CIRCUMVENTING THE FLORIDA CONSTITUTION: PROPERTY TAXES AND SPECIAL ASSESSMENTS, TODAY'S ILLUSORY DISTINCTION

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I. INTRODUCTION

Florida's cities and counties must maneuver through a minefield of options and legal limitations when they search for ways to fund capital improvements, general services, and unfunded mandates passed down from the state legislature and Congress.[1] Although the 1968 revision of Florida's Constitution[2] granted counties and municipalities the exclusive power to levy property (ad valorem) taxes[3] on real and personal property,[4] that power has been diluted by a myriad of property tax exemptions and constitutional amendments, which limit millage rates and assessments.[5] Sixteen counties can no longer raise property tax rates, because their

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This Comment is dedicated with love and appreciation to my husband Bruce J. Dubov, whose love, encouragement, and good humor made my law school years the best experience of my life, to my father Harry R. Snead, who exemplifies all the best qualities of the "Greatest Generation," and to the memory of my mother, Mary Ann Snead. I would like to thank Pinellas County Attorney Susan H. Churuti, Professors Thomas C. Marks, Jr., James J. Brown, and Kristen D.A. Carpenter, and the members of the *Stetson Law Review* for their advice and editorial assistance throughout the preparation of this Comment. Finally, special thanks to Jim Smith and the staff of the Pinellas County Property Appraiser's Office, with whom I have been privileged to work for the past twelve years.

1. *See generally* Joni Armstrong Coffey, *The Case for Fiscal Home Rule*, 71 Fla. B.J. 54 (1997) (summarizing the fiscal problems faced by many local governments and advocating the expansion of local government power to establish finance and taxation policies that more adequately reflect the provision of services at the local level).

2. All references to "the Constitution" refer to the 1968 revision of the Florida Constitution and subsequent amendments.

3. The terms "property tax" and "ad valorem tax" are used interchangeably. An "ad valorem tax" is a tax imposed based on the value of the thing being taxed, which is typically real property or tangible personal property. *Black's Law Dictionary* 615 (Bryan A. Garner ed., pocket ed., West 1996).

4. Fla. Const. art. VII, §§ 1(a), 9(a).

5. *Id.* §§ 3–4, 6, 9(b).

current rates have reached the constitutionally imposed limit of one percent.[6] The task of raising revenues at the local level is further complicated by a population that has made its anti-tax sentiment clear, while demanding improved schools, lower crime rates, better roads, and more responsive social services.[7]

In response to the erosion of the property tax base, local governments impose a variety of fees, service charges, and special assessments to provide infrastructure and services for a growing population.[8] Although these other revenue sources share some characteristics with taxes, they are not classified as taxes[9] and thus do not violate the Constitution's provision that preempts taxes, other than the ad valorem tax, to the state.[10] City and county commissions often are forced to test limitations on their power to raise revenue by characterizing a levy as a fee or special assessment when it is actually a tax.[11] In the past, Florida's courts admonished local governments for mislabeling taxes as user fees or special assessments,[12] but in recent years the majority of the Florida Supreme Court has opened the door for local governments to circumvent constitutionally imposed property tax limitations with a slow but steady expansion of the power to levy special assessments in place of property taxes.[13] In so doing, the court has blurred the distinction between taxes and special assessments to such an extent

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6. *Infra* nn. 28–35 and accompanying text.

7. Marion J. Radson, *A Fee or Not a Fee — That Is the Question: Understanding Taxes and Fees after Alachua County v. State*, 23 Agenda (newsletter of The Fla. B. City, County & Local Govt. L. Sec.) 1 (Dec. 1999).

8. *Id.* at 16–19.

9. *See Klemm v. Davenport*, 129 S. 904, 907 (Fla. 1930) (distinguishing special assessments from taxes).

10. Fla. Const. art. VII, § 1(a); *see e.g. City of Boca Raton v. State*, 595 S.2d 25, 29 (Fla. 1992) (holding that a valid special assessment was not a tax and thus was not "prohibited by article VII, section 1(a) of the Florida Constitution"); *see generally* Fla. Legis. Comm. Intergovtl. Rel. & Fla. Dept. Revenue, *Local Government Financial Information Handbook* 1, 52 (1999) (discussing county and municipal home rule powers and their limitations).

11. *State v. City of Port Orange*, 650 S.2d 1, 4 (Fla. 1994). In this case, the Florida Supreme Court recognized that the city faced revenue pressure that resulted in its efforts to impose a transportation utility fee on owners and occupants of all property that was not vacant. The court characterized the fee as "a creative effort in response to the need for revenue" and concluded that "constitutional provisions cannot be circumvented by such creativity." *Id.*; *see Hanna v. City of Palm Bay*, 579 S.2d 320, 323 (Fla. Dist. App. 5th 1991) (holding that general road improvements could not be funded by special assessments, because the improvements conferred a general benefit on the community at large).

12. *E.g. City of Port Orange*, 650 S.2d at 3.

13. See *infra* notes 172 to 225 and accompanying text for an analysis of the case law detailing the expanded use of special assessments.

that it has, in the words of Justice Charles T. Wells, "foster[ed] government that is not straightforward or honest about revenue raising."[14]

Following an explanation of constitutional and statutory limits on the property tax, this Comment will review the use and misuse of special assessments as an alternative source of local government revenue. This Comment will then critically analyze a series of recent Florida Supreme Court cases that broadened local government power to levy special assessments during the 1990s. Finally, this Comment will discuss moderate property tax reform, which, if implemented, would alleviate the need for many special assessments.

II. FLORIDA'S CONSTITUTIONALLY IMPOSED PROPERTY TAX STRUCTURE

Florida's current Constitution was adopted in 1968, following the Constitution Revision Commission's analysis of the 1885 Constitution and the Commission's recommendations to the Florida legislature. The voters ratified the new Constitution as proposed by the legislature.[15]

The new Constitution directed the legislature to prescribe regulations governing ad valorem taxation,[16] prohibited the state from levying ad valorem taxes on real or tangible personal property,[17]and further directed that the law authorize counties, municipalities, and school districts to levy property taxes on both real and tangible personal property.[18] The Constitution also provided for a $5,000 homestead exemption[19] and permitted the legislature to authorize, by general law, classified use valuation of

14. *Harris v. Wilson*, 693 S.2d 945, 950 (Fla. 1997) (Wells & Harding, JJ., dissenting).

15. Fla. Legis. Comm. Intergovtl. Rel., *Local Government Constitutional Revision Issues* 26 (Sept. 30, 1997).

16. Fla. Const. art. VII, § 4 ("By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation.").

17. *Id.* § 1(a) ("No state ad valorem taxes shall be levied upon real estate or tangible personal property.").

18. *Id.* § 9(a) ("Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes.").

19. *Id.* § 6(a). The original 1968 Constitution provided for a $5,000 homestead exemption on property owned by people who maintained their permanent residences on that property. *Id.* Later, Section 6(d) was adopted to increase the exemption to $25,000. *Id.* § 6(d).

agricultural property[20] and exemptions for religious, charitable, educational, and scientific properties.[21] In a notable change from the 1885 Constitution, the 1968 revision contained caps on millage rates[22] imposed by local government entities.[23]

In the face of this apparently broad delegation of the power to levy property taxes, it is hard to imagine how local governments eventually found themselves facing revenue shortfalls and budget crises. The answer lies in the analysis of constitutional provisions that limit local government property tax rates, authorize exemptions and special agricultural valuations, and limit the rate of increase in valuation of homesteaded property.[24] Large reductions in taxable property value statewide resulted from two significant constitutional amendments related to homestead exemptions.[25] The effect of a third amendment, adopted in 1998 on behalf of low income senior citizens, has yet to be measured.[26] The brief summary of these provisions provided below[27] illustrates how the power to levy property taxes has been eroded during the past thirty years.

A. Millage Caps

Fifteen Florida counties are unable to raise tax rates, because their current rates are at ten mills or one percent, the limit prescribed by the Constitution.[28] When Florida voters adopted the

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20. *Id.* § 4(a) (providing for assessment of agricultural land, high water recharge land, and noncommercial recreational land based upon its character or use rather than the market valuation standard).

21. *Id.* § 3(a) (authorizing the legislature to create, by general law, property tax exemptions for "portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes").

22. Millage rate is defined as the rate of taxation expressed as thousandths of a dollar per dollar. More simply, a mill is one tenth of one percent and ten mills is the equivalent of a one percent tax rate. Millage rates are multiplied by the taxable value of property to determine the property tax. Intl. Assn. Assessing Officers, *Property Assessment Valuation* 6–7 (Intl. Assn. Assessing Officers 1977).

23. Fla. Const. art. VII, § 9(b); *see* Fla. Legis. Comm. Intergovtl. Rel., *supra* n. 15, at 26 (describing the history of millage caps in Florida).

24. Fla. Const. art. VII, §§ 4(a), (c), 6(c)–(d), (f), 9(b).

25. The Save Our Homes Amendment was placed on the ballot by citizen initiative and was adopted by the electorate in the November 1992 general election. *Id.* § 4(c) (amended 1992). In 1980 voters also approved an increase in the homestead exemption from $5,000 to $25,000. *Id.* § 6(c)–(d) (amended 1980).

26. *Id.* § 6(f) (amended 1998) (creating an additional local option $25,000 exemption for low income senior citizens).

27. *Infra* nn. 28–76 and accompanying text.

28. Fla. Dept. Revenue, *Florida Property Valuations & Tax Data* 157–158 (Dec. 1999).

1968 Constitution, it contained limiting language that had not been part of the 1885 Constitution. While the 1885 Constitution limited the millage rate that could be levied for school purposes, the 1968 version extended similar limitations to counties and municipalities.[29] When the 1965 Constitution Revision Commission made its recommendations to the Florida legislature, it did not include the millage caps that eventually became part of the new Constitution.[30] However, the legislature added the millage caps, apparently in response to public outcry against large property tax increases.[31] The millage caps have had a significant impact on many local government entities. By 1999 fifteen counties had reached the ten mill county cap and another five counties were within one mill of the cap.[32] Three cities, including Miami, reached the ten mill municipal cap and another ten were at or above nine mills.[33] In addition, twelve of the state's sixty-seven school districts were within one mill of the ten mill school millage cap.[34] In recent years, local governments have turned increasingly to alternative funding sources to meet their revenue needs.[35]

1999 Tax Data		Column 3	Column 4	Column 5	Column 6
County	County Millage	Percent County Value Exempt for Homestead, Disability, Widow (HDW)	Percent County Value Not Taxable Due to Agriculture Classification	Total Percent Value Not Taxable Due to Agricultural Class / HDW	Percent Residential that are 100% Tax Exempt
Washington	10.0000	16%	16%	32%	29%
Sumter	10.0000	18%	15%	33%	24%
Bradford	10.0000	15%	20%	35%	26%
Hendry	10.0000	5%	36%	41%	16%
Calhoun	10.0000	15%	27%	42%	37%
Dixie	10.0000	16%	27%	43%	56%
Madison	10.0000	14%	30%	44%	29%
Glades	10.0000	5%	42%	47%	18%
Gilchrist	10.0000	15%	33%	48%	28%
Lafayette	10.0000	11%	37%	48%	38%
Jefferson	10.0000	9%	51%	60%	30%
Union	10.0000	6%	61%	67%	*
Statewide		10%	3%	13%	6%

* Not reported

Table 1: Value Reductions for Homestead Exemption and Agricultural Classification for Select Counties at the Ten Mill Cap

29. Fla. Legis. Comm. Intergovtl. Rel., *supra* n. 15, at 26.

30. *Id.* at 27.

