districts). These statutes create or authorize the establishment of special districts and contain express authority for the levying of special assessments: Fla. Stat. § 153.53 (1991) (Water and Sewer Districts); id. § 161.31 (Beach and Shore Preservation Districts); id. § 163.506 (Neighborhood Improvement District); id. § 189.404 (Independent Special Districts); id. § 190.005 (Community Development Districts); id. § 298.001 (Water Control Districts); id. § 418.30 (Mobile Home Park Recreation Districts).

These statutes authorize the creation of special districts, but do not provide express authority to levy special assessments: id. § 125.901 (Juvenile Welfare Boards); id. § 154.207 (Health Facility Authorities); id. § 154.331 (Health Care Districts); id. § 155.04 (Hospital Districts); id. § 159.604 (Housing Finance Authorities); id. § 159.703 (Research and Development Authorities); id. § 163.356 (Community Redevelopment Agencies); id. § 189.4041 (Dependent Special Districts); id. § 266.00001 (Historic Preservation Boards); id. § 285.17 (Indian Tribe Special Improvement Districts); id. § 315.03 (Port Authorities); id. § 348.0003 (Expressway and Bridge Authorities); id. § 421.04 (Housing Authorities); id. ch. 243 (Educational Facility Authorities).

143. Id. § 189.403(1). For a detailed explanation of Florida special districts, see Mary K. Falconer, Special Districts: The "Other" Local Governments—Definition, Creation and Dissolution, 18 STaT. L. REV. 583 (1989). See also David M. Hudson, Special Taxing Districts in Florida, 10 FLA. ST. U. L. REV. 49 (1982).
(c) During their unexpired terms, members of the special district’s
governing body are subject to removal by the governing body of a
single county or a single municipality.
(d) The district has a budget that requires approval through an
affirmative vote or can be vetoed by the governing body of a single
county or a single municipality.

Dependent special districts may be creatures of county or city govern-
ment through home rule power under the Florida Constitution and
applicable Florida law. Such a district is therefore a dependent dis-

Dependent districts are essentially answerable to a particular county
or city government because the applicable general purpose govern-
ment appoints and reviews the districts’ board members and budgets.
If dependent districts levy property taxes, the millage of the applicable
county or city may be affected.

An independent special district is “a special district that is not a
dependent special district as defined in subsection (2). A district that
includes more than one county is an independent special dis-

All of these general laws provide whether the district shall have the
power to levy taxes, service charges, or non-ad valorem special assess-

144. FLA. STAT. §§ 125.01(5)(a), 189.403, 189.4041 (1991).
145. Id. § 189.4041.
146. See id. chs. 125, 166, 189.
147. Id. § 189.403.
148. Id. § 189.404(2)(a), (e). See also id. §§ 190.004, .012.
149. See also id. § 189.404(2).
150. Id. § 189.4031.
151. To establish an independent district by ordinance or rule is to authorize the existence
and function of a district on certain lands pursuant to its charter as created by the Legislature.
See id. §§ 190.005(1), (2); .006; .046.
bonds to be amortized by such revenues. For example, section 189.4065 provides that "[c]ommunity development districts may and other special districts shall provide for the collection of annual non-ad valorem assessments in accordance with chapter 197" or alternatively chapter 170, Florida Statutes.

Used in this context, "special district" means only a unit of a local special-purpose government.\textsuperscript{152} Although there are other public agencies, entities, or units that are considered either "local government" or "special districts," these are not local governments. For example, county financing units (MSTUs and MSBUs) are not special districts.\textsuperscript{153} Likewise, water management districts, viewed as special taxing districts, are regional, not local, and are operated pursuant to chapter 373 as agents of the state or pursuant to certain special regulatory duties.\textsuperscript{154} Under some circumstances, these districts levy property taxes collected by the individual tax collector in each county, even though these districts are regional, and cross several county lines.\textsuperscript{155} However, they are not local special purpose governments, and they cannot levy special assessments.\textsuperscript{156}

4. General and Special Purpose Local Governments: Additional and Supplemental Authority To Levy Non-Ad Valorem Special Assessments

The Legislature has given all local governments (counties, municipalities, and dependent and independent special districts) additional authority to impose and collect non-ad valorem special assessments supplemental to, and consistent with, the home rule power under sections 125.01 and 166.021, Florida Statutes, and chapter 170, Florida Statutes, or any other law.\textsuperscript{157} In the authors' opinion, the additional authority should also apply to special districts because they are also local governments.\textsuperscript{158}

D. The Boca Case and Its Impact

In City of Boca Raton v. State\textsuperscript{159} the Florida Supreme Court held that special assessments are not taxes.\textsuperscript{160} According to the court,

\begin{footnotes}
\footnotetext{152.}{Id. § 189.403(1).}
\footnotetext{153.}{See supra notes 122-27 and accompanying text.}
\footnotetext{154.}{FLA. STAT. § 189.403(6) (1991).}
\footnotetext{155.}{See, e.g., id. §§ 373.0697(2), 373.539(1).}
\footnotetext{156.}{Id. § 373.503(1).}
\footnotetext{157.}{Id. § 197.3631.}
\footnotetext{158.}{The language is also consistent with then-Chief Justice McDonald's discussion in Taylor v. Lee County, 498 So. 2d 424, 426 (Fla. 1986). See also FLA. STAT. ch. 189 (1991).}
\footnotetext{159.}{595 So. 2d 25 (Fla. 1992).}
\footnotetext{160.}{Id. at 29.}
\end{footnotes}
[t]axes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to the property; instead [taxes] may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer a specific benefit upon the land burdened by the assessment.\textsuperscript{161}

Furthermore, the court pointed out that a valid special assessment must be fairly and reasonably apportioned.\textsuperscript{162}

The court's analysis of a municipality's authority to levy special assessments should resolve much of the confusion about a local government's authority to levy these special assessments. The court stated that municipalities may levy special assessments unless expressly prohibited by statute or the constitution or unless the constitution expressly preempts this authority to the state or county government.\textsuperscript{163}

In finding that municipalities may levy special assessments pursuant to their home rule powers, the court analyzed the broad home rule powers granted to counties by chapter 125, \textit{Florida Statutes}, and the interplay with other statutes that expressly authorize counties to issue revenue bonds.\textsuperscript{164} Although dicta, the court's analysis strengthens the theory discussed in this Article that counties have both inherent and express authority to levy non-ad valorem special assessments.

