

CHAPTER 5 IMPLEMENTATION ISSUES

Introduction

Aside from the issue raised in Chapter 4 concerning the manner in which a local government accumulates revenues for the local share of the response and recovery costs of a hurricane, two other implementation issues deserve attention: (1) local government options for levying a risk-based assessment for emergency management services and (2) the political feasibility of the concept. Assessment options are a direct function of the revenue-generating authority local governments have under state law; thus the legal feasibility of a risk-based assessment for emergency management services may vary among the states. Political feasibility is likely to hinge on several issues including the perceived fairness of the assessment method, the redistribution effects of a new tax mechanism, and the administrative costs.

In this chapter we explore these two implementation issues and offer some concluding thoughts on the merits of a risk-based assessment for local emergency management services.

Assessment Options

The means for funding a public service is a critical aspect of any plan to serve the residents and property owners in a local government jurisdiction. In the United States, the authority for local governments to levy revenues for the purpose of funding local services and infrastructure varies across states. This authority depends on the relationships that the state and local governments have formalized through the state constitution, statutory law, and special law. The states typically grant or have a role in facilitating the granting of revenue authority to local governments. The authority can range from allowing a very limited number of revenue options to a wide selection which often involves or corresponds with the existence of local self-government or home rule. The following overview describes revenue-generating authority that is typically available to local governments throughout the United States. The subsequent section explains local government revenue authority in Florida. Finally, characteristics of revenue options considered appropriate for funding emergency management services are presented.

Overview of Local Government Revenues

Local government revenues to fund infrastructure and services include a wide assortment of possibilities. At one end of the revenue spectrum are taxes which are typically labeled a general revenue and cover general services and expenditures. At the other end of the spectrum are fees or charges based on the cost of the service that are paid voluntarily by the resident or unit served. Table 5-1 depicts the major revenue options available to local governments. Comparing and contrasting the revenue options appearing in Table 5-1, there are several points that merit highlighting.

Table 5-1
General-Purpose Local Government Revenue Options

Revenue Source	Characteristics	Examples
General Taxes	Compulsory payments used to finance general government programs; tax payments are not linked, directly or indirectly, to individual's consumption of specific goods and services.	Sales, income and property taxes.
Narrow-Based Benefit Taxes	Taxes on specific activities or purchases generally, but often indirectly, related to use of public facilities; revenues usually earmarked for particular expenditure categories	Motor vehicle and fuel taxes; tourist development taxes
Utility Fees	Analogous to private market prices; benefits accrue to identifiable individuals; payment varies with consumption	Charges for sewer, water, and publicly-provided electricity
User Fees and Service Charges	Similar to private market prices but may involve a subsidy to specific users; usually voluntary; payments normally based on an individual's consumption	Fees for public swimming pools, trash collection, health services, public museums
Impact Fees	Fees levied on new development for funding capital outlay for infrastructure serving the new development	Impact fees on roads, water/sewer, parks and recreation and other infrastructure
Special Assessments	Compulsory fees imposed on real property for specific benefits from public investments or services; costs allocated in proportion to benefits received	Local assessments for sidewalks, street paving and lighting, and fire protection services

Adapted from United States Advisory Commission on Intergovernmental Relations (1987).

Taxes. Taxes are compulsory while fees and charges are not. With taxes, there is typically no direct connection between the revenue and the service or infrastructure. In addition, "benefits from taxes are general, community-wide, and serve at least one of three functions: (1) governmental support, (2) administration of the law, or (3) execution of the functions of the sovereign" (Van Assenderp and Solis, 1993: 830). Property or ad valorem taxes serve all of these functions and are based on uniform assessment rates. Examples of other taxes levied by local governments include income taxes, sales taxes, tourist development taxes, and gas taxes.

Utility Fees. Utility fees are used primarily to cover the operation and maintenance costs of a wide range of municipal utility services. Rates are typically based on easily measured units of consumption, e.g. gallons of water per month. A relatively new type of local government utility fee is the transportation utility fee which is used to cover the costs of operating and maintaining new roads and eliminating congested conditions on existing roads (Ewing, 1994). Fees are set in accordance with the service provided based on such measures as front footage, estimated trip generation, or land use type, e.g. residential, commercial, industrial.

User Fees and Service Charges. These are charged to cover the cost incurred by an individual's use of a facility or service. They are often flat fees for all users (park entrance fee) or there may be a simple rate structure for different categories of users, e.g. residential versus commercial solid waste collection charges.

Impact Fees. Impact fees have specific characteristics that distinguish them from other fees or charges. They are used to finance the capital costs of public facilities and infrastructure needed to serve new development (operating costs are excluded). Generally, an impact fee is a direct payment from a developer or builder to the local government, rather than an individual payment from each property owner or resident. They are one-time charges, although they may be collected over an extended period of time. State case law has established that impact fees must be based on a clear nexus between the fee and the demands created by new development and that the level of the fee must be proportional to the cost of the facilities needed to serve the new development (see for example *St. John's County v. Northeast Florida Builders Association*, 583 So. 2d 635 (Fla. 1991) and *Banberry Development Corporation v. South Jordan City*, 631 P. 2d 899 (Utah 1981)).