31. *Id.* at 27 n. 46 (quoting *State v. Dickinson*, 230 S.2d 130, 134 (Fla. 1969), which cited a commentary on the proposed 1968 Constitution revision).

32. Fla. Dept. Revenue, *supra* n. 28, at 157–158.

33. *Id.* at 107–136.

34. *Id.* at 157–158.

35. Coffey, *supra* n. 1, at 57.

B. Homestead Exemption

Article VII, Section 6(a) of the Florida Constitution provides for a $5,000 exemption from taxable value on real property owned and occupied by bona fide Florida residents. In 1980 voters passed an amendment to increase the amount of the homestead exemption to $25,000.[36] The effect of this amendment on the tax base has been dramatic, particularly in rural counties with small populations and low aggregate property values.[37] Column 6 of Table 1 summarizes the percentage of residential property within several selected counties that is completely exempt due to the $25,000 homestead exemption.[38] Each of these counties reached the ten mill cap.[39] Many of Florida's rural counties have much lower average residential values than their urban counterparts.[40] As a result, the homestead exemption exempts a much higher percentage of the rural county value than the ten percent statewide average.[41] The exemption removed almost $89 billion in value from statewide rolls in 1999.[42] Although the statewide average is only ten percent, several small counties that have reached the ten mill cap lose over fifteen percent of total county property value due to the $25,000 exemption.[43] There have been recurring suggestions that the homestead formula should be revised so that every property owner pays taxes on some base increment of value before receiving the exemption on the next

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36. Fla. Const. art. VII, § 6(c)–(d) (amending Section 6 to increase the value of the homestead exemption from $5,000 to $25,000). When the legislature enacted Section 196.031(3)(e) to implement the increased exemption, it attempted to provide the $25,000 benefit *only* to homeowners who had resided in the state for five consecutive years. Fla. Stat. § 196.031(3)(b)(1) (2001). The Florida Supreme Court found the statute "unconstitutional under the equal protection clause of article I, section 2, of the Florida Constitution"; therefore, the full $25,000 exemption has been available to all applicants regardless of length of residency. *Osterndorf v. Turner*, 426 S.2d 539, 544 (Fla. 1982).

37. Fla. Dept. Revenue, *supra* n. 28, at 224–225.

38. *Id.*

39. *Id.* at 157–158.

40. For example, in 1999 Dixie and Calhoun counties had average just value for single family residences of about $31,800 and $37,300, respectively, while Palm Beach County reported average just value exceeding $162,000 for single-family homes. *Id.* at 179–180, 183–184.

41. *Id.* at 218–219 (summarized in Column 3 of Table 1 of the text).

42. *Id.* at 9–10 tbl. 5.

43. *Id.* at 218–219. Column 3 of Table 1 summarizes the percent of total value that is exempt due to the $25,000 homestead exemption. *Id.* This data is compiled from the tax rolls of selected counties at the ten mill cap. *Id.*

$25,000 increment.[44] For example, the first $10,000 of value could be taxed, and the value from $10,001 through $35,000 would be the exempt portion.[45] Amounts greater than $35,000 would be taxed as they are now. While this and similar proposals seem to emerge every few years, there has been no real effort to put such a constitutional amendment on the ballot. It is quite likely that an amendment of this nature would pit voters who reside in less expensive residential properties, such as mobile homes, small inland condos, and rural residences, against their urban counterparts who reside in more expensive homes. This proposal also has been criticized for being regressive, because it would increase ad valorem taxes on those in the least expensive properties, while the taxes for those who live in more expensive homes would not change.[46] In a report that was prepared for the 1998 Constitution Revision Commission, the 1998 Florida Legislative Committee on Intergovernmental Relations evaluated several options that would have restructured the current homestead exemption.[47] Among others, the options included eliminating the exemption, restructuring the exemption according to the relative value of the home, and phasing out the exemption for more expensive property.[48] However, no amendments related to the homestead exemption were placed on the 1998 general election ballot for voter consideration.[49]

C. Agricultural Classification

The Florida Constitution permits the legislature to enact laws requiring property appraisers to value agricultural property based upon its character and use.[50] The history of agricultural classification is a storied one, deeply rooted in Florida's change from an agrarian state to one with large urban centers, competing interests between farmers and developers, and the economic requirements of a state with a booming population.[51] Early controversy surrounding

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44. Fla. Legis. Comm. Intergovtl. Rel., *supra* n. 15, at 30–31.

45. *Id.* at 30.

46. *Id.* at 30–31.

47. *Id.* at 29–33.

48. *Id.* at 31–32.

49. Fla. Const. Rev. Commn., *Proposals from 09/25/97 Meeting* <http://www.law.fsu.edu/crc/proposals/tabloid.html> (accessed Apr. 1, 2001).

50. Fla. Const. art. VII, § 4(a).

51. James S. Wershow, *Recent Developments in Ad Valorem Taxation*, 20 U. Fla. L. Rev. 1, 1 (1967). While the history of the agricultural classification is beyond the scope of this Comment, interested readers will find a thorough review of the subject in a series of articles

the special treatment of agricultural property resulted, because the legislature enacted special valuation statutes covering the appraisal of agricultural property without constitutional authority.[52] The 1885 Florida Constitution did not recognize any exemption or classified use valuation of farmland, but required that tax laws "secure a *just valuation* of all property."[53] Justice E. Harris Drew, dissenting from the majority's opinion in *Lanier v. Overstreet*,[54] summarized the issue most eloquently.

> To recognize the power of the Legislature to grant exemptions from taxation to certain classes . . . will be to destroy the ad valorem taxing system in this State and to place the burden of government on those who are not fortunate enough to be brought within a favored class. The Legislature has no power, under our Constitution, to exempt any property from taxation. If this is to be changed, it should be done by amendment to the Constitution and not by edict of this Court.[55]

When the 1968 Florida Constitution was adopted, Article VII, Section 4(a) accomplished precisely what Justice Drew suggested. Article VII authorized the legislature to enact general law for classified use valuation of agricultural property.[56] The legislature, acting on this authority, indeed adopted statutory provisions for classification and assessment of agricultural lands that remain in effect today.[57] These provisions result in substantially lower valuation of agricultural land than would be realized if a fair market value standard was used.[58] The effect on rural counties is profound, because the agricultural classification often results in reductions that exceed one quarter of a county's total value.[59] Column 4 of

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written by James S. Wershow. *Id.*; James S. Wershow, *Ad Valorem Assessments in Florida — Whither Now?*, 18 U. Fla. L. Rev. 9 (1965) [hereinafter Wershow, *Whither Now?*]; James S. Wershow, *Ad Valorem Taxation and Its Relationship to Agricultural Land Tax Problems in Florida*, 16 U. Fla. L. Rev. 521 (1964).

52. Wershow, *Whither Now?*, *supra* n. 51, at 11 (discussing the evolution of the Florida law governing assessment of agricultural property during the 1950s and 1960s).

53. *Id.* at 10.

54. 175 S.2d 521 (Fla. 1965).

55. *Id.* at 526 (Drew, Thomas & O'Connell, JJ., dissenting).

56. Fla. Const. art. VII, § 4(a).

57. Fla. Stat. § 193.461 (2001).

58. Fla. Dept. Revenue, *supra* n. 28, at 20 tbl. 10, 26 tbl. 12. Approximately $28 billion in value was eliminated from county tax rolls in 1999 on properties classified as agricultural. *Id.*

59. *Id.* at 218–219.

Table 1 summarizes the percentage of value lost from the tax rolls of selected counties at the ten mill cap due to the agricultural classification.[60] The primary policy reason behind the agricultural classification is to encourage farmers to preserve their lands for agricultural use rather than to sell the land for commercial use.[61] Containment of urban sprawl and protection of the agricultural sector of the economy are arguably proper public policy goals. However, the dual track standards for valuation, when combined with lower residential property values and millage caps, have left a great number of Florida's rural counties with little recourse in the ad valorem taxation scheme. Many of these counties lose over a third of their total value to a combination of agricultural classification and homestead exemption.[62] Column 5 of Table 1 summarizes the percentage of value lost from the tax rolls of selected counties at the ten mill cap due to the $25,000 homestead exemption and agricultural classification.[63]

D. Save Our Homes Amendment

In 1992 voters approved an amendment[64] commonly called the Save Our Homes cap.[65] Save Our Homes limits increases in assessed value to the lesser of three percent or the increase in the consumer price index for the preceding year.[66] The cap took effect in 1995[67] and steadily increased taxable value reductions from three and a half billion dollars in capped value in 1995 to over twenty billion dollars in 1999.[68] This amendment resulted from the same anti-tax sentiment that led California to pass Proposition 13 two decades

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60. *Id.*

61. James S. Wershow & Edward S. Schwartz, *Ad Valorem Assessments in Florida — Recent Developments*, 36 U. Miami L. Rev. 67, 74 (1981).

62. Fla. Dept. Revenue, *supra* n. 28, at 218–219.

63. *Id.*

64. The issue was placed on the ballot through the initiative petition process authorized by Article XI, Section 3 of the Florida Constitution.

65. Fla. Const. art. VII, § 4(c) (amended 1992); Fla. Legis. Comm. Intergovtl. Rel., *supra* n. 15, at 31; Coffey, *supra* n. 1, at 55.

66. Fla. Const. art. VII, § 4(c)(1)(A)–(B) (amended 1992) ("[C]hanges in assessments shall not exceed the lower of . . . three percent (3%) of the assessment for the prior year" or "the percent change in the Consumer Price Index . . . for the preceding calendar year.").

67. Coffey, *supra* n. 1, at 55 n. 15.

68. Fla. Dept. Revenue, *supra* n. 28, at 87–88 tbl. 41 (data taken from both the 1998 and 1999 compilations).

earlier,[69] but was a less drastic measure than the California law because it limited increases in assessed value only on homestead property, while the California amendment limited increases on all property.[70] The homestead exemption and the value limitation imposed by Save Our Homes combined to keep over $112 billion in value from Florida's 1999 property tax base.[71]

E. Additional Low Income Senior Citizen Homestead Exemption

Despite the significant benefits afforded homesteaded property owners by the homestead exemption and the Save Our Homes valuation cap, the legislature placed, on the 1998 general election ballot, a constitutional amendment providing a new low income senior citizen exemption.[72] The measure was passed by the voters and went into effect in 2000.[73] This is a local option exemption that can be implemented by counties and municipalities and applies only to the millages levied by those local governments that adopt an ordinance to enact the exemption.[74] In addition, counties or cities can elect to exempt an amount less than $25,000 if they so choose.[75] Fewer than one-third of Florida's sixty-seven counties and forty-eight municipal governments enacted the measure for 2000,[76] and the long-term effects of this exemption are yet to be determined.

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69. *See generally* Mary Lafrance, *Constitutional Implications of Acquisition-Value Real Property Taxation: The Elusive Rational Basis*, 1994 Utah L. Rev. 817, 818–821 (1994) (examining California's Proposition 13 and Florida's Save Our Homes Amendment).