In regard to municipalities, the court held that the home rule powers in chapter 166, \textit{Florida Statutes}, function in a similar manner.\textsuperscript{165} This holding should reassure municipal governments that they may choose between statutes expressly authorizing such levies or may proceed directly through their home rule powers. Although the court did not discuss the third category of local government in Florida—special districts—nothing in the court's opinion is inconsistent with the authority of districts to levy special assessments.\textsuperscript{166}

The most important outcome of the \textit{City of Boca Raton} decision for local governments was the court's acceptance of the method used by the city of Boca Raton to apportion the non-ad valorem special

\begin{itemize}
\item[161.] \textit{Id.}
\item[162.] \textit{Id.} The court's express differentiation of taxes from special assessments, as opposed to the old practice of analogizing the two, should dispel the confusion about the true nature of non-ad valorem special assessments.
\item[163.] \textit{Id.} at 28.
\item[164.] \textit{Id.} at 30. \textit{See also} Taylor v. Lee County, 498 So. 2d 424 (Fla. 1986).
\item[165.] City of Boca Raton v. State, 595 So. 2d 25, 29-30 (Fla. 1992).
\item[166.] \textit{See supra} notes 115-21 and accompanying text.
\end{itemize}
assessment it sought to levy. The court expressly rejected the argument that a special assessment "cannot be sustained because it will be applied on an ad valorem basis." The Legislature should nevertheless examine several aspects of the law to dispel the public's lingering fears about a local government's levy and use of non-ad valorem special assessments.

III. A TEST FOR VALID NON-AD VALOREM SPECIAL ASSESSMENTS

When a local government levies a valid special assessment, it must determine that the property upon which the assessment is levied receives an ascertainable "special and peculiar benefit." In addition, the owner must pay the assessment, which is based upon fair and reasonable apportionment of the burden to pay. In contrast, a tax confers a general, community-wide benefit.

A. Ascertainable Special Benefit Test

The local governing authority levying a special assessment must first determine that a special benefit will accrue to the property because of the improvement, system, facility, or service the assessment funds. Historically, the primary systems, facilities, services, and improvements funded by special assessments were those that abutted the property levied, such as street improvements and the draining of wetlands.

In Lainhart v. Catts, for example, the Florida Supreme Court considered the special benefit conferred on wetlands property located within the Everglades Drainage District where a proposed special assessment would have funded drainage. The court stated:

It is reasonable to presume, if indeed it is not obvious, that all lands lying within the drainage district, whether actually overflowed or not, will be greatly enhanced in value, when the purposes of this legislation have been accomplished, by being rendered far more

167. The city apportioned the assessment based on the value of the property. "[T]he City made specific findings that the improvements would constitute a special benefit to the subject property, that the benefits would exceed the amount of the assessments, and that the benefits would be in proportion to the assessments." City of Boca Raton, 595 So. 2d at 30 (emphasis added).
168. Id. at 31.
169. Id. at 29. Usually, the question is one of law and fact. Sometimes, however, it is only a question of law if the type of levy in question has already been held invalid by case law. In such a situation the only question remaining is the determination of reasonable and fair apportionment.
170. Id.; South Trail Fire Control Dist. v. State, 273 So. 2d 380 (Fla. 1973).
171. City of Ft. Myers v. State, 117 So. 97, 102 (Fla. 1928).
172. 75 So. 47 (Fla. 1917).
desirable for habitation and more susceptible to cultivation than in their present natural condition, they being for the most part, as alleged in the bill, now swamp and overflowed lands.\textsuperscript{173}

The fundamental point about special benefit to the property is that the system, facility, service, or improvement provided is not, per se, the special benefit. Instead, it is simply the mechanism from which the special benefit to the property is derived. Whether judicially presumed or statutorily expressed, the special benefit to the property from the mechanism must be ascertainable.

\subsection{Ascertainment of Special Benefit}

The ascertainment of special benefit is an important task for any levying local government. Failing to ascertain the special benefit peculiar to each parcel of property renders the levy unenforceable because without a special benefit the ordinance would be an attempt at a general tax. The tax would fail because the procedural and substantive requirements for such taxes, especially property taxes, were not followed.\textsuperscript{174} The authors recommend the following steps to ascertain a special benefit.

When a governing body tries to ascertain special benefit, it should first conduct research and analyze information. Financial experts and consulting engineers can present an analysis upon which the finding of special benefit to the property levied would be based.

Second, the governing body should ascertain special benefit to property by identifying, determining, and assessing what special benefits—over and above general community-wide benefits—would flow to the property from the construction and provision of the systems, facilities, and services. For example, the special benefit to a piece of property from a drainage system is not how much water is drained off the property, based on the related engineering and financial computations; rather, the special benefit is the identified and determined added use, enjoyment, or value of that property from the drainage system. The special benefit is not the provision for fire protection, the collection of solid waste, the provision of water management and control, or the availability and use of water supply and sewage treatment. The special benefit is what flows from such facilities.