Special Assessments. The special assessment differs from both a tax and a fee. Special assessments are similar to taxes in that they are compulsory. However, they are usually "imposed on property owners within a limited area to help pay the cost of local improvements which especially benefit property within that area" (Martinez, 1989: 24). The direct relationship between the level of the assessment and the benefit to the property is known as a nexus and is one of the key distinctions between special assessments and taxes. This benefit principle "avoids the redistribution of private wealth to the entire community by apportioning the cost of a particular public improvement according to the benefit" that the property receives from it (Bradley, 1987: 2). Improvements that are typically financed using special assessments are street paving, sidewalk and gutter construction, and street lighting. Other services funded using special assessments have included fire protection, solid waste collection and disposal, and stormwater management.

Mixed Revenue-source Financing. For a particular service or type of

infrastructure, more than one revenue source may be used. General taxes, for instance, often subsidize the cost of infrastructure or services that are critical but cannot be funded using only fees or assessments. Stormwater or drainage infrastructure, for example, is expensive to construct in many communities and general revenue may be necessary for a portion of the capital outlay. Revenue-sharing programs are also a means for funding local government services and infrastructure. In these programs, the state levies the tax and then distributes the revenue proceeds to local governments using a distribution formula. The authorized uses for the distribution from a revenue-sharing program are often specified in general law.

Home Rule. In addition to the revenue authority granted specifically by the state for use by local governments, there is a power that, if granted, allows local governments greater autonomy. This power, known as home rule, allows local control over matters without state interference. It is often granted in the state constitution but also resides in statutory law. Forty-eight states grant home rule authority to municipalities and 37 to counties (United States Advisory Commission on Intergovernmental Relations, 1993). Local government home rule can be established across four basic areas: (1) structure and form of government, (2) functions performed, (3) fiscal, revenue raising, borrowing, and expenditures, and (4) personnel. Most of the revenue options listed in Table 5-1 are available to local governments located in home-rule states.

Local Government Revenue Authority in Florida

Compared to other states, local government revenue authority in Florida is relatively generous and flexible. Revenue authority is granted through several constitutional and statutory provisions. Florida law also grants home rule authority to municipalities and counties. In the following paragraphs, the concept, granting, and practice of home rule is discussed as well as several more specific grants of authority in constitutional and statutory law. The objective is to provide a complete review of all of the options, under current law, that may be available to local governments in Florida to fund emergency management services. Case law is cited where it is relevant for clarifying interpretations of the law.

Local Government Home Rule.¹ Local government home rule was granted to municipalities and counties by the state and its electorate in 1968 amendments to the *Florida Constitution* and in subsequent amendments to statutory law. The legal sources granting the authority differ for counties and municipalities. Article VIII, section 1(g) of the *Florida Constitution* grants clear home rule power to charter counties. With the adoption of a county charter, a county has “self-executing functional powers of government” with the authority to enact local ordinances without specific state legislative authority to do so. The provisions of Article VIII, section 1(f) of the *Florida Constitution* concerning non-charter government were considered insufficient for the self-execution of home rule. In 1971, provisions were added to Chapter 125, *Florida Statutes* granting broad powers of self-government to non-charter counties limited only by required consistency with general or special law (section 125.01, *F.S.*).

Municipal government powers were also addressed in 1968 amendments to the *Florida Constitution* (Article VIII, section 2(b)). However, similar to the concerns raised regarding the powers of non-charter counties, the constitutional provisions referring to

municipal government were not a broad granting of home rule (*City of Miami Beach v. Fleetwood Hotel*, 261 So. 2d 801 (Fla. 1972)). Subsequently, the Florida Legislature enacted the Municipal Home Rule Powers Act in 1973. This codification of law recognized the authority of municipal government under Article VIII, section 2(b) of the *Florida Constitution* to “enact legislation concerning any subject matter upon which the state may act” (Florida Senate Finance, Taxation, and Claims Committee, 1991: 12).

Even though home rule power has been granted to municipalities and counties in Florida, there are still constraints placed on this power. Due to a specific limitation in the *Florida Constitution* (Article VII, section 9(a)), municipalities and counties are only authorized to levy ad valorem taxes and those taxes authorized in statutory law. This constraint prohibits a local government from levying a tax that is not authorized explicitly in the statutes, and thus acts as a severe constraint on the tax revenues that may be levied by local governments. These limits on tax authority in Florida often act as incentives for local governments to enact non-ad valorem revenues, fees, or charges. Current local government taxing authority and examples of local government non-ad valorem revenues are explained in the following sections.