70. Fla. Const. art. VII, § 4(c); *see* Lafrance, *supra* n. 69, at 819 n. 18 (comparing Florida's Save Our Homes Amendment with California's Proposition 13).

71. Fla. Dept. Revenue, *supra* n. 28, at 9–10 tbl. 5, 87–88 tbl. 41.

72. Fla. H. Jt. Res. 3151, 1998 Reg. Sess. 1 (May 5, 1998). The fact that Florida's senior citizens make up a great percentage of the State's active voters might cause one to question the legislature's motives when it decided to put the amendment on the ballot. While property tax relief potentially could benefit all low income residents, the amendment was designed to assist only those who had attained the age of sixty-five. *Id.*

73. Fla. Const. art. VII, § 6(f) (adopted 1998).

74. *Id.* Section 6(f) permits the legislature to "allow counties or municipalities . . . to grant an additional . . . exemption" and permits local taxing authorities to grant the exemption in amounts "not exceeding twenty-five thousand dollars to any person . . . who has attained age sixty-five and whose household income . . . does not exceed twenty thousand dollars." *Id.*

75. *Id.*

76. Fla. Dept. Revenue, *Counties and Municipalities Implementing Additional Exemption for Tax Year 2000*, at 1 (Aug. 3, 2000) (spreadsheet compiled from preliminary value rolls submitted by property appraisers). Data compiled by the Florida Department of Revenue indicates that nineteen counties and forty-eight municipalities adopted the exemption for the 2000 tax year. *Id.* Total value exempted statewide has not yet been determined.

III. LEGISLATIVE LIMITS ON PROPERTY TAX BASE GROWTH

Although new property tax exemptions can be authorized only through amendment of the Constitution, the legislature plays a pivotal role in the expansion and reduction of the tax base through its power to make, change, and repeal general law.[77] Chapters 192 through 197 of the Florida Statutes codify the State's property tax program.[78] These chapters outline definitions and procedures for property tax administration,[79] assessment methodology,[80] and exemptions.[81]

A. De Facto Property Tax Exemptions for Incomplete New Construction

Article VII, Section 4 of the Florida Constitution requires the legislature to establish law ensuring the just valuation of all property.[82] Exceptions to this mandate are provided in sections that allow exemptions or special use valuation.[83] Of particular importance is the absence of any constitutional provision permitting special classification or exemption for either incomplete construction or tangible personal property in the process of being installed in incomplete structures. Despite this absence of constitutional authority, in 1961 the legislature, through the exercise of its power to make general law, enacted the "substantial completion" statute.[84] The statute requires county property appraisers to leave unfinished

77. Article III of the Constitution outlines the duties of the Florida legislature. Fla. Const. art. III. Article VII requires the legislature to adopt regulations "which shall secure a just valuation of all property for ad valorem taxation," but gives the legislature the option of classifying or exempting certain kinds of property to either reduce or eliminate property taxes. Fla. Const. art. VII, §§ 3(a), (d), 4(a)–(b), (d).

78. Fla. Stat. chs. 192–197 (2001).

79. *Id.* chs. 192, 194 (general taxation provisions and property assessment administration and judicial review).

80. *Id.* ch. 193 (providing for assessment practices and just valuation standards).

81. *Id.* ch. 196 (providing for property tax exemptions).

82. Fla. Const. art. VII, § 4.

83. *Supra* nn. 36–76 and accompanying text.

84. Fla. Stat. § 192.042. Article VII, Section 4 requires the legislature to prescribe regulations that "shall secure a just valuation of all property for ad valorem taxation", while other provisions permit assessments based on character or use or prescribe tax exemptions. Fla. Const. art. VII, § 4. Article VII does not include any mention of incomplete structures or new construction.

construction off the annual property value roll and creates a de facto property tax exemption despite the fact that no such exemption has been authorized by the Florida Constitution.[85] Property appraisers apply the substantial completion test to determine the taxable status of improvements to real property as of January 1st of each tax year.[86] Section 192.042(1) defines this test and related case law has refined its interpretation.[87] Under the current law, a building is substantially complete if it can be used for its intended purpose on January 1st.[88] The statute has been criticized by local governments, because the owners of newly constructed buildings escape taxation for part of a tax year even though they use public services provided by the local property tax during the same time period.[89]

Counsel for the Property Appraiser's Association of Florida opined, in a 1993 letter to the Speaker of the Florida House of Representatives, that the substantial completion test was established in response to pressure from the building industry.[90] The industry overbuilt portions of the residential market in the late 1950s and needed a tax break to help recover from its financial

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85. Fla. Const. art. VII; Fla. Stat. § 192.042. The substantial completion requirement was first adopted by 1961 Fla. Laws ch. 61-240, which originally was codified as Florida Statutes Section 193.11(4). Fla. Advisory Council Intergovtl. Rel., *Ad Valorem Partial Year Assessments: Relevant Issues and Information* 7 (1995). While the language has changed somewhat since 1961, the statute's effect has remained the same except that it was given a new section number and, in 1980, it was made to apply to tangible personal property as well. *Id.* at 8.

86. Fla. Stat. § 192.042(1).

87. *Id.*; *see e.g. Hausman v. Bayrock Inv. Co.*, 530 S.2d 938, 939–940 (Fla. Dist. App. 5th 1988) (holding that "occupancy is not the appropriate test" for substantial completion of shell buildings and that a building "may be deemed substantially complete for tax purposes" even if it lacks some items); *Colding v. Klausmeyer*, 387 S.2d 430, 432 (Fla. Dist. App. 2d 1980) (holding that occupancy of a structure is not the appropriate test of substantial completion when the builder's purpose was to erect a shell building suitable for tenant leasing and tenant build-out); *John Henry Jones, Inc. v. Lanier*, 376 S.2d 450, 452 (Fla. Dist. App. 5th 1979) (holding that incomplete residential units are not taxable when a developer could have completed them by the tax lien date, but did not do so); *Forte Towers E., Inc. v. Blake*, 275 S.2d 39, 40–41 (Fla. Dist. App. 3d 1973) (holding that buildings can be substantially complete without being one hundred percent complete).

88. Fla. Stat. § 192.042(1) (defining "substantially complete" to mean that "the improvement or some self-sufficient unit within it can be used for the purpose for which it was constructed").

89. In *Collier County v. State*, the county argued that the substantial completion statute provided "a windfall to certain citizens which was unfair to those taxpayers who did not receive the same advantage." 733 S.2d 1012, 1019 (Fla. 1999) (emphasis omitted). However, the court concluded that if there was an improper "windfall" for some taxpayers, the county's only source of redress was with the legislature that created the statute. *Id.* at 1019.

90. Letter from Larry E. Levy, Counsel, Fla. Assn. of Prop. Appraisers, to Bo Johnson, Speaker, Fla. H., *Substantial Completion Statute* 2 (Mar. 19, 1993) (copy on file with Author).

woes.[91] History repeated itself in 1980 when the legislature passed measures for tangible personal property that were similar to the substantial completion test.[92] This statute mandated that fixtures, machinery, and equipment in the process of being installed in new or expanded improvements to real property should not be assessed until they are connected to the taxable facility.[93] The tax advantages of these statutes accrue to the owners of buildings under construction and the owners of machinery and equipment in the process of being installed.

From the early 1970s until May 1999, the courts interpreted the substantial completion statute in several relevant cases.[94] Implicit in the appellate court rulings was a finding that the statute was constitutional.[95] In 1983 the Fourth District Court of Appeal expressly upheld the constitutionality of the substantial completion statute in *Markham v. Yankee Clipper Hotel*.[96] While the court disagreed with the property appraiser's decision to assess uninhabitable hotel rooms, the court rejected the taxpayer's assertion that Section 192.042(1) was unconstitutional.[97] Appellate court acceptance of the substantial completion statute remained intact until 1999, when the Third District Court of Appeal, in *Fuchs v. Robbins*,[98] declared the statute to be unconstitutional under Article VII, Section 4 of the Florida Constitution and created a conflict between the appellate districts over the constitutionality of the substantial completion test.[99] The Florida Supreme Court heard oral

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91. *Id.*

92. Fla. Stat. § 192.042(2) (1980); Letter, *supra* n. 90, at 2.

93. Fla. Stat. § 192.001(11)(d).

94. *See supra* n. 87 (providing examples of cases that have interpreted the substantial completion test).

95. Prior to a 1980 revision of Article V of the Florida Constitution, the "inherency doctrine" permitted the Florida Supreme Court to review conflicting cases from the district courts of appeal when one district held a statute unconstitutional and another district simply construed the statute at issue. John F. Cooper & Thomas C. Marks, Jr., *Florida Constitutional Law: Cases and Materials* 160, 163 (3d ed., Carolina Academic Press 1996). Presumably, the court reasoned that when a lower court interpreted a statute without declaring it unconstitutional, it impliedly found the statute to be constitutional. *Id.* Thus, an implied finding of its constitutionality was inherent. *Id.* After 1980, lower courts were required to declare *expressly* a state statute to be constitutional before a conflict could be created with a sister court that held the same statute unconstitutional. *Id.*

96. 427 S.2d 383, 384 (Fla. Dist. App. 4th 1983) (holding that the substantial completion statute is constitutional).

97. *Id.* at 384, 386.

98. 738 S.2d 338 (Fla. Dist. App. 3d 1999) (en banc).

99. *Id.* at 348.

arguments, but has not issued an opinion on the constitutionality of the substantial completion test.[100]

At least one local government unsuccessfully attempted to circumvent the substantial completion statute through application of fees targeted at new construction.[101] Collier County enacted an ordinance that would have imposed a special service fee on new construction completed after January 1st of the tax year when that property escaped taxation through application of the substantial completion test.[102] However, the Florida Supreme Court struck down the fee as an impermissible attempt to interfere with legislative intent as expressed in the state statutes.[103]

B. Senior Citizen Income Levels and the Low Income Senior Citizen Exemption

Recently, the legislature heightened the effects of a new property tax exemption through its unfortunate definition of a specific word within a constitutional provision.[104] The legislature adopted enabling legislation for the additional homestead exemption for low income senior citizens during its 1999 session.[105] The potential reduction in the tax bases of communities where large numbers of low income senior citizens reside was exacerbated when the legislature defined "income" in such a way that social security benefits generally would be excluded from the calculation.[106] When the voters passed the new exemption in 1998, the language created an exemption for seniors "whose household income, as defined by general law, does not exceed twenty thousand dollars."[107] The term "income" was not specifically defined as gross income, adjusted gross income, or taxable income, nor did the ballot require that the

100. Oral arguments were made before the Florida Supreme Court on May 11, 2000. As of April 1, 2001, the court had not issued its opinion.

101. *See e.g. Collier County*, 733 S.2d at 1019 (holding that an interim government service fee on property that escapes property taxation was an impermissible tax).

102. *Id.* at 1015, 1016.

103. *Id.* at 1019.

104. The word "income" in the constitutional provision governing the exemption for low income senior citizens was given a specific definition by the Florida legislature when it enacted Section 196.075, the exemption's enabling legislation. Fla. Stat. § 196.075(1)(b).

105. *Id.* § 196.075.

106. *Supra* n. 104 and accompanying text.