Third, governing bodies should find out what courts have determined constitutes a cognizable special and peculiar benefit for a valid

\textsuperscript{173} \textit{Id.} at 55-56 (validating the assessment).

\textsuperscript{174} \textit{See supra} notes 21-35 and accompanying text.
non-ad valorem special assessment. Courts have recognized a variety of special benefits to property. Perhaps the most important is the actual and potential added use and enjoyment of the property.\textsuperscript{175} Other examples of special benefits include decreases in insurance premiums, increases in rental value, enhanced protection of public safety, and enhancement in the value of business property.\textsuperscript{176} In one case the court distinguished the enhancement in value of a locality as a whole from a community-wide benefit.\textsuperscript{177}

Once these special benefits are identified, their determination must be pursuant to judicially derived guidelines. For example, courts have held that the special benefits need not be either direct to the property or immediate.\textsuperscript{178} The determination can be measured by current use and by possible future uses.\textsuperscript{179} Finally, whether present or future, direct or indirect, the special benefits must be reasonably certain of computation.\textsuperscript{180}

Confusion arises because some infrastructure provided to the property and financed by a local government would appear to be "services" that benefit people in the community in general, and not the property.\textsuperscript{181} In addition, "added use and enjoyment" to property may also benefit the people who own the property.

A local government's provision of fire protection and of emergency medical and rescue services illustrates this confusion. To the lay person, these services appear to benefit people. Emergency medical and rescue services, in particular, may not appear to present any special benefit to property. In these ambiguous situations the levying local government entity must determine (1) how the system, facility, or service is to be set up, implemented, and provided; (2) the cost involved; (3) the special benefit of how the property will receive added use, enjoyment, or reduced insurance premiums; and (4) whether the cost is fairly and reasonably apportioned to each affected and specially benefitted piece of property.\textsuperscript{182} There is no reasonable basis to ascertain, for example, that the construction of a stationary county or municipal health unit or of a local or regional hospital results in spe-

\textsuperscript{175} Meyer v. City of Oakland Park, 219 So. 2d 417, 420 (Fla. 1969).
\textsuperscript{176} Fire Dist. No. 1 v. Jenkins, 221 So. 2d 740, 741 (Fla. 1969).
\textsuperscript{177} Atlantic Coastline R.R. v. City of Winterhaven, 151 So. 321, 323 (Fla. 1933).
\textsuperscript{178} Meyer, 219 So. 2d at 420.
\textsuperscript{179} Fire Dist. No. 1, 221 So. 2d at 741.
\textsuperscript{180} Id.
\textsuperscript{181} Crowder v. Phillips, 1 So. 2d 629 (Fla. 1941). See also South Trail Fire Control Dist., 273 So. 2d 380, 382 (Fla. 1973); State v. Halifax Hosp. Dist., 159 So. 2d 231 (Fla. 1963); State ex rel. Ginsburg, 185 So. 646 (Fla. 1938).
\textsuperscript{182} See infra notes 209-26 and accompanying text.
cial benefit to parcels of property. 183 Therefore, a special assessment for such stationary buildings and related facilities would not be appropriate. However, the provision of mobile emergency medical and rescue services could result in lower insurance premiums and added use and enjoyment of one's property and thus constitute a special benefit to property. Analogies can be made to the provision of fire control. In such an ascertainment, there is specific legislative184 and judicial authority supporting the finding of a specific benefit.

Some infrastructure provides a service, is part of a facility, and constitutes a system. Examples include the provision of street lights, garbage collection, garbage disposal, and even landfill construction or closure. There is direct legislative and case law authority for the levy of special assessments for solid waste collection and disposal.186

2. Challenges to the Ascertainment of Special Benefit

The courts require findings of an ascertainable benefit to the property levied. In Fisher v. Board of County Commissioners, for example, all property within a service district was specially assessed to fund the paving of roads, widening of streets, and other services.187 The Florida Supreme Court held that the finding of a special benefit did not rest solely "in the judgment or upon the 'ipse dixit' of the municipal officer or officers. . . ."188 Rather, the court held that the determination of special benefit "is a question of fact to be ascertained and established as any other fact. . . ."189 These findings, when made by a governing body, must be presumed valid.190 This presumption of validity "can be overcome only by strong, direct, clear and positive proof."191

183. Crowder, 1 So. 2d at 631.
186. Fla. Stat. § 125.01(1)(k), (q), (r) (1991); Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977); Gleason v. Dade County, 174 So. 2d 466 (Fla. 3d DCA 1965); Dade County v. Federal Nat'l Mortgage Ass'n, 161 So. 2d 255 (Fla. 3d DCA 1964). See also Solid Waste Management Act of 1988, ch. 88-130, 1988 Laws of Fla. 599 (codified at Fla. Stat. § 403.706(1)) (granting countywide responsibility and power for solid waste disposal facilities).
187. 84 So. 2d 572, 574-75 (Fla. 1956).
188. Id. at 576 (citing Atlantic Coast Line R.R. v. City of Lakeland, 115 So. 669, 675 (Fla. 1927)).
189. Id.
190. Meyer v. City of Oakland Park, 219 So. 2d 417, 420 (Fla. 1969); Rosche v. City of Hollywood, 55 So. 2d 909, 913 (Fla. 1952) ("[A]ll presumptions are in favor of the validity of assessments for local improvements, and the burden of proof is on persons attacking the validity of assessments to show that they are invalid."); City of Hallandale v. Meekins, 237 So. 2d 318, 320 (Fla. 4th DCA 1970), decision adopted sub nom. Investment Corp. of S. Fla. v. City of Hallandale, 245 So. 2d 253 (Fla. 1971).
191. Meyer, 219 So. 2d at 420.
The courts recently increased the burden needed to overcome this presumption. In *Charlotte County v. Fiske* the Second District Court of Appeal considered a special assessment that funded solid waste collection in an unincorporated part of Charlotte County. The district court held that "administrative or legislative determinations or findings of fact are entitled to great weight and ought not be lightly tampered with or voided absent a clear showing that they are arbitrary, oppressive, discriminatory or without basis in reason." In deciding whether a party challenging the validity of such findings has met his burden the Florida Supreme Court has held that:

if reasonable men may differ as to whether land assessed was benefitted by the local improvement the determination as to such benefits of the city officials must be sustained. If the evidence as to benefits is conflicting and depends upon the judgment of witnesses, the findings of the [governing body] will not be disturbed.