The Florida judiciary has further clarified the extent of the home rule powers granted in the constitution and statutes for counties and municipalities. Decisions issued by the Florida Supreme Court soon after the relevant home rule provisions were added to the *Florida Constitution* affirmed the granting of the power of local self-government to charter counties (*State ex rel. Volusia County v. Dickinson*, 269 So. 2d 9 (Fla. 1972) and *Broward County v. City of Ft. Lauderdale*, 480 So. 2d 631 (Fla. 1985)). *Volusia County v. Dickinson* also clarified that charter counties had the powers of municipal government. In addressing the relationship between charter counties and municipalities within their jurisdiction, *Broward County v. City of Ft. Lauderdale* stated that a charter county could not preempt a municipality’s provision of services without meeting the requirements of Article VIII, section 4, *Florida Constitution*, which refers to the transfer of powers.²

More recently, the courts have addressed the exercise of home rule in challenges against certain types of revenues levied by local governments. A transportation utility fee levied by Port Orange was challenged successfully in *City of Port Orange v. State*, 650 So. 2d 1 (Fla. 1994). The city exercised home rule power in levying the fee for defraying the costs of operating, maintaining, and improving the local road system. The Florida Supreme Court declared, however, that the fee did not meet the requirements of a valid fee, one of which is to be voluntary. The use of roads was not viewed as voluntary. The court found that this fee was actually a tax, and therefore illegal, because there was not specific authority to levy this tax in state law.

Another critical Supreme Court case, *City of Boca Raton vs. State of Florida*, 595 So. 2d 25 (Fla. 1992), held that the city had the power to levy special assessments under “home rule.” The court stated that “a municipality may now exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law, and a municipality may legislate on any subject matter on which the legislature may act, except those subjects described in paragraphs (a), (b), (c), and (d) of section 166.021(3).”³ Even though the transportation utility fee levied by Port Orange was declared invalid by the Supreme Court, special assessments, as well as franchise fees and impact fees, have been interpreted to be legitimate non-tax

revenues levied under the home rule powers granted in constitutional and statutory law.⁴

Local Government Taxes. As noted above, local governments in Florida must be granted authority in the *Florida Constitution*, statutory law, or special law in order to levy any tax. All authorized general-purpose local government taxes are levied at the discretion of the local governing boards. While several different types of local government taxes are authorized in law, the ad valorem property tax generates the highest level of revenue for local governments in Florida. The authority for local governments to levy ad valorem taxes appears in Article VII, section 9 of the *Florida Constitution*. Municipalities and counties may not exceed 10 mills except for a temporary increase which allows millage to be raised for a 2 year time period with referendum approval (section 200.101, *F.S.*). The methods for levying the ad valorem tax are further clarified in statutory law and are described briefly in the following paragraphs.

One approach often cited and exercised only by counties to provide a service and levy ad valorem taxes in a limited geographic area involves the creation of a municipal service taxing unit or MSTU. Authority for this approach resides in section 125.01(1)(q), *Florida Statutes*. As stated in the provisions that address MSTUs, a county may do the following:

establish, and subsequently merge or abolish . . . municipal service taxing . . . units for any part or all of the unincorporated area of the county, within which may be provided fire protection, law enforcement, beach erosion control, recreation service and facilities, water, streets, sidewalks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, transportation, indigent health care services, mental health care services, and other essential facilities and municipal services from funds derived from . . . taxes within such unit only.

The MSTU may not have a millage level above 10 mills. Also noteworthy is that the creation of an MSTU and the levy of ad valorem taxes do not require a referendum of the electors in the area of the MSTU. This statute also addresses the inclusion of a municipal jurisdiction in an MSTU. Areas within a municipality may be included in an MSTU with consent in an ordinance passed by the municipal governing board. In addition, the total millage for that area in the jurisdiction of the municipality, including the county and municipality, may not exceed 10 mills.

Additional authority related to the county levy of taxes involves the creation of a special district (section 125.01(5), *F.S.*). The statutory authority grants counties the power to create special districts in unincorporated and incorporated areas with the approval of the affected municipality or municipalities. This statutory subsection requires the levy of ad valorem millage to be approved by the voters in the district and states that such a district may not be used to provide services only in the unincorporated areas of the county.

Another major tax levied at the local level of government is the public service tax. This tax may be levied by municipalities and charter counties.⁵ The relevant statutory authority for this tax states “a municipality may levy a tax on the purchase of electricity,

metered or bottled gas (natural liquified petroleum gas or manufactured), and water service. The tax shall be levied only upon purchases within the municipality and shall not exceed 10 percent of the payments received by the seller of the taxable item from the purchaser for the purchase of such service” (section 166.231, *F.S.*). According to the Florida Advisory Council on Intergovernmental Relations (1995a), 275 or 71% of municipalities and seven charter counties levy such a tax generating a combined total of \$460 million in 1992-93 revenues.