107. Fla. Const. art. VII, § 6(f) (adopted 1998).

legislature adopt any of the definitions used by the Internal Revenue Service (IRS) for federal income tax purposes.[108]

Despite the fact that two other property tax exemptions based on a claimant's income level include social security benefits,[109] the legislature adopted the IRS definition of adjusted gross income to set the limit for the new property tax exemption.[110] By selecting the IRS definition, the legislature significantly expanded the pool of senior citizens who may qualify, because, in most cases, social security benefits will not be included in the calculation.[111] Had the legislature adopted the same income definition used to exempt property owned by totally and permanently disabled persons[112] and persons who reside in nonprofit homes for the aged,[113] social security benefits would be included in the calculation of income used to qualify an applicant for the exemption, and the exemption would be more narrowly targeted toward those who are most in need of property tax relief.[114]

Although the electorate amended the Constitution to provide the low income senior citizen exemption, it was up to the legislature to provide responsive and reasonable enabling legislation.[115] It is difficult to imagine that the public intended to provide this tax break for a couple earning up to $43,999 per year or to single seniors

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108. *Id.*

109. Fla. Stat. § 196.101(4)(a) (exemption for totally and permanently disabled persons); *id.* § 196.1975(6) (exemption for property used by non-profit homes for the aged).

110. *Id.* § 196.075(1)(b).

111. Under the IRS definition of adjusted gross income, a single person receiving $14,000 in social security benefits, a $12,000 pension, and interest income of $6,000 annually for a total gross income of $32,000 would qualify for the low income senior citizen exemption. *See* IRS, *1999 1040 Forms and Instructions* 24–25 (1999) (providing information to assist tax payers in filing their taxes). Similarly, a couple receiving $24,000 in combined social security income and another $19,999 in other forms of income, for an annual total gross income of $43,999 also would qualify. *Id.* In comparison, if social security benefits were included as income, single people who now qualify with gross incomes between $20,001 and $32,000 would not be eligible for the exemption, nor would married couples with gross incomes between $20,001 and $43,999. *Id.*

112. Fla. Stat. § 196.101(4)(a) (providing that "the term 'gross income' includes . . . social security benefits paid to the persons").

113. *Id.* § 196.1975(6) (specifying that "gross income includes social security benefits").

114. *Supra* n. 111.

115. The Florida Constitution was amended in 1998 to permit local taxing authorities to grant the exemption in amounts "not exceeding twenty-five thousand dollars to any person . . . who has attained age sixty-five and whose household income, *as defined by general law,* does not exceed twenty thousand dollars." Fla. Const. art. VII, § 6(f) (adopted 1998) (emphasis added). The constitutional language does not specify what is to be included in income, leaving that decision for legislative definition in the general law. *Id.*

earning $32,000 per year when the language in the Constitution specifically provides a $20,000 threshold, but that is exactly the consequence of the legislature's definition.[116] Perhaps this unfortunate selection explains why the majority of Florida's local governments have refused to adopt this local option exemption.[117]

IV. SPECIAL ASSESSMENTS: ONE RESPONSE TO PROPERTY TAX LIMITS

Local governments have found new and creative ways to raise revenue. For years, cities and counties have collected regulatory fees, user and impact fees, and special assessments.[118] Florida courts generally have been quick to prevent local governments from levying taxes disguised as fees,[119] but, in recent years, have relaxed the rules traditionally applied to distinguish taxes from special assessments.[120]

A. Special Assessments Defined

Special assessments and taxes are both involuntary payments; they differ because taxes are levied for the general benefit of the community, while special assessments provide a special benefit to the assessed property.[121] As early as 1930, the Florida Supreme Court required that the party paying the special assessment receive a "special or peculiar benefit in the enhancement of value of the property against which it is imposed."[122] In *City of Boca Raton v.*

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116. *See supra* n. 111 (examining the IRS definition of "gross income").

117. *See supra* n. 76 and accompanying text (discussing the adoption of the low income senior citizen exemption).

118. *See* Fla. Legis. Comm. Intergovtl. Rel. & Fla. Dept. Revenue, *supra* n. 10, at 52 (providing an analysis of local government funding sources); Fla. Dept. Banking & Fin. Loc. Govt. Reporting, *State of Florida Local Governments* <http://localgovserver.dbf.state.fl.us/> (accessed Apr. 1, 2001) (providing downloadable city and county financial data including database files on special assessment, fee, and tax revenues for 1993 through 1999).

119. *E.g. Collier County*, 733 S.2d at 1018–1019; *City of Port Orange*, 650 S.2d at 4 (finding a transportation utility fee was an unauthorized tax).

120. *See infra* nn. 171–225 and accompanying text (discussing trends in Florida's special assessment jurisprudence).

121. *See generally* Beth A. Jacobsthal & Al Maldonado, *McQuillin: The Law of Municipal Corporations* vol. 14, § 38.02 (3d ed., West 1998 & Supp. 1999); Henry Kenza van Assenderp & Andrew Ignatius Solis, *Dispelling the Myths: Florida's Non-Ad Valorem Special Assessments Law*, 20 Fla. St. U. L. Rev. 823, 826–831 (1993) (defining the distinctions between taxes and special assessments and providing a summary of the historical development of these definitions in Florida).

122. *Klemm*, 129 S. at 907.

State,[123] the court explained the two-prong test used to analyze the validity of special assessments.[124] "First, the property assessed must derive a special benefit from the service provided."[125] For example, replacing gravel roads with paved roads enhances the value of the property abutting the roads, but does not specially benefit properties outside the proximate area. Thus, a special assessment would be appropriate to fund the road paving, because the abutting properties are specially benefitted. Second, the amount of "the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit."[126] If a special assessment meets these two requirements, it is not an illegal tax and does not violate the constitutional provision preempting taxation, except for the ad valorem tax, to the state.[127]

B. Historic Treatment of Special Assessments and the Special Benefits Test

Prior to the 1970s, special assessments typically were levied for benefits to property abutting the improvements funded by the assessment.[128] Early cases applying the special benefits test upheld assessments for drainage, sewer systems, and pavement of roads, because the special benefit accruing to the assessed property easily was discerned for these types of capital improvements.[129] However, the Florida Supreme Court invalidated as improper taxation special assessments for fire services, hospitals, health care units, and garbage collection, because the projects did not provide a benefit to the assessed properties that was sufficiently different from that

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123. 595 S.2d 25 (Fla. 1992).

124. *Id.* at 29.

125. *Id.*

126. *Id.* The problem of reasonable apportionment, prong two of the special assessments analysis, is beyond the scope of this Comment. However, for those interested in that aspect of special assessment administration, Henry Kenza van Assenderp and Andrew Ignatius Solis explored the subject in some depth in a 1993 article. van Assenderp & Solis, *supra* n. 121, at 861–864.

127. Fla. Const. art. VII, § 1(a); *City of Boca Raton*, 595 S.2d at 29.

128. *See* van Assenderp & Solis, *supra* n. 121, at 853 (discussing the historical development of special assessments).

129. *E.g. Meyer v. City of Oakland Park*, 219 S.2d 417, 418, 420 (Fla. 1969) (allowing assessments for sewer improvements); *A. Coast Line R.R. Co. v. City of Gainesville*, 91 S. 118, 121, 122 (Fla. 1922) (explaining circumstances under which assessments for street improvements are permissible); *Lainhart v. Catts*, 75 S. 47, 56 (Fla. 1917) (upholding special assessments for a swamp reclamation and drainage project).

provided to the community as a whole.[130] The court concluded that the existence of facilities like hospitals and health care units provided a general benefit beyond the geographic boundaries of properties in close proximity to the facilities, while construction of new sewer facilities only benefited property that connected to the new sewers.[131] The justices consistently applied a narrow construction of the word "special" and refused to permit assessments for indirect or general benefits to property.[132] The court was careful to identify and prohibit attempts to disguise taxes as special assessments when the levy did not provide peculiar benefits to the assessed property.[133] In particular, the court pointed out the importance of properly labeling revenue sources to avoid impermissible circumvention of the homestead exemption provided for by the Florida Constitution and Section 196.031.[134]

In *Fisher v. Board of County Commissioners of Dade County*,[135] the court declined to broaden its definition of "special benefit" to permit special assessments for paving and repairing streets and street lighting, despite the fact that a majority of the affected property owners voted to approve the assessment.[136] A unanimous court concluded that the county failed to show that the real property subject to the assessment would be specially benefited and held that calculation of the assessments in proportion to the property values used for ad valorem purposes was typical of pure property taxes.[137] Of special concern to the court was the language of Article X, Section 7 of the Florida Constitution, which permits special assessments on properties receiving the homestead exemption if the

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130. *See St. Lucie County-Ft. Pierce Fire Prevention and Control Dist. v. Higgs*, 141 S.2d 744, 746 (Fla. 1962) (holding that a special assessment for fire services was a tax and could not be applied against homestead property); *City of Ft. Lauderdale v. Carter*, 71 S.2d 260, 261 (Fla. 1954) (holding that a special assessment for garbage disposal services was improper); *Whisnant v. Stringfellow*, 50 S.2d 885, 885 (Fla. 1951) (holding that a levy for a county health unit did not provide a special or peculiar benefit to real property and was therefore a tax); *Crowder v. Phillips*, 1 S.2d 629, 631 (Fla. 1941) (holding that construction and maintenance of a hospital did not provide special benefits to real property).

131. *Supra* nn. 130–131 and accompanying text.

132. *E.g. Higgs*, 141 S.2d at 746; *Fisher v. Bd. of County Commrs. of Dade County*, 84 S.2d 572, 576 (Fla. 1956); *City of Ft. Myers v. State*, 117 S. 97, 104 (Fla. 1928) (finding that the foundation for special assessments is based on the principle that properties assessed must receive a benefit "in addition to those received by the community at large").

133. *Higgs*, 141 S.2d at 745.

134. *Id.* at 746.

135. 84 S.2d 572 (Fla. 1956).

136. *Id.* at 580.