The nature of the benefit accruing to the property is also important to determine the validity of the special assessment and the validity of the findings made by the levying body. The supreme court has held that "‘benefit’ . . . does not mean simply an advance or increase in market value, but embraces actual increase in money value and also potential or actual or added use and enjoyment of the property." Further, the court has held that "[i]t is not necessary that the benefits be direct or immediate, but they must be substantial, certain, and capable of being realized within a reasonable time."

Although special assessments have historically been used to fund the construction of improvements such as streets, seawalls, and sewer systems, there is no specific legal requirement that a special assessment fund the construction of a facility or public improvement. "The 'improvement' involved may well be simply the furnishing of or making available a vital service, e.g., fire protection or . . . garbage disposal."

192. 350 So. 2d 578 (Fla. 2d DCA 1977).
193. Id. at 580; see also South Trail Fire Control Dist. v. State, 273 So. 2d 380 (Fla. 1973).
195. Meyer v. City of Oakland Park, 219 So. 2d 417, 420 (Fla. 1969). This definition would appear to support the hypothesis that special assessments could be used to fund an improvement of some kind which would maintain property in its pristine state, based on an increase in its natural use or increased enjoyment from its natural state.
197. See South Trail Fire Control Dist., 273 So. 2d 380 (special assessment used to fund fire protection); see also Fire Dist. No. 1, 221 So. 2d at 740 (fire protection); Charlotte County v. Fiske, 350 So. 2d 578, 580 (Fla. 2d DCA 1977) (funding of garbage disposal).
198. Fiske, 350 So. 2d at 580 (footnotes omitted).
The Florida Supreme Court has listed decreases in insurance premiums, added public safety, and the enhancement of property values by the provision of the service or improvements as special benefits that can sustain the levy of a special assessment.\(^\text{199}\) Furthermore, the special benefit is not limited to the present use of the property, but may include a special benefit to a reasonable future use.\(^\text{200}\) In certain limited situations, a determination of the particular benefit accruing to each parcel of property is still not necessary.\(^\text{201}\)

When a particular improvement by its nature is designed essentially to afford special or peculiar benefits to abutting or other property within the protective proximity of the improvement, it is presumed that special or peculiar benefits may or will accrue to the property so situated, and thus special assessments are permitted without an expressed finding or determination by the city that the property will be benefitted.\(^\text{202}\)

In summary, a special benefit is presumed if the system or facility abuts the property. If not, the issue is one of law and fact, unless a statute or case law has specifically determined that a certain type of system, facility, or service results in a special benefit.

\((a)\) The Levying Consideration

The county, municipality, or district, in levying a non-ad valorem special assessment, should address at least two subjects: (1) noticed hearings and related ordinances or resolutions to enact valid and constitutionally sound special assessments and (2) noticed hearings and related resolutions, as applicable, for the collection and the enforcement of special assessments. These two subjects are best considered by the taxing authority at the same time.

For the levy of the special assessment, the authors recommend that elected officials make sure the professional staff takes reasonable steps (1) to determine the need for the infrastructure to be financed by

\(^{199}\) Fire Dist. No. 1, 221 So. 2d at 741. At issue in a pending case, Madison County v. Foxx, Case No. 91-04119 (Fla. 1st DCA 1991), are special assessments for fire protection, emergency medical service, landfill closure, and solid waste collection. Madison County adopted four ordinances—Nos. 89-26, 89-27, 89-28, and 28-29—to fund these systems, facilities, or services by special assessment. See Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment at 10, Foxx v. Madison County (Fla. 3d Cir. Ct. 1990) (No. 90-161-CA); Dryden v. Madison County (Fla. 3d Cir. Ct. 1990) (No. 90-198-CA).

\(^{200}\) City of Hallandale v. Meekins, 237 So. 2d 318, 321-22 (Fla. 4th DCA 1970).

\(^{201}\) Id.; City of Treasure Island v. Strong, 215 So. 2d 473, 477-78 (Fla. 1968) (quoting Atlantic Coast Line R.R. v. City of Gainesville, 91 So. 118 (Fla. 1922)).

\(^{202}\) Meekins, 237 So. 2d at 321.
special assessments as opposed to other financing mechanisms, (2) to ascertain the special benefit to property from the governmental activity funded through the special assessment, and (3) to determine the reasonable and fair apportionment on each parcel of property of the burden to pay the special assessment levy. In addition, the authors also recommend that, for any first-time levy, there be a hearing for written and oral comments on the proposed infrastructure desired and on the choice of special assessment financing. This hearing should be noticed pursuant to proper enactment of a county or a municipal ordinance, or special district resolution authorizing the imposition of a contemplated special assessment for a particular system facility or service. For example, there should be a basic ordinance or resolution on a nonemergency basis imposing a special assessment. Subsequently, at noticed hearings, a series of resolutions can be adopted, including an additional resolution providing more specifically and in detail for the particular system services and facilities, describing the assessment methodology, and directing the preparation of the non-ad valorem special assessment roll. This resolution is often referred to as an initial resolution and is followed by a final resolution after all hearings and comments are considered.