Other types of local government taxes are authorized and important, but do not generate the revenue levels of the ad valorem tax or the municipal service tax (Florida Advisory Council on Intergovernmental Relations, 1995b). These taxes are gas taxes, tourist development taxes, sales taxes, and occupational license taxes. For all of these taxes, allowable uses of the revenues are specified in state statute.

Other Local Government Revenues with an Emphasis on Special Assessments. Due to their home rule powers, Florida's counties and municipalities are equipped legally to develop and levy a wide range of revenues that are not taxes. These revenues, often specified in statutory references, have taken a variety of forms for different purposes. Impact fees, which cover infrastructure expenses for new development, regulatory fees, and service charges are a few examples. However, the type of non-ad valorem revenue that is becoming more prominent for Florida's local governments is the special assessment.

Current Florida law does not specify a definition of special assessments. Instead, an understanding of special assessments must be based on general descriptions of local sources of financing and revenues, the legal powers that authorize their levy in Florida, and Florida case law. Several methods or approaches for levying special assessments are specified in statutory law. Some of these approaches are explained in the following paragraphs.⁶

Statutory law authorizes the levy of special assessments by counties in three separate provisions. Each statutory reference has a different level of specificity and corresponding requirements. The first statutory provision authorizes the levy and collection of special assessments by counties (section 125.01(1)(r), *F.S.*).⁷ This authority is the most general reference of the three and appears to be relatively broad. It is not clear, however, whether counties have levied special assessments solely on the basis of this broad authority. Most have apparently relied on the formal creation of municipal service benefit units (MSBUs) or special districts which are addressed explicitly in two additional statutes.

The creation of MSBUs is authorized under the same statutory section as municipal service taxing units (MSTUs): section 125.01(1)(q), *Florida Statutes*. MSBUs differ from MSTUs only in the manner in which revenues are collected. While MSTUs are financed through ad valorem taxes, MSBUs are financed through service charges or special assessments. Services and infrastructure that may be provided through MSBUs may be the same as those listed above for MSTUs. MSBUs may include incorporated and unincorporated areas with the formal consent of the affected municipality or municipalities.

Section 125.01(5) *Florida Statutes* authorizes the creation of special districts by county governing boards. The purpose of the special district addressed in this statutory subsection is to provide municipal services. As with MSBUs, formal consent is required

from municipalities included within the boundaries of a special district. Revenues within such special districts may be collected through service charges, special assessments, or taxes. Additional provisions concerning special districts in both counties and municipalities are set forth in Chapter 189 *Florida Statutes*. Much of Chapter 189 is devoted to independent special districts, in contrast to dependent districts which are directly governed by local governments. Independent districts must be created by special state legislation. A variety of independent special districts are authorized by specific statutes including independent fire protection districts (Chapter 191, *F.S.*) and water control districts (Chapter 298, *F.S.*).

For municipalities, the explicit authority for levying special assessments resides in Chapter 170 *Florida Statutes*. In this chapter, municipalities are authorized to levy special assessments for the following local municipal improvements (section 170.01(1), *F.S.*):

- (a) construction, reconstruction, repair, and other improvements to streets and sidewalks;
- (b) construction, reconstruction, repair, and upgrading of stormwater sewers and other drainage structures, sanitary sewers, water bodies, marshlands, and natural areas, and all or part of a comprehensive stormwater management system;
- (c) construction or reconstruction of water mains and other water distribution facilities;
- (d) relocation of utilities including electrical, telephone, and cable television services;
- (e) construction or reconstruction of parks and other recreational facilities and improvements;
- (f) construction and reconstruction of seawalls;
- (g) drainage and reclamation of wet, low, or overflowed lands;
- (h) offstreet parking facilities, parking garages or similar facilities;
- (i) mass transportation systems;
- (j) improvements for watercraft passage and navigation; and
- (k) payment of all or any part of the costs of any such improvements by levying and collecting special assessments on the abutting adjoining contiguous, or other specially benefitted property.

Approval by a majority vote of the affected property owners is required for offstreet parking facilities, parking garages, or other similar facilities, and mass transportation systems.

Section 170.201(1) *Florida Statutes* provides additional authority "to levy and collect special assessments," for funding "capital improvements and municipal services, including, but not limited to fire protection, emergency medical services, garbage disposal, sewer improvement, street improvement, and parking facilities." The statute also addresses the apportionment of costs, stating that this apportionment may be based on "(a) the front or square footage of each parcel of land; or (b) an alternative methodology, so long as the amount of the assessment for each parcel of land is not in excess of the proportional benefits as compared to other assessments on other parcels of land."