137. *Id.* at 579.

assessment provides a special benefit.[138] The *Fisher* court expressed its concern that judicial erosion of the case law governing special assessments would "completely destroy the beneficent safeguard which the people voted to themselves when they approved the constitutional amendment" for the exemption of homestead property.[139] The court declined to approve an assessment that would fund services through a mechanism designed to take advantage of the special benefit exception to the Constitution's homestead provision, because the services failed to provide a real special benefit.[140] The court apparently realized that the special benefit exception was not intended to provide a loophole through which the homestead exemption could be bypassed except in cases in which the affected property received a clear enhancement or benefit different from that enjoyed generally by the community at large.[141]

A few years later, in 1962 the Florida Supreme Court, citing its holding in *Fisher,* upheld a trial court's ruling that a special assessment for a fire prevention and control district was actually a tax and could not be applied against properties that benefited from the $5,000 homestead exemption.[142] Thirty-five years later, the Fourth District Court of Appeal applied logic similar to that of the *Fisher* court when it found that a special assessment, levied by the City of Palm Bay to repave roads, was improper.[143] In *Hanna v. City of Palm Bay,*[144] the city attempted to finance a fifteen-year road rehabilitation project through special assessments after it failed to gain the approval of the city's voters for a millage increase to fund the project.[145] The court concluded that the city's plan was "intended to benefit the taxpayers and community *at large* by upgrading *all* City-maintained streets and . . . [u]nder the guise of special assessments, . . . merely shifted its responsibility for the maintenance of streets onto individual property owners."[146] Thus, as recently as 1991, some Florida courts required that special assessments provide greater benefits to assessed properties than benefits enjoyed generally by nonassessed property.[147] While *Fisher* was

138. *Id.* at 580.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Higgs,* 141 S.2d at 746.
143. *Hanna,* 579 S.2d at 323.
144. 579 S.2d 320 (Fla. Dist. App. 5th 1991).
145. *Id.* at 323.
146. *Id.* (emphasis added).
147. *Id.* at 321–322.

never overruled and district court of appeal cases like *Hanna* remained intact, the Florida Supreme Court clearly receded from its protective posture in 1995 when it approved special assessments for a stormwater drainage system in *Sarasota County v. Sarasota Church of Christ, Incorporated.*[148]

C. What Is Wrong with Special Assessments?

1. Frustration of the Constitution's Property Tax Exemptions

One reason local governments use special assessments is to sidestep property tax exemptions and to levy assessments against properties that are partially or wholly exempt from taxation.[149] In *Church of Christ*, the county imposed a special assessment to fund stormwater management services.[150] The assessment applied to church-owned properties that were exempt from the property tax under Article VII, Section 3(a) of the Florida Constitution as codified in Section 196.196.[151] The churches argued that the stormwater utility service did not provide a peculiar or special benefit to their properties,[152] and the Second District Court of Appeal affirmed the trial court's decision to invalidate the assessment.[153] The Florida Supreme Court's four-member majority remanded the case to the district court for an opinion consistent with the supreme court's findings that property could be specially benefited even when the assessment is levied throughout the community, and that legislative determinations declaring the existence of special benefits were to be upheld unless they were arbitrary.[154]

Three justices dissented from the majority opinion.[155] Justice Wells, in the first of four vigorous dissenting opinions in cases

148. 667 S.2d 180, 186 (Fla. 1995).

149. Article VII, Section 6(a) exempts homestead property from taxation "except assessments for special benefits." Fla. Const. art. VII, § 6(a). Special assessments are not subject to property tax exemptions, because special assessments are not a tax. *Supra* n. 9 and accompanying text.

150. 667 S.2d at 182.

151. *Id.*

152. *Id.* at 184.

153. *Sarasota County v. Sarasota Church of Christ, Inc.*, 641 S.2d 900, 901 (Fla. Dist. App. 2d 1994). The appellate court concluded that "[s]tormwater management services . . . are not a valid special assessment and are . . . services whose revenues should be raised through the taxation method." *Id.* at 903.

154. *Church of Christ*, 667 S.2d at 183, 184, 186, 187.

155. *Id.* at 187 (Grimes, Wells & Harding, JJ., dissenting).

concerning special assessments,[156] concluded that the majority had created an illusory distinction between taxes and special assessments.[157] His reasoning was persuasive. Justice Wells objected to the standard of review adopted by the majority, because it implied a willingness to abdicate the court's responsibility by allowing the legislature to make legal decisions regarding the distinctions between taxes and special assessments.[158] He objected to the levy of special assessments throughout an entire community to pay for the cost of services, which was a direct contradiction to the court's earlier holding in *Fisher*.[159] There, the court prohibited a special assessment for street improvements, maintenance, and street lights, because it was an attempt to avoid the Constitution's homestead exemption provisions without evidence that the public improvements provided special and peculiar benefits to the assessed property.[160]

It is difficult, if not impossible, to reconcile the concept of special benefit with a community-wide levy. If all property in the community benefits from stormwater management, then how can the benefit be special? No single lot or group of lots is specially helped or served; rather, the whole community is alleged to benefit. This type of community-wide benefit is within the province of taxation. If local governments are routinely permitted to fund community-wide services by special assessments, then the exemptions provided for in the Florida Constitution will be meaningless. The opinion of the Second District Court of Appeal in *Church of Christ*[161] affirmed the trial court's holding that the stormwater system did not confer a special benefit and aptly described the potentially damaging effects of converting from a tax-based service provision to an assessment-based system.

> This ordinance changed the payment of such services from a tax base, from which churches are exempt, to a special assessment . . . which churches are compelled to pay.
>
> . . .

156. *Id.* Justice Wells authored the dissenting opinions in *Lake County v. Water Oak Management Corporation*, 695 S.2d 667, 670 (Fla. 1997), *Harris*, 693 S.2d at 949, *State v. Sarasota County*, 693 S.2d 546, 549 (Fla. 1997), and *Church of Christ*, 667 S.2d at 187.

157. *Church of Christ*, 667 S.2d at 187.

158. *Id.* at 187–188.

159. *Id.* at 187; *Fisher*, 84 S.2d at 577–578.

160. *Fisher*, 84 S.2d at 579–580.

161. 641 S.2d 900 (Fla. Dist. App. 2d 1994).

> If services are allowed to routinely become special assessments then potentially the exemption of Churches from taxation will be largely illusory. . . . [T]he significant majority of items presently comprising the ad valorem tax base are services by nature. A domino effect could ensue if special assessments are continually expanded to include generic services.[162]

The key to protecting constitutionally based exemptions is the strict application of the special benefits test as expressed by the court in *Klemm v. Davenport*[163] and *City of Boca Raton*.[164] Specifically, special benefits accrue to property only if the property receives an enhancement in value that is greater than the general enhancement in value enjoyed by the community as a whole.[165] For example, constructing sewer lines in an area served by septic tanks or paving dirt and gravel roads within a subdivision could properly be funded through special assessments, because the affected properties enjoy a benefit that will enhance their value. Other property, remote from the site of the improvements, would not enjoy a similar benefit.

The important questions posed by *Church of Christ* are how special benefits will be defined and to what extent the court will defer to legislative pronouncements as to the existence of peculiar and special benefits to the assessed properties.[166] If the court continues to permit special assessments that provide only marginal, indirect, and general benefits to properties protected by religious, homestead, or other exemptions, it will further assist local government efforts to circumvent property tax exemptions simply by using the "special assessment" label on what should be regarded as an impermissible community-wide tax.

2. The Lost Federal Income Tax Deduction for Property Taxes

At present, the Internal Revenue Code permits individuals to deduct state or local real estate taxes when they choose to itemize deductions.[167] The IRS does not treat special assessments as taxes

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162. *Id.* at 902–903.

163. 129 S. 904, 907 (Fla. 1930).

164. 595 S.2d at 29; *supra* nn. 123–127 and accompanying text.

165. 595 S.2d at 31 (quoting *Klemm*, 129 S. at 640, and *City of Ft. Myers*, 117 S. at 104) (Whitfield, J., concurring)).

166. *See infra* nn. 171–225 and accompanying text (discussing trends in Florida's special assessment jurisprudence).

167. 26 U.S.C. § 164(a)(1) (1994).

and prohibits deductions for amounts paid for special assessments unless the taxpayer can show that the charges were for maintenance or repair of existing systems rather than for construction of new improvements.[168] Thus, when a local government elects to fund improvements through special assessments rather than through property taxes, the taxpayers lose between fifteen and forty percent of the assessment that would have been returned in the form of a federal income tax deduction, depending on their tax bracket.[169] Although special assessments are deductible when used to fund maintenance or services, the average taxpayer may find it difficult to distinguish which portion of an assessment is deductible and which is not. The burden of making the correct tax choice falls on the taxpayer.[170] It seems reasonable to expect local governments to act in a manner that is financially beneficial to the public they serve. By imposing special assessments rather than property taxes, counties and municipalities cause property owners to lose federal income tax deductions that could reduce their federal tax burdens.

D. Trends in Florida's Special Assessment Jurisprudence

The Florida Supreme Court's apparent willingness to permit expanded use of special assessments did not happen overnight. Instead, the court whittled away at constitutional protections limiting property taxes in a series of cases that spanned thirty years.[171] By the mid-1970s, the court reached several decisions that thwarted the purpose of property tax millage caps by permitting

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168. Dept. of the Treas., *IRS Publication 530, Tax Information for First-Time Homeowners* 3 (1999) ("You cannot deduct amounts you pay for local benefits that tend to increase the value of your property. Local benefits include construction of streets, sidewalks, or water and sewer systems. . . . You can, however, deduct assessments (or taxes) for local benefits if they are for maintenance. If you cannot show which part of the assessment is for maintenance, . . . you cannot deduct any of it.").

169. For example, in 1999 a single taxpayer who had taxable income of $27,000 was in the twenty-eight percent tax bracket. If she paid a special assessment of $200 for sewer system construction, she could take that $200 as a deduction. However, if the $200 charge was paid through property taxes based on the value of her property multiplied by the millage rate, she could itemize a deduction for property taxes including the $200, thus recovering 28 percent or $56 of the $200.

170. *Id.* at 3.

171. In 1969 the court permitted special assessments for fire services in *Fire Dist. No. 1 of Polk County v. Jenkins*, 221 S.2d 740, 742 (Fla. 1969). Thirty years later, the Fourth District Court of Appeal upheld an assessment by the City of Pembroke Pines to impose a special assessment for combined fire and rescue services despite the fact that the emergency services portion of the assessment failed to provide a special benefit to the assessed property. *City of Pembroke Pines v. McConaghey*, 728 S.2d 347, 351 (Fla. Dist. App. 4th 1999).

special assessments to fund governmental services rather than improvements.[172] The court further diluted the protections afforded homestead and other tax exempt properties during the late 1990s when it broadened the geographic boundaries within which a special benefit could be identified[173] and redefined the special benefits test from one of uniqueness to one requiring only a nexus between the service and the benefit.[174]

1. Judicial Deference for Legislative Findings that Improvements and Services Confer a Special Benefit

The first step down the slippery slope of constitutional circumvention began in the late 1960s and 1970s when Florida courts began to permit local government assessments for services that traditionally had been funded through property taxes.[175] In *South Trail Fire Control District v. State*,[176] the Florida Supreme Court upheld a special assessment to fund fire protection and ambulance services based upon a legislative declaration that such services benefited "all property within the territorial bounds of the district."[177] A few years later, in *Charlotte County v. Fiske*,[178] the Second District Court of Appeal, relying in part on *South Trail*, held that construction of an improvement was not necessary for a special assessment to be valid and that the furnishing of a vital service such as garbage disposal was sufficient to sustain a special assessment.[179] In both cases, the courts relied on the long-recognized principle that courts should not substitute their opinions for those of a legislature unless the legislature acts in a clearly arbitrary way.[180] Of course, courts exercise discretion when they determine whether or not a legislative body acted reasonably or arbitrarily. The degree of deference paid to legislative findings is a key issue in the special

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172. *Charlotte County v. Fiske*, 350 S.2d 578, 580–581 (Fla. Dist. App. 2d 1977) (upholding special assessments for garbage disposal services); *S. Trail Fire Control Dist. v. State*, 273 S.2d 380, 382, 384 (Fla. 1973) (upholding special assessments for fire and ambulance services); *Jenkins*, 221 S.2d at 742.

173. *Church of Christ*, 667 S.2d at 183.

174. *See Lake County*, 695 S.2d at 669 (replacing the special benefits test with the logical relationship test and upholding a special assessment for solid waste disposal services).

175. *Jenkins*, 221 S.2d at 742.

176. 273 S.2d 380 (Fla. 1973).