During these workshops there should also be a discussion of whether the collection and enforcement methodology should involve the use of tax certificates and tax deeds to deal with the delinquency of payment of a special assessment for a piece of property, including homestead property. Because article X, section 4 of the Florida Constitution allows owners of homestead property to lose their property for failure to pay special assessments and because the local government is contemplating the levy of a special assessment, the property owners should have a right to express their opinion about whether the collection and enforcement procedures for nonpayment will involve either lien foreclosure in circuit court or the automatic issuance of tax certificates and tax deeds pursuant to uniform collection and enforcement procedures.

(b) Challenges Preceding the Levy

With regard to preadoption and levying, the notice and public participation procedures that attend the public meetings of counties, municipalities, and special districts are governed by chapters 125 and 166, Florida Statutes, and other applicable general law. These laws give all citizens and affected persons the opportunity to appear and voice their agreement or disagreement to the members of the governing bodies and their professional staff. Interested persons should also be given the opportunity to supply written comments on the proposed levying
ordinances or resolutions and can appear at workshops and hearings to voice concerns, questions, support, or opposition.

(c) Challenges Following the Levy

In Florida, when a property owner seeks to challenge an ad valorem property tax in circuit court, the taxpayer may opt to make only partial payment of the property taxes while the property tax assessment is litigated. In other words, the taxpayer does not have to pay the full amount to litigate the ad valorem tax assessment. However, the taxpayer must pay "not less than the amount of the tax which he admits in good faith to be owing." There is no general law that deals with such specific challenges after a local government has enacted the levying ordinance or resolution imposing a non-ad valorem special assessment. However, case law, civil procedure rules, and some statutory laws apply so that affected property owners may file individual or class-action suits as property owners or as homestead owners for declaratory judgment, injunctive relief, restraining orders, and related remedies, including refunds, under certain circumstances.

Unfortunately for the taxpayer, Florida law has a presumption against the granting of refunds for property taxes or special assessments except in special circumstances. The presumption is even stronger if the refund involves substantial numbers of taxpayers and, as a consequence, large amounts of money.

The courts must address several questions before they can decide whether a substantive challenge to an enacted ordinance levying a non-ad valorem special assessment has merit. First, they must determine whether the levy in the ordinance is a general ad valorem assessment. If the courts find that the levy is a tax, the next question is whether that particular tax has been authorized by general law.

204. Id.
205. Id.
206. Colding v. Herzog, 467 So. 2d 980, 983 (Fla. 1985). See also Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971); Deltona Corp. v. Bailey, 336 So. 2d 1163 (Fla. 1976); Gulesian v. Dade County Sch. Bd., 281 So. 2d 325 (Fla. 1973); Alsdorf v. Broward County, 373 So. 2d 695, 701 (Fla. 4th DCA 1979). Cf. International Studio Apartment Ass'n Inc. v. Lockwood, 421 So. 2d 1123 (Fla. 4th DCA 1982) (where a refund was authorized but prospectively only).
207. See cases cited supra note 206.
208. See FLA. CONST. art. VII, §§ 1(a), 9(a); Belcher Oil Co. v. Dade County, 271 So. 2d 118, 122 (Fla. 1972); City of Tampa v. Bardsong Motors, Inc., 261 So. 2d 1, 3 (Fla. 1972).

If the levy is not a tax, the only other source of authority for the county or municipality to use in levying the non-ad valorem special assessment is the home rule provision under article VIII of
The authors suggest asking the following questions in any challenge:
1. Does the local government have the legal authority to levy the proposed assessment?
2. Does the levy finance a system, facility, or service from which a special benefit ascertainable to each parcel of property is derived, over and above a general benefit to the community or to property, whether direct and immediate? Can the special benefit be measured by current use or possible future use of the property? Is the special benefit direct, approximate, and reasonably certain of computation at some point?
3. Would the nature of the special benefit derived from the system, facility, or service include any one or more of the following: increased market value, actual or potential added use or enjoyment of the property, impact on existing and possible future uses of property, potential for decreases in insurance premium, potential for enhancement and value of business property, potential for increases in rental value of the property, and potential for enhanced protection of public safety?
4. Is the exercise of discretion by the local government when adopting the levying ordinance or resolution, a reasonable exercise of discretion so that reasonable people may differ, or does it transcend the limits of equality and reason so that it could be viewed as extortion or confiscation of the assessed property?

B. Reasonable Apportionment Test

In determining the validity of a special assessment, courts also examine whether the cost that the property owner is required to pay has been reasonably and fairly apportioned to the property levied. An apportionment is considered reasonable unless it "so transcend[s] the limits of equality and reason" that it becomes extortion and confiscation of the property assessed. Florida courts have held that in these

the Florida Constitution.

To determine whether the ordinance is a valid exercise of home rule authority, the question is essentially whether the levy is an exaction or impact fee traveling under the police power of home rule, a service charge traveling under the police and other powers of home rule local governments, or a lienable special assessment travelling under revenue sources authorized under home rule. If the levy before the court is a resolution of a special district levying a special assessment, then the inquiry is whether it has followed the requirements of the applicable general law and whether there is any related general special act or county ordinance. The final major question then is whether the ordinance under challenge is in any way inconsistent with any applicable general or special law or whether the district resolution is based upon expressed statutory authority.