The *Florida Statutes* include other references to local government non-tax revenues. For example, funding of stormwater management is addressed explicitly by statutory provisions that supplement other local government revenue authority (section 403.0893, *F.S.*). Under these provisions, a county or municipality may follow one of three strategies for funding the planning, construction, operation, and maintenance of stormwater management systems that are part of a local comprehensive stormwater management program adopted pursuant to state requirements in section 403.0891(3) *Florida Statutes*:

- (1) create one or more stormwater utilities and adopt a stormwater utility fee system;
- (2) establish and set aside, as a continuing source of revenue, other funds for these purposes; or
- (3) create one or more stormwater management system benefit areas within which all property owners are assessed a per acreage fee.

If the benefit area method is employed, benefit subareas must be established in areas where different land uses receive substantially different levels of stormwater benefits. Within these subareas different per acreage fees must be assessed that bear a reasonable relationship to the benefits received. Local governments are explicitly authorized to employ the non-ad valorem assessment procedures detailed in Section 197.3632 *Florida Statutes*.

Case Law Governing Special Assessments. Florida case law has supported the levy of special assessments for a variety of purposes. *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992), articulated a two-part constitutional test for special assessments: they must (1) confer a special benefit to the burdened property and (2) be fairly apportioned. In *City of Boca Raton*, special assessments were defined as follows:

A legally imposed special assessment is not a tax. Taxes and special assessments are distinguishable in that while both are mandatory, there is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer specific benefit upon the land burdened by the assessment. . . . It is imposed upon the theory that that portion of the community which is required to bear it receives some 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. It is limited to property benefitted, is not governed by uniformity and may be determined legislatively or judicially. . . . There are two requirements for the imposition of a valid special assessment. First, the property assessed must derive a special benefit from the service provided...Second, the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit.

According to information compiled by the Florida Advisory Council on Intergovernmental Relations (1992), the most common public purposes funded using special assessments have been solid waste, street lighting, fire protection, road paving,

and ambulance/EMS services in counties, and road paving, sidewalks, road improvements, and streets/curbs in municipalities. The public services or facilities for which special assessment levies have been upheld in recent case law include fire protection (*Fire District No. 1 of Polk County v. Jenkins*, 221 So. 2d 740 (Fla. 1969) and *South Trail Fire Control District, Sarasota County v. State*, 273 So. 2d 380 (Fla. 1973)), solid waste disposal services (*Charlotte County v. Fiske*, 350 So. 2d 578 (Fla. 2 DCA 1977) and *Harris v. Wilson*, 693 So. 2d 945 (Fla. 1997)), stormwater management (*Sarasota County v. Sarasota Church of Christ*, 667 So. 2d 180 (Fla. 1995) and *City of Gainesville v. State of Florida*, 778 So. 2d 519 (Fla. App. Dist. 1 2001)), and specifically enumerated improvements to the infrastructure in a downtown area (*City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992)).

While the array of services and facilities for which special assessments appear to be an appropriate funding source is relatively broad, the state courts have varied in their interpretations. These differences have been particularly apparent between the appellate courts and the State Supreme Court. In 1994, a Florida Appellate Court upheld a special assessment for fire and rescue services and in the same decision declared a special assessment for funding stormwater management services in Sarasota County invalid. In this appellate decision, the court stated that stormwater management services, unlike fire and rescue services, "benefit the community as a whole and provide no direct benefit, special benefit, increase in market value or proportionate benefit regarding the amount paid by any particular land owner" (*Sarasota County v. Sarasota Church of Christ*, 641 So. 2d 900 (Fla.App. 2 Dist. 1994)). Based on this decision, stormwater management services failed the standard as a service or facility that had a "special" benefit to the property. The Florida Supreme Court subsequently reversed this appellate decision, and declared the special assessments for stormwater management services valid (*Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995)).

A special assessment for fire protection services in Lake County was also successfully challenged in an appellate court (*Water Oak Management Corporation, et. al. v. Lake County Florida*, 673 So. 2d 135 (Fla. App. 5 Dist. 1996)). Lake County attempted to reduce its ad valorem burden and shifted the funding for fire protection services to a special assessment. In this decision, the appellate court found that Lake County had failed to make a legislative determination as to the special benefit to the assessed properties. The appellate court concluded that the special assessment "merely funds an undifferentiated service for the county in general and is designed to reduce costs of this service that would otherwise come from general revenue funded by ad valorem taxes." The Florida Supreme Court reversed in *Lake County Florida v. Water Oak Management Corporation*, 695 So. 2d 667 (Fla. 1997). The court observed that the special benefit test "is not whether the services confer a 'unique' benefit or are different in type or degree from the benefit provided to the community as a whole . . . rather, the test is whether there is a 'logical relationship between the services provided and the benefit to real property.'" The court goes on to reiterate its findings in *Fire District No. 1 of Polk County v. Jenkins* (1969), that "fire protection services do . . . specially benefit real property by providing for lower insurance premiums and enhancing the value of the property."