177. *Id.* at 383 (quoting 1970 Fla. Laws ch. 70-933).

178. 350 S.2d 578 (Fla. Dist. App. 2d 1977).

179. *Id.* at 580.

180. *S. Trail*, 273 S.2d at 383.

assessments debate, because the governmental entities making the legislative findings relative to special benefits are the same local governments struggling to deal with funding woes. If the state's justices and judges are too reluctant to declare a legislative finding arbitrary, there will be no check on the use of special assessments that confer only marginal benefits on the property assessed. The deference showed to the legislative body by the courts in these two cases foreshadowed the concern expressed by Justice Wells in his dissent in *Church of Christ*, in which he questioned the majority's discussion of the proper standard of review for special assessment cases.[181] Justice Wells believed that the majority's deference to legislative findings would be read as an abdication of the court's responsibility to make "the fundamental legal determination of whether the taxing authority's levy is a special assessment or a tax."[182]

These decisions clearly undermined the millage caps provided for in Article VII, Section 9(b) of the Florida Constitution.[183] Many local governments impose ad valorem taxes to pay for fire and ambulance services.[184] Such services benefit individuals and property and seem to fall into the category of government functions that should be funded properly through property taxes.[185] In 1962 the Florida Supreme Court invalidated a special assessment for fire prevention and control services.[186] In *Saint Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs*,[187] the court concluded

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181. 667 S.2d at 187 (Wells & Harding, JJ., dissenting).

182. *Id.*

183. Millage rates are calculated by dividing the dollar amount of the budget to be funded through property taxes by the total taxable value in the district to which the levy will apply. Thus, when the dollars required for fire services are deducted from that portion of the budget to be funded by the property tax, the millage rate required to raise the appropriate property tax revenue is reduced. For example, if County A has a total taxable property value of $50,000,000 and wishes to fund $500,000 of its budget through property taxes, then the required millage rate is $500,000 divided by $50,000,000 or 10 mills. However, if County A reduced the amount of its budget to be funded by property taxes from $500,000 to $400,000 because it decided to collect a total of $100,000 in special assessments for fire services, then the millage rate would be reduced to 8 mills ($400,000 divided by $50,000,000), leaving a 2 mill cushion that could be used for other budget items.

184. Pinellas County established fifteen fire districts with 2000 millage rates ranging from 1.5000 to 5.500 mills. *See* W. Fred Petty, *Millage Rates-(Dollars Per Thousand) Levied for 2000 Taxes* tbl. 1 (2000) (Pinellas County millage rate table produced by the Pinellas County tax collector).

185. *See Klemm*, 129 S. at 907 (describing the purpose of taxation and distinguishing special assessments from taxes).

186. *Higgs*, 141 S.2d at 746.

187. 141 S.2d 744 (Fla. 1962).

that fire services provided no special benefit to the assessed property and that "protection from fire was 'general' as distinguished from 'special.'"[188] Eleven years later, in *South Trail*, an assessment for fire services was approved.[189]

Equally confounding is the court's about-face from a 1954 decision prohibiting a special assessment for garbage disposal services.[190] In *City of Fort Lauderdale v. Carter*,[191] the court refused to permit the city to impose a special assessment for garbage disposal services.[192] Almost fifty years later, in *Lake County v. Water Oak Management Corporation*[193] and *Harris v. Wilson*,[194] the court approved special assessments for services similar to those that would have been provided by Fort Lauderdale in the 1954 case.[195] Apparently, what was not so special in 1954 is considered special by the court's standard today, and cities, counties, and special districts will be permitted to impose special assessments for services that were traditionally funded by property taxes.

Clearly, the court's definition of what constituted a special benefit changed between the time of the *Higgs* and *Carter* decisions and the *South Trail*, *Lake County*, and *Harris* decisions. The court provides no persuasive rationale for the erosion of the special benefits test as articulated in its earlier cases. The recent validations of special assessments for fire protection and garbage disposal, in the face of previous decisions invalidating similar assessments, appear to be fueled by the court's sympathy for the plight of local governments.

The court is in a position to recognize the difficulties faced by local governments caught between property tax limitations and the need to provide services. Bond validation cases, often the source of special assessment litigation, proceed directly from the circuit courts to the supreme court under provisions in Article V of the Florida Constitution.[196] While not all special assessment challenges involve bond validation, the Florida Supreme Court heard first-hand from

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188. *Id.* at 745.
189. 273 S.2d at 384.
190. *Compare Lake County*, 695 S.2d at 668 (concluding that a special assessment for fire protection and waste disposal was proper) *with Carter*, 71 S.2d at 261 (holding that a special assessment for garbage disposal services was improper).
191. 71 S.2d 260 (Fla. 1954).
192. *Id.* at 261.
193. 695 S.2d 667 (Fla. 1997).
194. 693 S.2d 945 (Fla. 1997).
195. *Lake County*, 695 S.2d at 668; *Harris*, 693 S.2d at 946.
196. Fla. Const. art. V, § 3(b)(2).

many local governments about the struggle to fund services. The court may recognize the importance of providing local governments with the means to govern. However, it is not for the court to legitimize funding mechanisms that play fast and loose with the state's existing financing scheme, flawed as it may be. The question of local government fiscal policy is one for the legislature, local governments, and the people of Florida. It is largely a political question, involving strong public sentiment, well-connected special interests, and a legislature enamored with the slogan "no new taxes." The court's job is to ensure that Florida law, as it exists in the Constitution and statutes, is upheld. However, the court should not ameliorate local revenue problems by reinventing law related to special assessments.

2. Redefining Special Benefits — Special Is Not So Special Any More

"[S]pecial assessments must confer a specific benefit upon the land burdened by the assessment."[197] At the heart of the controversy surrounding special assessments is the analytical process used to determine whether special or "peculiar" benefits are enjoyed by assessed properties.[198] Citing cases from the 1920s, 1930s, and 1970s, the Florida Supreme Court, in *City of Boca Raton*, reiterated the well-established precedent defining special benefits as peculiar benefits that differ in type or degree from those enjoyed by the community at large.[199] The court upheld a special assessment levied to make improvements intended to revitalize Boca Raton's downtown area.[200] The assessment was levied against downtown property excluding church and residential properties, because the improvements were designed to rejuvenate the business community.[201] Thus, as late as 1992, the court affirmed its acceptance of the traditional special benefits test that represented the first prong of the two-prong test used to validate special assessments.[202]

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197. *City of Boca Raton*, 595 S.2d at 29 (citing *City of Naples v. Moon*, 269 S.2d 355, 358 (Fla. 1972)).

198. van Assenderp & Solis, *supra* n. 121, at 854 (analyzing the test used to distinguish special benefits from general benefits).

199. 595 S.2d at 29 (citing *Moon*, 269 S.2d at 358; *Klemm*, 129 S. at 907–908; *A. Coast Line R.R. Co.*, 91 S. at 118).

200. *Id.* at 26, 31.

201. *Id.*

202. *Id.* at 29. The property assessed must gain a special benefit from services funded by the assessment and the assessment must be fairly apportioned. *Id.*

With its 1995 decision in *Church of Christ*, the court began to broaden the definition of "special benefits" to permit the cost of services to be assessed against property throughout the community as a whole.[203] Less than two years later, in *Lake County*, the court further extended the definition by holding that the test for special benefit was not its uniqueness when compared to the benefits enjoyed by the community as a whole, but instead was "whether there is a 'logical relationship' between the services provided and the benefit to real property."[204] Once again, Justice Wells dissented and took issue with the majority's redefinition of the special benefits test.[205] He concluded that the majority had eliminated the distinction between taxes and special assessments and that there needed to be *both* "a 'logical relationship' between the services provided and the benefit" *and* a special or peculiar benefit to the assessed property.[206] Definitions of the phrases "peculiar benefit" and "'logical relationship' between the services provided and the benefit to real property"[207] are significantly different, the latter much broader in scope than the former. Thus, the test for a special benefit is vastly different today than it was seventy years ago when the court defined special benefits as a "special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the *improvement* made with the proceeds of the special assessment."[208] Today, there is no longer a requirement for special assessments to fund *only* improvements.[209] Special assessments are routinely levied for continuing services when there is no "peculiar" benefit, but only a logical relationship between the benefit and the service provided.[210]

In perhaps the most egregious example of the court's willingness to ignore its own precedent, it affirmed, in *Harris*, a district court of appeal decision upholding special assessments levied on residential properties in the unincorporated area of Clay County.[211] The purpose of the assessment was to finance maintenance of an

203. 667 S.2d at 183.
204. 695 S.2d at 669.
205. *Id.* at 671 (Wells, Grimes & Harding, JJ., dissenting).
206. *Id.*
207. *Id.*
208. *Klemm*, 129 S. at 907 (emphasis added).
209. *S. Trail*, 273 S.2d at 382 (permitting special assessments for services rather than improvements).
210. *Lake County*, 695 S.2d at 669.
211. 693 S.2d at 946.

existing solid waste disposal facility.[212] The court held that the special benefit was a question "for the legislative body imposing the assessment and [would] not be overturned absent a finding of arbitrariness."[213] As Justice Wells feared when he dissented in *Church of Christ*,[214] the court's deference to the legislative authority's finding of a special benefit bordered on an abdication of the judiciary's responsibility to ensure that the legislature's finding was not arbitrary.[215] The end result was the levy of a special assessment that quite arguably was an impermissible tax, because the solid waste disposal facility at issue was used by property owners throughout the community and provided no special benefit to the assessed property.[216] In a classic example of the fox guarding the hen house, city and county commissions apparently will be permitted to decide for the court what constitutes a special benefit. Equally troublesome is the court's acceptance of the county's argument that it had no other way to collect payments for the cost of waste disposal.[217] The county permitted other property owners to use the county landfill and to pay a tipping fee if and when they chose to use the available service.[218] The charge was voluntary, because the property owner was not required to use the landfill.[219] Only unincorporated residential property owners were required to finance the service involuntarily by means of the special assessment.[220] Judge Anne C. Booth, in her dissent from the First District Court of Appeal decision upholding the assessment, noted that the county-wide benefits of the landfill were enjoyed "by both assessed and non-assessed property owners."[221] She pointed out that reductions in littering, availability of the landfill, and the cleaner environment resulting from use of the landfill were all benefits described by the county in interrogatory answers provided in the circuit court record.[222] It is hard to imagine how general enhancements to the community at large provided special benefits solely to residential

212. *Id.*
213. *Id.* at 947.
214. 667 S.2d at 187–188 (Wells & Harding, JJ., dissenting).
215. *Harris*, 693 S.2d at 947.
216. *Id.* at 950 (Wells & Harding, JJ., dissenting).
217. *Id.* at 949–950.
218. *Id.* at 949.
219. *Id.*
220. *Id.*
221. *Harris v. Wilson*, 656 S.2d 512, 518 (Fla. Dist. App. 1st 1995) (Booth, J., dissenting), *aff'd*, 693 S.2d 945 (Fla. 1997).
222. *Id.*

property owners in the unincorporated county. It equally is difficult to justify the mandatory imposition of a special assessment on one class of properties while other classes were permitted to use and pay for the landfill services on a voluntary fee basis. The unfortunate answer may be found in Justice Wells's dissent, where he concluded that the majority permitted the special assessment because it was "an efficient collection device, not because it [met] the previously recognized criteria for a special assessment."[223]

Thus, the court has redefined "special" from its historic construction in *Klemm*, a construction that required peculiar and direct benefits to the assessed property, typically achieved from physical improvements, not services.[224] Today, the court includes as a "special" benefit the intangible enhancements to property caused by less litter and a cleaner environment and justifies its new definition on the basis of administrative efficiency and ease of collection.[225] The constitutional protections for exempt property and limitations on property tax rates have been circumvented successfully. The courts, exercising excessive deference toward legislative determinations, willingly have abdicated their responsibility to determine whether special assessments actually provide special benefits or are merely taxes disguised by an improper label.