209. Fisher v. Board of County Comm'rs, 84 So. 2d 572, 576 (Fla. 1956).
situations, "it then becomes the duty of the courts to protect the person or corporation assessed from robbery under color of a better name."211

The line between confiscation or extortion and a valid non-ad valorem special assessment is drawn at the point where "the entire cost of the services to the residential units is equally distributed among such units."212 In other words, if all "units bear equal pro rata shares of the costs for equal pro rata shares of the service, the proportionate 'benefits' equal the apportioned costs."213 Furthermore, the reasonable apportionment regarding a non-ad valorem special assessment is not subject to the constitutional doctrine of uniformity required for ad valorem taxes.214

As with the determination of special benefits, the determination of whether the burden to pay for the special benefit from a non-ad valorem special assessment has been reasonably apportioned is a legislative function of the levying local government.215 As such, the method of apportioning the cost of the system, service, or facility provided must be given great weight.216 If reasonable people may differ over the reasonableness of the apportionment, the apportionment scheme must be sustained.217

"As long as the amount of the assessment for each tract is not in excess of the proportional benefits as compared to other assessments on other tracts," any method of apportioning the special benefits is

211. Id.
213. Id.
214. See City of Boca Raton v. State, 595 So. 2d 25 ( Fla. 1992); Meyer v. City of Oakland Park, 219 So. 2d 417, 420 ( Fla. 1969); Rosche v. City of Hollywood, 55 So. 2d 909, 913 ( Fla. 1952); City of Hallandale v. Meekins, 237 So. 2d 318, 320 ( Fla. 4th DCA 1970), decision adopted sub nom. Investment Corp. of S. Fla. v. City of Hallandale, 245 So. 2d 253 ( Fla. 1971).
215. South Trail Fire Control Dist. v. State, 273 So. 2d 380, 383 ( Fla. 1973); Fire Dist. No. 1 v. Jenkins, 221 So. 2d 740, 742 ( Fla. 1969); Lainhart v. Catts, 75 So. 47, 55 ( Fla. 1917); Fiske, 350 So. 2d at 580.
216. Meekins, 237 So. 2d at 320-21. The Florida Supreme Court has explained that: Many elements enter into the question of determining and prorating benefits in a case of this kind. They are physical condition, nearness to or remoteness from residential and business districts, desirability for residential or commercial purposes, and many other peculiar to the locality where the lands improved are located. . . .

No system of appraising benefits or assessing costs has yet been devised that is not open to some criticism. None have attained the ideal position of exact equality, but, if assessing boards would bear in mind that benefits actually accruing to the property improved in addition to those received by the community at large must control both as to benefits prorated and the limit of assessments for cost of improvement, the system employed would be as near the ideal as it is humanly possible to make it.

City of Boca Raton, 595 So. 2d at 31 (quoting Meyer, 219 So. 2d at 419-20 (citations omitted)).
valid and need not be mathematically precise.218 Some of the most recognized and accepted methods are the front-foot rule,219 the area method,220 and the market value method.221 The supreme court has also expressly recognized the validity of apportioning special benefits on an ad valorem basis.222 Many considerations and procedures available to challenge the ascertainment of special benefit also apply to challenges to the apportionment of special assessment levies.

An affected person seeking to challenge the method of apportionment may challenge the ordinance either before or after its adoption. When challenging the ordinance before its adoption, the affected person should be ready to attend the public hearings and try to determine whether the staff has properly documented the basis for reasonable apportionment of the levy. If there is a disagreement over the basis of the levy—or if the local government has not prepared a basis—the affected person should point this out. In addition, the affected person may hire experts to advise what would constitute a reasonable apportionment. When challenging an ordinance after its adoption, an affected person may seek an injunction or declaratory statement at the trial level or extraordinary writ at the appellant level.223

Regardless of how the apportionment scheme is challenged, the affected person has a difficult task. The scheme must be sustained if reasonable people might differ over its reasonableness.224 On the other hand, if the apportionment “so transcend[s] the limits of equality and reason that . . . [it becomes] extortion and confiscation” of the property assessed, then the scheme can no longer be sustained in the court of law.225 This is hard to prove because the function of levying the assessment, including determining reasonable apportionment, is the legislative function of the governing body of the county, municipality, or special

218. City of Boca Raton, 595 So. 2d at 31 (quoting South Trail Fire Control Dist., 273 So. 2d at 384).
219. See Atlantic Coast Line R.R. v. City of Gainesville, 91 So. 118 (Fla. 1922) (defining a “front-foot rule”).
220. See Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969); City of Hallandale v. Meekins, 237 So. 2d 318 (Fla. 4th DCA 1970) (defining an “area method”) decision adopted sub nom. Investment Corp. of S. Fla. v. City of Hallandale, 245 So. 2d 253 (Fla. 1971).
221. City of Boca Raton v. State, 595 So. 2d 25, 31 (Fla. 1991) (citing Richardson v. Hardee, 96 So. 290 (Fla. 1923)); see also City of Naples v. Moon, 269 So. 2d 355, 358 (Fla. 1972) (defining “market value method”).
222. See City of Boca Raton, 595 So. 2d at 31; Moon, 269 So. 2d at 358; Hardee, 96 So. at 292.
223. Fla. Stat. ch. 86 (1991); Fla. R. Civ. P. 1.110(b); see also Carson v. City of Fort Lauderdale, 155 So. 2d 620 (Fla. 2d DCA 1963).
district. The key, therefore, is to show that there was an abuse of discretion that overcomes the legislative presumption of validity.

IV. SOME THOUGHTS ON THE CONTEXT OF NON-AD VALOREM SPECIAL ASSESSMENTS

Under existing law, non-ad valorem special assessments are constitutional and valid if they: (1) satisfy any one of the judicially identified or statutorily expressed indices of special and peculiar benefit to property and (2) satisfy the court determined elements of reasonable and fair apportionment.