An important case that has not yet been fully adjudicated is *SMM Properties v.*

City of North Lauderdale, 760 So. 2d 998 (Fla. App. 4 Dist. 2000). The Fourth District Court of Appeals sustained a trial court ruling that the emergency medical services component of a special assessment for an integrated fire rescue program did not provide a special benefit to the assessed properties and was, therefore, an illegal ad valorem tax. The appellate court observed that “emergency medical transportation services benefit people, not property.” The difficult legal issue raised in *SMM Properties* is whether or not a court can “dissect . . . the services funded by . . . [a] special assessment and then invalidate . . . the entire special assessment based on a finding that one particular element . . . failed to satisfy the special benefit test.” In *City of Pembroke Pines v. McConaghey*, 728 So. 2d 347 (Fla. App. 4 Dist. 1999), the Fourth District Court of Appeals held that it was improper for the trial court to dissect the services of an integrated fire protection program. However, in *SMM Properties*, the Fourth District Court rejected that rationale, and held that each component of a service program funded through a special assessment must survive the special benefits test. The court reiterated this rationale in rejecting the City of North Lauderdale’s argument that a special assessment for emergency medical services must be sustained because section 170.201(1) *Florida Statutes* lists emergency management services as one of several municipal services for which special assessments may be levied. The court maintained that the specific services encompassed by an emergency medical services program must confer a special benefit to the assessed property. The District Court of Appeals certified the case to the Florida Supreme Court to finally resolve this question. Although the Supreme Court accepted jurisdiction in February 2001, no opinion had been issued as of this writing.

Recognizing the number of different types of services and facilities for which special assessments have been used as a funding source and the variations in court interpretations, the determination of special benefit often creates some confusion. As evidenced by the cases concerning the Boca Raton downtown development special assessment, the Sarasota County stormwater management special assessment, the Lake County fire protection assessment, and the City of North Lauderdale emergency medical services assessment, it is critical to substantiate clearly the “special benefit” to the assessed property. To augment efforts to meet the “special benefit” test, one legal reference on special assessments recommends that the following questions be addressed in the development of a special assessment for a public service or facility (Van Assenderp and Solis, 1993):

- (1) Does the local government have the legal authority to levy the proposed assessment?
- (2) Does the levy finance a system, facility, or service from which a special benefit ascertainable to each parcel of property is derived, over and above a general benefit to the community or to property, whether direct or immediate? Can the special benefit be measured by current use or possible future use of the property? Is the special benefit direct, approximate, and reasonably certain of computation at some point?
- (3) Would the nature of the special benefit derived from the system, facility, or service include any one or more of the following: increased market value, actual or potential added use or enjoyment of the property, impact on existing and

possible future uses of property, potential for decreases in insurance premium, potential for enhancement and value of business property, potential for increases in rental value of the property, and potential for enhanced protection of public safety?

- (4) Is the exercise of discretion by the local government when adopting the levying ordinance or resolution, a reasonable exercise of discretion so that reasonable people may differ, or does it transcend the limits of equality and reason so that it could be viewed as extortion or confiscation of the assessed property?

The apportionment methodology for special assessments is also critical. However, a review of several cases and examples of these methodologies suggests that the judiciary gives local jurisdictions relatively wide latitude. In *City of Boca Raton v. State* (1992), the special assessment in the downtown development area was apportioned on the basis of the property value of the benefitted tracts. The assessment for a particular tract corresponded to its value as a proportion of the value of the land in the entire area. The methodology was also "self-correcting" in that if "over ten years, the assessed value of that particular property did not benefit to the same degree as the rest of the downtown, their percentage of the total assessment would go down proportionally." A small number of residential properties in the downtown area and the churches in the area were exempted from the assessment because they would receive less benefit from the project than the business properties.

The stormwater management special assessment in *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995) was based on the expected or estimated stormwater burden created by each tax parcel.⁸ This unit was labeled the equivalent stormwater unit. The calculation relied on information measuring the "net impervious area" and a factor for the pervious area. The methodology also accounted for variations in the land use due to crop rotation or other changes during the year.

Special assessments for street and road improvements typically use the residence/lot or the front footage in the apportionment methodology. Some of the variations on this approach are presented below (Florida Advisory Council on Intergovernmental Relations, 1992: 15):

The City of St. Petersburg divides 100% of the cost of paving roads up to 24 feet in width into the total front footage of property adjacent to the road paving project. However, corner lots receive a 60% rate break on side footage. If a road is wider than 24 feet then the municipality pays the cost of paving the additional width including any other costs, such as a thicker asphalt layer, associated with the wider street. The assumption is that roads wider than 24 feet benefit other-than-local property owners.

The City of Vero Beach pays one third of the costs of special assessment paving projects. Landowners on both sides of the roadway pay the remaining costs on a modified front footage basis. The modification spreads costs more equitably among properties that generate identifiable differences in vehicular traffic such as high rise condominiums.