V. THE FUTURE OF SPECIAL ASSESSMENTS: WHERE SHOULD WE GO FROM HERE?

Local governments attempting to generate revenue through the use of special assessments are constrained by the Constitution, the statutes, and the courts. While a patchwork of fees and special assessments may make up some of the revenue lost through property tax constraints, a statewide revision of the property tax system would provide a less complex, more uniform solution. Special assessments are not the answer to local government funding woes. By definition, they should not be used to fund community-wide programs that are general in nature.[226] Funding for law enforcement, the judicial system, and education is vitally important, and special assessments, at least for now, cannot be imposed to meet those needs. The court distinguished between fire and law enforce-

223. *Harris*, 693 S.2d at 949–950 (Wells & Harding, JJ., dissenting).

224. 129 S. at 907.

225. *Harris*, 693 S.2d at 947, 949.

226. *See supra* nn. 121–134 and accompanying text (examining the definition of special assessment and the historical application of the special benefits test).

ment services in *Lake County* when it opined, "[U]nlike fire protection services, those services provide no direct, special benefit to real property."[227] The court's logic is not persuasive. There is little discernible difference between the benefit of a fire department putting out a fire and that of a police officer stopping vandalism or burglary of a particular piece of property. Both are necessary government services and both benefit property. The distinction is a tenuous one. The court already demonstrated its willingness to permit wide latitude to governments imposing special assessments. Perhaps now it will hold the line in accordance with the *Lake County* decision. Further relaxation of the special benefits test will not serve the public and will cause the court to appear a willing participant in circumvention of constitutional property tax protections.

The piecemeal imposition of special assessments alienates taxpayers, is difficult to explain, and provides a means for local governments to bypass provisions of the Constitution. The solutions to local government funding problems should come from the legislature, the Florida Constitution Revision Commission, the Taxation and Budget Reform Commission, and the electorate, not the courts. Article XI of the Florida Constitution empowers each of these entities to place constitutional amendments on the ballot for consideration by the voters.[228] This power could be exercised to provide local governments with legitimate means to raise funds. In addition, the legislature should restrain its tendency to erode the tax base for the benefit of special interests[229] at the expense of local governments that have reached the ten mill cap and taxpayers who do not enjoy special interest status.[230]

Broad revisions of the state's system for taxation and finance would provide funding alternatives to special assessments and would make the legitimate use of special assessments easier to understand and less insidious than the recent trend of using special

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227. 695 S.2d at 670.

228. Fla. Const. art. XI, §§ 1–6 (providing methodology for amending the Constitution).

229. For an example of legislative action that both limits the tax base and favors special interests, review *supra* notes 46 to 59 and accompanying text. *See e.g.* 1999 Fla. Laws ch. 99-304 (creating a property tax exemption for child care facilities operating in enterprise zones); Fla. H. 1801, 1 (Mar. 12, 1999) (This was a bill that did not pass that proposed exemption for certain building spaces used for theaters and art galleries.).

230. For a review of information concerning the ten mill cap, see *supra* notes 28 to 35 and accompanying text.

assessments to fund services previously supported by property taxes.

The following recommendations are targeted toward stabilizing the property tax base and transferring greater revenue-raising power to the local level, where government is closest to the people who require government services. Due to the political improbability of obtaining voter approval of some potential solutions to Florida's fragmented property tax system, this Comment does not consider the problematic and seldom-mentioned suggestions of repealing the homestead, charitable, or religious exemptions, the Save Our Homes property valuation cap, or the agricultural classification.[231] Instead, the solutions proposed here are smaller in scope and thus achievable. They are intended to limit the use of special assessments, to abolish statutory provisions that go beyond property tax relief measures outlined in the Constitution, and to revise constitutional provisions that limit local government power to raise property taxes.

A. Limit Special Assessments to Improvements Only

The legislature should restrict, by general law, the use of special assessments for capital improvements only and prohibit their use for funding services. Such legislation would negate Florida Supreme Court rulings that permitted the expanded use of special assessments to fund garbage, fire, ambulance, and a plethora of other services. The plain language of such a statute must be clear enough to assure the judiciary of the legislature's intent. An ambiguous statute would leave the door open for further judicial activism.

While there exists some sentiment that everyone should pay something for services, the people of Florida determined in 1968 that owners of homesteads, religious property, and other specific types of property were to benefit from certain tax exemptions. Clearly, community-wide services, such as fire protection, ambulance service, and garbage collection, provide a general benefit to everyone who owns property and are appropriately funded through taxes, even when the system of taxation contains provisions for exempting certain property. The Florida Supreme Court should retreat from its recent redefinition of special benefits to the standard that was prescribed in *Klemm*[232] and affirmed in *Higgs*[233]

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231. *See supra* nn. 36–76 and accompanying text (discussing exemptions, agricultural classification, and the Save Our Homes Amendment).

232. 129 S. at 907.

233. 141 S.2d at 746.

so that special assessments are imposed only for improvements that provide special and peculiar benefits to the assessed property.

B. Raise, Remove, or Locally Adjust the Ten Mill Cap

While removal of the ten mill cap on municipalities, counties, and school districts would be the easiest solution to the problems of small rural counties with low residential values and large tracts of agricultural land, it is unlikely that such an amendment would pass a statewide vote with the current strength of the anti-tax, anti-government sentiment. However, a proposal to raise or remove the cap on local school districts might be more palatable because of recent attention focused on the shortcomings of the public school system. In a report it prepared for the 1998 Constitution Revision Commission, the Florida Legislative Committee on Intergovernmental Relations reviewed an option to eliminate the ten mill cap; however, that option was not placed on the ballot for consideration by the voters.[234]

C. Repeal the Substantial Completion Statute or Adopt a Partial Year Assessment System for New Construction

The legislature considered two separate proposals addressing the problem of the tax-free status of incomplete construction and construction work in progress.[235] Each proposal has attractive features and each has its drawbacks.[236] To date, the legislature has chosen the status quo and has avoided adopting either proposal. Of course, the upcoming *Fuchs* decision on the constitutionality of the substantial completion statute could decide the issue.[237]

1. Repeal Substantial Completion

A constitutionally permissible and administratively manageable solution to property tax losses caused by the substantial completion test and construction work in progress statute is possible. The

234. Fla. Legis. Comm. Intergovtl. Rel., *supra* n. 15, at 28–29.

235. *See supra* nn. 84–103 and accompanying text (discussing the substantial completion test).

236. *See infra* nn. 238–265 and accompanying text (considering the possibility of repealing the substantial completion and construction work in progress statutes).

237. *See supra* nn. 99–100 and accompanying text (noting that *Fuchs* created a conflict between the appellate districts regarding the constitutionality of the substantial completion test).

statutes could simply be repealed.[238] This is not a new proposal, but it is one that has not been given adequate consideration.[239] If the legislature is prepared to face opposition from the special interests that benefit from the existing property tax provision, it could provide local governments with additional revenue to replace some of the revenue generated by special assessments.[240] This solution will ensure that the legislature complies with the constitutional mandate requiring just valuation of *all* property.[241] The Florida Advisory Council on Intergovernmental Relations reported that up to eighty-seven million dollars in taxes would have been raised in 1993 had the substantial completion statute been repealed.[242] While the council cautioned that it believed the estimate to be overly optimistic, it is clear that eliminating the statute would result in substantial revenue from sources that currently escape taxation.[243] For rebuttal of the argument that assessment of partially constructed property is too difficult and controversial, one only has to look to many other states where there is no equivalent to the substantial completion statute and where property is assessed as it stands, complete or incomplete, on the assessment date.[244]

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238. The substantial completion standard was legislatively imposed and was not mandated by the Florida Constitution. The legislature has the power to repeal the statute if it so desires under the authority of Article III, Section 1, which vests the legislative power within Florida to the State legislature and Article VII, Section 4, which requires the legislature to prescribe general law ensuring just valuation for all property. Fla. Const. art. III, § 1; *id.* art. VII, § 4.

239. The Advisory Council on Intergovernmental Relations (ACIR) considered the repeal of the substantial completion statutes when it prepared its 1995 report on assessments. Fla. Advisory Council Intergovtl. Rel., *supra* n. 85, at 19–21. The ACIR concluded that the option would be relatively easy to implement, but would not generate as much revenue as partial year assessments. *Id.* at 20.

240. The lack of readily available statewide data distinguishing between impact fees, special assessments for services, and special assessments for improvements makes it difficult to develop a plan to replace special assessment revenue. Currently, local governments report special assessment and impact fee revenues to the Florida State Comptroller in a single sum. *See* Fla. Dept. Banking & Fin. Loc. Govt. Reporting, *supra* n. 118 (providing downloadable city and county financial data including special assessment, fee, and tax revenue data for 1993 through 1999).

241. Fla. Advisory Council Intergovtl. Rel., *supra* n. 85, at 21.

242. *Id.* at 20.

243. *Id.*

244. *See* Ga. Dept. Revenue R. & Regs. r. 560-11-11-.09 (1999) (providing rules for valuing construction in progress); N.C. Gen. Stat. § 105-317(a)(3) (1999) (requiring appraisal of partially completed buildings). North Carolina and Georgia use similar methods to assess incomplete new construction for tax purposes. In both states, a building under construction on the tax date is assessed based on its value in its incomplete state. Ga. Dept. of Revenue R. & Regs. r. 560-11-11-.09; N.C. Gen. Stat. § 105-317(a)(3). Thus, a building that consists of only a foundation and exterior walls will be valued at less than another building under

Regardless of whether the Florida Supreme Court determines the substantial completion statute to be unconstitutional, the legislature should take the initiative to repeal the statute. During the 2000 legislative session, contradictory bills were introduced either to repeal the statute or to place a constitutional amendment on the ballot to make the substantial completion rule part of the Constitution. Neither measure was adopted.[245]

2. Florida Joint Advisory Council on Intergovernmental Relations: A Proposal for Partial Year Assessments

Partial year assessment is a process that results in a fractional valuation based upon the percentage of time during the tax year that an improvement is complete.[246] Simply put, if a building was completed on September 1st of a given year, a partial year assessment would equal the value of the completed improvement multiplied by four-twelfths (four of twelve months).[247] On its face, this process sounds fairly simple. In practice, the constitutional, statutory, and administrative difficulties posed by partial year assessments are complex.[248]

The Advisory Council on Intergovernmental Relations has addressed many issues pertaining to local government financing and taxation and in 1995 issued its report on partial year assessments.[249] The council's report was prepared largely through the efforts of the Partial Year Assessment Work Group, which reviewed the constitutional and statutory issues associated with partial year assessments.[250]

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construction, using the same blueprints and construction materials, but with its roof and some interior drywall work completed. This valuation model could be followed in Florida if the substantial completion statute were repealed.