Moreover, if the local government has not abused its discretion, the authors believe that a non-ad valorem special assessment that is otherwise valid should be sustained even if: (1) it provides either a government or proprietary service; (2) its funds are used only for operational expenses; (3) it is an exercise of the home rule power by a county or municipality although not using special districts or, in regard to counties, an MSTU or MSBU; (4) it also results in a general community-wide benefit; (5) it was enacted without referendum; (6) it was enacted with no limit in the rate of assessment; (7) it was not specifically noticed on or concurrent with the annual truth-in-millage notice (TRIM); (8) it is not collected on the Tax Collector's official annual tax notice; (9) it results in loss of homestead property for nonpayment even though homestead property is subject to the certain constitutional exemptions from the property tax; (10) it is levied even when other sources of appropriate funding are available; (11) it is levied in part in response to state mandates; or (12) it is levied to fund a local "wish list" over and above essential improvements to pay for infrastructure or for the impacts of new growth or both, even if other sources of funds are available. The presence of any one or more of these twelve considerations does not render any non-ad valorem special assessment invalid.

There is no monetary limit on valid and constitutional non-ad valorem special assessments. There are, however, some important laws and procedures that tend to work against excess or abuse:

(1) The "notice" required on the bottom of the TRIM notice to the effect that, in addition to taxes, local government may also levy special assessments;
(2) Any special assessment already requires notice before it is levied.231

(3) The local government may opt to collect and enforce these assessments on the annual tax notice pursuant to the uniform non-ad valorem collection process that requires several sets of detailed and timely newspaper notices and hearings (at least six months apart), including one U.S. mail notice, and which further fully discloses and safeguards against loss of homestead property, all of which work a chilling effect on the levy itself.232

(4) The capital improvement mechanism233 under the growth management laws of Florida.234 If the existing comprehensive planning law

final tax bill may contain non-ad valorem assessments which may not be reflected on this notice such as assessments for roads, fire, garbage, lighting, drainage, water, sewer or other governmental services and facilities which may be levied by your county, city or any special district.”

Id. § 200.069(12). Accordingly, when individual property owners, including owners of homestead property, receive their TRIM notice (which deals only with property tax matters, including millage), they will be on notice that their final tax bill received later in the fall from the tax collector may include legitimate governmental levies that are lienable on homestead but are not ad valorem taxes; hence, non-ad valorem special assessments may be levied not only for “facilities” but also for “services.”

231. Neither a county nor a municipality may levy a non-ad valorem special assessment without adopting it by ordinance or by resolution, implementing the applicable legal authority to levy. Id. §§ 125.01, 166.021(4). Special districts may not levy non-ad valorem special assessments other than by noticed resolutions pursuant to the specific general or special law authorizing the levy of a special assessment by the district.

232. The uniform procedure is through the provisions of § 197.3632, Florida Statutes. The annual tax notice is spelled out in detail in § 197.3635, Florida Statutes, as to general ad valorem assessments (taxes) and non-ad valorem special assessments. The hearings and related notices are set forth in § 197.3632(3) and (4). Section 197.3632(8)(a), Florida Statutes, requires that the collection of non-ad valorem assessments shall be subject to all of the collection provisions in chapter 197 which apply to general ad valorem assessments (property taxes), including the use of tax certificates and tax deeds. There is also the $100 threshold for taxes and assessments on homestead property so that no tax certificate may be sold until and unless that threshold has been exceeded. Id. § 197.432(4).

233. See id. §§ 163.3177(3), 163.3202(2)(g). By the term “capital improvement mechanism,” the authors mean (1) the capital improvement “element” in § 163.3177(3), Florida Statutes; (2) a capital improvement program which, under current law, may be within the element in a separately enacted ordinance not in the plan under § 163.3127(3), Florida Statutes; and (3) the capital improvement “budget” authorized under home rule.

234. The “Growth Management Law” is really an amalgam of several general statutory provisions in Florida. These provisions include chapter 187, the state plan; chapter 186, authorizing regional policy plans; and chapter 163, the Local Government Comprehensive Planning and Land Development Regulation Act of 1985, as amended in 1986 and 1992. Section 163.3164(23), Florida Statutes, defines “public facilities” to mean “major capital improvements including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities” (emphasis added). Section 163.3177(3)(a), Florida Statutes, provides for a mandatory capital improvements element to be included in the plan. The capital improvements element is “designed to consider the need for and the location of public facilities in order to encourage the efficient utilization of such facilities.” Id. (emphasis added). Accordingly, the capital improvements element shall consider those
is properly used and focused, many levies of non-ad valorem special assessments would be better thought out, and the potentially frivolous or excessive use eliminated.

There are some legislative policy proposals that could not only prevent further excess and abuse but could also add more certainty, clarity, and fairness in the levy, collection, and enforcement of non-ad valorem special assessments. These include:

(1) A statutory compilation of those systems, services, and facilities for which no challenge to the special benefit provided may be maintained;

(2) Codification of the factors that local governments must consider to ascertain whether the proposed system, facility, or service, other than those specially provided for in (1) above, confers or results in a special and peculiar benefit to the property. Such a codification would eliminate the uncertainty that invites litigation because of the presumptive nature of special assessment levies;

(3) Codification of methodology for fair and reasonable apportionment of the burden to pay the assessment levied on the specially benefitted property;