If the roadway paving project extends through city-owned property then the city typically bills itself at an increased front footage rate modified to reflect high vehicular traffic.

Pompano Beach divides 100% of the footage of adjacent land. Payment of the assessment is typically due over a three-year period with other installment options available to the landowner.

The above examples indicate that the connection between the assessment and benefit to property depends on a complex interaction of property attributes, project complexity, and community standards. Even when recognizing that the benefit and fair apportionment requirements are consistently referenced, each methodology used for special assessments will be scrutinized with validity determined on the basis of a number of factors. Addressing this point, the Supreme Court in *City of Ft. Myers v. State*, 117 So. 97, 104 (Fla. 1928), stated the following in its decision:

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

Summary of Revenue Evaluation Criteria. Because of the home rule power that municipalities and counties have been granted in Florida, there may be several options for funding a particular municipal service. Several criteria are described below that are useful in comparing revenue options for funding municipal services.

Nexus. Selecting a revenue that ensures a "nexus" or connection between the service, benefit to the property, and level of payment is at the crux of the tax benefit equity principle upon which this study is based. The connection between revenues collected and services provided by a local government also allows for greater accountability in the provision of that service and easier monitoring of the demand, cost efficiency, and quality. While the presence of a nexus is not exclusively associated with non-tax revenues, it is typically a feature of a fee, charge, or special assessment.

Home Rule Authority. This criterion indicates whether the authority to levy the revenue is sufficient under home rule without the enactment of a general law or special law authorizing its levy. Special or general legislation, while necessary for a tax in Florida, is not necessary for the levy of other revenues by general-purpose local governments.

Assessment Rates and Levels. This criterion concerns whether there is a minimum or maximum assessment rate or level for the revenue and whether that level or rate must be uniform for all assessed units. For taxes, the rate is generally uniform throughout the area subject to the tax. For non-tax revenues, variation in the rate is acceptable if it is equitable, reasonable, and fair. For impact fees, the rate must be proportional to the cost incurred by the municipality in providing the service. For special

assessments, the rate must be proportional to the benefit received by the assessed property unit.

Mandatory/Voluntary. This criterion indicates whether reliance on a service or infrastructure and payment for the service or infrastructure is mandatory or voluntary. Taxes and certain types of non-tax revenues, such as special assessments, are mandatory. Fees and charges are typically voluntary.

Geographic Area. This criterion addresses whether the area that will be receiving the services should be and/or can be clearly identified and any limitations on what that area should or can encompass.

Revenue Administration. Administration of the revenue must be efficient, affordable, and effective. New revenue sources that require entirely new administrative systems will be more costly than those which can be incorporated into existing systems.

Interlocal Agreements. Where a county initiates a non-ad valorem assessment for services provided in both unincorporated areas of the county as well as incorporated municipalities, formal consent by the governing body of the affected municipality may be required before the assessment can be levied within an incorporated area. Revenue sources that do not require such agreements will be easier to implement than those that do.

Expenditure Limitations. This criterion addresses the extent to which there are limits to the purposes for which the revenue proceeds may be used. With the exception of narrowly based taxes (motor fuel and tourist taxes), taxes are considered general revenue and may fund all requirements related to services or infrastructure. Non-tax revenues are typically limited to one service or facility and may be limited to operational costs only.

A Special Assessment for Funding Emergency Management Services

Based on the criteria enumerated above and applicable statutory and case law for the State of Florida, the most appropriate revenue source for funding local emergency management services in Florida appears to be the special assessment. A policy of tax benefit equity requires a *nexus* between services consumed and the level of payment. Such a policy dictates avoiding revenue generated by ad valorem or other broad-purpose taxes as the source of funding for emergency management services.

Expediency favors a revenue that can be levied at the option of a local government without new state legislation. In Florida, *home rule authority* grants local governments the power to enact non-tax revenues without special or general state legislation. Current general law and relevant state court decisions define the basis for the levy of the revenue. As noted above, special assessments are one of several non-tax revenues authorized under home rule authority and general statutory authorities for local governments.

Because there typically is variation in the need for emergency management services within a jurisdiction or service area, it is desirable under a policy of tax benefit equity for the *assessment rate* to account for this variation. Special assessments and other non-tax revenues allow for such variation so long as the method of calculating the rate is uniform.

A *mandatory* revenue source is essential if it is to be used to fund emergency

management services. Thus special assessments are preferred over other non-tax revenues such as fees and service charges which are voluntary where the property owner has discretion in deciding whether or not to use the facility or consume the service.