245. Fla. Sen. 1010, 2000 Reg. Sess. 1 (Jan. 20, 2000); Fla. H. 0499, 2000 Reg. Sess. 1 (Nov. 30, 1999) (both available at <http://www.leg.state.fl.us/session/2000/billinfo/index>) (both proposing repeal of the substantial completion statute); Fla. Sen. 2430, 2000 Reg. Sess. 1 (Mar. 7, 2000) (available at <http://www.leg.state.fl.us/sessoin/2000/billinfo/index>) (proposing amendment to the Constitution).

246. Fla. Advisory Council on Intergovtl. Rel., *supra* n. 85, at 5.

247. *Id.* at 10.

248. Section IX of the Advisory Council on Intergovernmental Relations report summarizes the complex issues raised by partial year assessments, which include proration of exemptions, application to tangible personal property, effect of the Save Our Homes Amendment on a partial year assessment, and treatment of substantially destroyed property. *Id.* at 27–35. The report recommended several options for dealing with these issues. *Id.*

249. *Id.* at 1.

250. *Id.* at 2.

Critics of partial year assessments cite constitutional problems and case law related to the unequal treatment of real and tangible personal property,[251] while the proposal's supporters assert that a 1985 Florida Supreme Court case provides an escape from the requirement for equal treatment of the two property types.[252] The law is far from clear concerning disparate treatment of real and tangible personal property.

Those who oppose partial year assessments point to *Valencia Center, Incorporated v. Bystrom*,[253] in which the Florida Supreme Court, citing an earlier decision in *Interlachen Lakes Estates v. Snyder*,[254] confirmed that the legislature may enact regulations relevant for property valuation, but that those regulations must apply equally to all property classes unless specifically excepted by the Constitution.[255] Thus, if partial year assessments are levied against real property, they must be levied against personal property as well.[256] While application of partial year assessments to both real and personal property might solve this constitutional issue, fractional assessment of personal property will create intolerable administrative problems for property owners, county property appraisers, and tax collectors, because, by its very nature, tangible personal property is movable and can be easily installed and removed several times during a year.[257]

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251. *See Valencia Ctr., Inc. v. Bystrom*, 543 S.2d 214, 215 (Fla. 1989) (concluding that Section 193.023(6) was unconstitutional); *Interlachen Lakes Ests., Inc. v. Snyder*, 304 S.2d 433, 434 (Fla. 1974) (holding that the law governing assessments must apply uniformly to all types of property unless otherwise authorized by the Constitution).

252. *Colding v. Herzog*, 467 S.2d 980, 983 (Fla. 1985) (concluding that "through its power to classify property for taxation purposes, the legislature has properly excluded household goods and personal effects without reference to the residency of the property owners").

253. 543 S.2d 214 (Fla. 1989).

254. 304 S.2d 433 (Fla. 1974).

255. 543 S.2d at 216 (relying on *Interlachen Lakes Estates, Inc.*, 304 S.2d at 434).

256. *Id.*

257. Under the present system of tangible property taxation, property owners must submit annual returns to county property appraisers that provide a list of the taxpayer's assets as of January 1st of the tax year. Fla. Stat. §§ 192.032(2), 193.052(1)(a). The difficulty in assessing tangible property on a partial year basis stems from the fact that the property is movable and can be in one jurisdiction on January 1st of a given year and in another jurisdiction later in the year. This is particularly true of leased equipment such as copiers, computers, and furniture. In addition, businesses often replace worn tangible property with new equipment, which results in a constant state of change in a taxpayer's tangible property assets. It is difficult to imagine a cost-effective and accurate means by which property appraisers could properly assess tangible personal property without placing an excessive burden on taxpayers and property appraisers. *See* Fla. Advisory Council Intergovtl. Rel., *supra* n. 85, at 27–29 (evaluating the advantages and disadvantages of partial year

Proponents of partial year assessments counter the *Interlachen Lakes Estates, Incorporated* decision with case law of their own. They argue that the Florida Supreme Court recognized, in *Colding v. Herzog*,[258] the impracticality of assessing property taxes on a class of property when the revenues generated by the tax would be less than the expense of administering the tax.[259] There is some evidence that the cost of assessing tangible personal property on a partial year basis would exceed the tax generated by the assessments.[260] Relying on *Colding*, those who favor partial year assessments argue that such assessments could apply to real property without an equivalent assessment against personal property.[261] Unlike revenue generated by a partial year assessment of tangible personal property, the revenue generated by real property partial year assessments would exceed the administrative costs of levying the tax.[262]

Adoption of partial year assessments also would require procedures for administering tax exemptions on a partial year basis and preparation and submission of two value rolls each year. The most inequitable effects of current tax law will not be corrected by partial year assessments. Under the present system of taxation, builders, developers, and holders of certain tangible property benefit from the services provided by property taxes without paying taxes on the value of incomplete improvements.[263] In many cases, new single family residences and condominiums are sold shortly after completion by sellers who benefited from the substantial completion loophole. New home buyers will bear the burden of the partial year

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assessments on tangible personal property).

258. 467 S.2d 980 (Fla. 1985).

259. Fla. Advisory Council Intergovtl. Rel., *supra* n. 85, at 28–29 (commenting on the principle outlined in *Colding* in support of excluding tangible personal property from partial year assessments).

260. *Id.* at 29. The Advisory Council on Intergovernmental Relations report cited an Orange County cost estimate that concluded the cost of administering partial year assessments on tangible property would exceed the revenues raised. *Id.*

261. *See supra* n. 259 and accompanying text (examining *Colding* as support for excluding tangible personal property from partial year assessments).

262. Fla. Advisory Council Intergovtl. Rel., *supra* n. 85, at tbls. 1, 8. The Advisory Council on Intergovernmental Relations estimated that over $81 million in revenue would have been raised in 1993 from partial year assessments on real property alone, while costs of administering the system were estimated at less than $3 million. *Id.* While these appear to be rather rough estimates, it seems certain that revenues will greatly exceed expenses if partial year assessments are implemented. *Id.*

263. *See supra* nn. 84–93 and accompanying text (discussing the development of the substantial completion test).

assessments while the sellers remain free of the partial year tax burden.[264] In addition, developers who build large multi-year commercial projects would receive a large tax break during the year or years that precede project completion.[265]

D. Redefine the Term "Income" as Applied to the Additional Low Income Senior Citizen Homestead Exemption

The effect of the additional homestead exemption for low income citizens has yet to be measured, because the 2000 tax rolls were the first to include the new exemption.[266] The legislature should mitigate its effect on the tax base by revising the definition of the term "income" in Section 196.075, which was enacted in 1999 as the exemption's enabling legislation.[267] As it stands today, most social security benefits will not be included in the income calculations for persons applying for the exemption.[268] Other income-based exemptions use a more inclusive definition of the term "income," ensuring that benefits are directed to those most in need.[269] The legislature should amend the definition of income from "adjusted gross income, as defined in [Section] 62 of the United States Internal Revenue Code"[270] to a definition that duplicates provisions in the statute governing exemptions for totally and permanently disabled persons.

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264. For example, a builder who began construction on a home during August 2002, completed the structure during March 2003, and sold the home to the current homeowner on April 1, 2003, would be billed for 2002 property taxes on the vacant lot on November 1, 2002. If partial year assessments were implemented, the new homeowner would receive a 2003 partial year assessment tax bill for seventy-five percent of the value of the completed structure (April through December 2003 represents three-fourths of the tax year). The builder who benefited from government services for the period from August 2002 through March 2003 paid no taxes on the partially complete building, despite the fact that while the property was owned by the builder, it benefited from police and fire protection, local roads, stormwater drainage, and sewer systems, just to name a few of the services provided through property taxes.

265. For example, if a developer begins construction of a large multi-story hotel or office building on June 1, 2001, and completes the structure on September 1, 2003, he will pay no taxes on the incomplete structure for a period of two years and three months and will be taxed upon completion for only the last three months of 2003.

266. The constitutional amendment creating the exemption was adopted in 1998 and the enabling legislation was enacted in 1999, effective with the 2000 tax year. *See supra* nn. 72–76 and accompanying text (discussing the additional exemption for low income senior citizens).

267. Fla. Stat. § 196.075; *supra* nn. 105–117 and accompanying text.

268. *Supra* nn. 111–112 and accompanying text.

269. *Supra* nn. 113–114 and accompanying text.

270. Fla. Stat. § 196.075(1)(b).

The disability exemption statute provides that "'gross income' includes United States Department of Veterans Affairs benefits and any social security benefits paid" to the applicants.[271] While such a change would not eliminate the exemption, it would target it toward those persons whose actual income is less than $20,000, the limit set in the constitutional amendment adopted by the voters in 1998.[272] Further, a change in the definition would slow the rate at which taxable value is removed from county tax rolls and might encourage more counties and municipalities to adopt local option ordinances authorizing the exemption.[273]

VI. CONCLUSION

Florida's local governments face increasing pressure to provide services, expand facilities, and fund mandates handed down by state and federal legislatures. Cities and counties make creative use of alternative funding sources such as impact, user, and regulatory fees and special assessments. Unfortunately, these creative attempts to generate revenue sometimes fly in the face of constitutional provisions adopted by the citizens of Florida specifically to limit local government ad valorem taxing powers. The judiciary has not been sufficiently protective of those constitutional provisions when evaluating challenges to special assessments imposed by cities, counties, and special districts.[274] The courts should not allow local governments to circumvent the Florida Constitution. The Constitution reflects the sentiments and desires of its citizens. The strong anti-tax sentiment prevalent throughout much of the country also is prevalent in Florida. In its sweeping expansion of the circumstances under which local governments may impose special assessments, the court has become a willing participant in the gutting of constitutional provisions concerning millage caps and tax exemptions.

The citizens who adopted amendments to limit the taxing powers of local governments are the same citizens who will suffer from a decline in government services and infrastructure. Government cannot provide what it cannot afford. Eventually, the legislature must face the facts about local government funding problems.

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271. *Id.* § 196.101(4)(a).

272. Fla. Const. art. VII, § 6(f) (adopted 1998).

273. *Supra* n. 76.

274. *See supra* nn. 171–225 and accompanying text (discussing recent trends in litigation involving special assessments).

It must stop catering to the special interests that demand new and increased exemptions. The legislature should be honest with its constituents about the cost of providing government infrastructure and services. Similarly, local governments must make greater efforts to educate their residents about the costs and benefits of local programs.[275] The Florida Supreme Court should not provide the means for local governments to give important constitutional provisions "a wink and a nod"[276] as they circumvent millage caps, property tax exemptions, and property value limitations. Twisted semantics and illusory distinctions do not transform a tax into a valid special assessment, and special assessments will not cure an inadequate property tax system badly in need of reform.

275. For example, in 1997 voters in Pinellas County renewed a one-cent sales tax increase for a period of ten years following an intensive campaign by local government officials to inform and educate the public about the need for the tax, projects that had been funded during the original taxing period, and projects that would be completed with the extended tax. The county published numerous pamphlets, newsletters, and advertisements to promote the tax. Samples of these publications are on file with the Author.

276. *Harris*, 693 S.2d at 950 (Wells & Harding, JJ., dissenting).