(4) Codification, in light of City of Boca Raton, of the authority for each type of local government to levy non-ad valorem special as-

capital improvements which constitute public facilities. The definition of "public facilities" is broad enough to include not only the actual capital facility itself, but the construction, reconstruction, service provision, and maintenance of such facilities. Most of these "public facilities" either constitute or can constitute a system, facility, or service that results in special benefits to real property. The law further requires that the capital improvements element of each county and city shall contain outlined "principles," "estimated" costs, and "standards" for the cost, location, need, and level or quality of service of the various authorized public facilities, both to cure an infrastructure deficit and to provide for facilities concurrent with the needs of new development. Id. § 163.3177(3)(a). The capital improvements element shall also be reviewed annually, and all public facilities shall be consistent with the element. Id. § 163.3177(3)(b). The capital facilities element, and all the other elements of the comprehensive plan, including the future land use plan element, shall be consistent with each other and economically feasible. Id. § 163.3177(2). All the elements of the local government comprehensive plans shall, in turn, be consistent with the regional policy plans and the State Comprehensive Plan. Id. § 163.3177(10)(a). The Legislature intends that the public participate in the development and amendment of all comprehensive plans and related land development regulations. Id. § 163.3181. All land development regulations promulgated by a county or municipality shall be consistent with the elements of the applicable local government comprehensive plan. Id. § 163.3202(1).

Under home rule for counties and municipalities (and applicable general and related law for special districts), no local government may construct any system, facility, service, or improvement which is in any way inconsistent with the local government comprehensive plan and related land development regulations. Neither can any such local government finance such inconsistent facilities. That is why the "Growth Management Law" already is beginning to serve as a limit on any excessive, abusive, or unnecessary funding of any system, facility, service, or improvement which meets the definition of a "public facility," including, therefore, those financed by non-ad valorem special assessments.
special assessments. The *City of Boca Raton* case clarifies that such assessments are not taxes and travel instead under home rule power of counties and cities.\(^{235}\) This additional codification should address the standalone power of charter counties under section 125.01, *Florida Statutes*, to levy assessments by simple enactment of nonemergency ordinances without setting up dependent districts or using municipal service taxing or benefit units;

(5) Requiring by statute all local governments to use the uniform collection procedures in section 197.3632, *Florida Statutes*, for non-ad valorem special assessments. This requirement would invoke the use of the tax certificate and tax deed enforcement processes which are universally available and are inherently fair, efficient, and accountable.

(6) Providing statutorily for a procedure by which taxpayers who challenge a particular levy of a non-ad valorem special assessment pay a portion under protest. This procedure would be analogous to the procedure that allows partial payment of contested property taxes under section 194, *Florida Statutes*; and

(7) Amend the so-called "Growth Management Law" to focus on the levy of special assessments to finance those capital improvements and related systems, facilities, and services of special benefit to real property. To guard against potential abusive or excessive use of non-ad valorem special assessments to finance systems, facilities, or services, and to promote intelligent, fair, focused, and practical funding of growth management through the use of the capital improvements mechanisms under comprehensive planning law. The Legislature should expressly mandate that all counties and municipalities correct their public facility deficiencies within a certain deadline and include in their capital improvements element all public facilities required for all of the development not just for five years but to the extent projected in their respective future land use elements. The Legislature should also require that those state and local government agencies which provide public systems, facilities, and services shall set realistic levels for their provision and be responsible for meeting those levels of service; and that counties and municipalities adopt by ordinance specific capital improvements programs with five-year outreaches, updated annually, along with consistent annual capital improvements budgets also by ordinance.\(^{236}\)

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\(^{235}\) City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992).

\(^{236}\) For two years, Senator Howard Forman, Dem., Pembroke Pines, has filed legislation including those ideas. See Fla. SB 1308 (1992); Fla. SB 2034 (1991).
Enacting these proposals would force clear determination and sound justification of why a particular local government proposes to levy an otherwise constitutional non-ad valorem special assessment. These changes would result in focusing on the appropriateness and need for a special assessment and would eliminate needless levies.

V. CONCLUSION

Non-ad valorem special assessments are not taxes, and a local government's authority to levy these assessments does not stem from its powers of taxation. Counties and municipalities may levy non-ad valorem special assessments pursuant to their constitutional home rule powers. Special purpose local governments may be authorized to levy non-ad valorem special assessments by the statutes governing their creation or establishment. Non-ad valorem special assessments do not impact a local government's millage rate or require that its adoption be put to a referendum vote.

A non-ad valorem special assessment is valid if (1) the system, facility, or service confers a special and ascertainable benefit to the property levied upon and (2) the assessment is reasonably apportioned among the property benefitted by the levy.

The main problem with the law of non-ad valorem special assessments in Florida is that its evolution has been driven primarily by case law under both the 1885 and 1968 Florida constitutions, accompanied by unprecedented surges in growth-related demands to fund municipal services. This has resulted in sporadic, incomplete, and uncoordinated legislation, which is tied to several perpetuated misconceptions. In addition, many factors have contributed to the confusion: (1) the advent of home rule and its relationship to the authority to levy non-ad valorem special assessments vis-a-vis the taxing power; (2) the reliance and subsequent constraints on the use of property taxes; (3) the advent of state mandates; (4) the enactment of growth management through local government comprehensive planning and land development regulation without more focused procedures and reasonable enabling legislation for funding; (5) political and demographic changes in taxpayer attitudes; (6) the sporadic and uncoordinated alternatives for levy, collection, and enforcement of local revenue; and (7) the presumptive validity of some special assessments until and unless challenged. Accordingly, local governments, public officials, taxpayers, courts, and practitioners have performed their responsibilities from a host of uncoordinated and undisclosed perspectives. The result has been confusion and uncertainty about the levy of non-ad valorem special assessments by Florida's local governments.
This situation is no longer acceptable. Because local governments are necessarily turning to special assessments in order to generate revenues, it is time to identify all the relevant authorities and procedures. This will provide a uniform perspective from which to derive an understandable, realistic, fair, and accountable use of non-ad valorem special assessments in Florida.

237. See supra notes 58-94 and accompanying text.