Because emergency management services are provided throughout an entire local government jurisdiction, the revenue source must be authorized for application throughout the entire *geographic area* to be served. In Florida, MSBUs as well as special districts are often created for a service area that is smaller than the boundary of the entire general-purpose local government's jurisdiction. However, state statutes do not preclude jurisdiction-wide MSBUs, special districts, or special assessments. In fact, special districts created by county governments may not be limited solely to the unincorporated areas of the county (section 125.01(5)(c), *F.S.*). Recent case law explicitly recognizes the authority of a county to impose a jurisdiction-wide special assessment (*Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995); *Harris v. Wilson*, 693 So. 2d 945 (Fla. 1997)). Because emergency management services do not benefit unimproved properties, the tax benefit equity principle dictates that it also must be legally feasible to limit the assessment to developed property parcels. The *Sarasota County* and *Harris* cases both explicitly approve of special assessments that are structured in this fashion.

In Florida, non-ad valorem assessments, including special assessments, can be collected using the *revenue administration* system already in place for ad valorem taxes (section 197.3632-197.3635, *F.S.*). In this process, the assessment for each parcel is recorded on a roll (computerized data file) that is prepared separately from the ad valorem roll. The special assessment appears on the tax bill, distinct from the ad valorem millage.

Florida counties are authorized to levy ad valorem taxes within both incorporated and unincorporated areas under Florida law (Chapter 192, *F.S.*). MSTUs established by counties, however, require *interlocal agreements* through formal consent by the governing bodies of incorporated areas to be included within the MSTU boundaries. MSBUs and special districts, which are the principal means through which counties levy special assessments in Florida, require similar consent by municipal governments prior to their assessment within incorporated areas (section 150.01(1)(q) and section 150.01(5)(a), *F.S.*).

The concept of *expenditure limitations* for revenues generated also is at the crux of the principle of tax benefit equity. This criterion also favors a non-tax revenue source for financing local emergency management services.

The final question is whether or not a risk-based special assessment for funding emergency management services associated with hurricanes is likely to succeed legal challenges based on Florida case law. As established above, the two-part constitutional test for special assessments under Florida case law requires that (1) the service or infrastructure must provide a special benefit to the assessed property and (2) the apportionment of the assessment must be fair and reasonable.

Benefits to assessed property are numerous, including the following:

- (1) planning and preparedness for, as well as actual implementation of, protective measures taken prior to the arrival of a hurricane that serve to reduce property

- damage, e.g. sand bagging and other emergency flood protection measures;
- (2) planning and preparedness for and implementation of post-disaster response actions taken to reduce fire hazards, theft and vandalism, and secondary damage from debris;
 - (3) planning for and implementation of recovery actions to restore damaged public facilities and infrastructure and remove and dispose of debris;
 - (4) planning for and implementation of mitigation measures designed to reduce damage to public facilities and infrastructure that serve assessed properties;
 - (5) provision of educational information and other technical and financial assistance for mitigating the vulnerability of private property;

These services not only help to reduce losses to assessed properties, some also may contribute to reduced insurance premiums, and others may enhance property values.

A potential sticking point is the fact that some of the services provided are directed at protecting public safety. As noted above, several recent state court cases have addressed the issue of dissecting integrated services and invalidating special assessments where some of the services are directed towards individuals rather than property, i.e. emergency medical services that are generally available to all citizens within a jurisdiction. It may be necessary to exclude from the special assessment any levy tied to EMS services. It seems reasonable to argue, however, that evacuation and shelter services are tied to the benefits that accrue from use of property and should, therefore be valid components of a special assessment for hurricane emergency management services. A related issue may be the ability to unambiguously differentiate emergency management services that can be attributed to the hurricane vulnerability of a property from similar services that are necessitated by other hazards to which all residents of the community may be more nearly equally vulnerable, e.g. lightning, tornadoes, droughts, blizzards, freezes, earthquakes, and civil disturbances. A defensible method for isolating these services, or the costs for these services, may be necessary. As noted in Chapter 2, this proved to be one of the major challenges of this project.

A special assessment for local emergency management services associated with hurricanes that is based on relative risk, as proposed in this study, appears likely to satisfy the criteria established in Florida case law for special assessment apportionment methodologies. Our analysis of the costs of planning, preparedness, mitigation, response, and recovery by local government (see Chapter 2) shows that response and recovery costs can be clearly linked to the level of damage likely to be sustained by improved property. We also found that in Lee County, planning, preparedness, and mitigation measures and services are more highly focused on areas and types of property thought to be at greater risk by local officials. In Chapter 3 we have described a uniform method of apportioning those costs based on relative risk that is analogous to the apportionment approach taken for the Sarasota County special assessment for stormwater improvements, where assessments are based on the amount of stormwater likely to be generated. Our use of a “self-correcting” ratio of proportional risk is analogous to the apportionment method based on property value used for the Boca Raton downtown redevelopment special assessment described above.

Because emergency management services are provided by counties to both unincorporated areas and incorporated municipalities within the county’s boundaries, a

special assessment should be levied throughout the county. Because the municipalities must approve the delivery of the service in their jurisdictions, interlocal agreements between the county and all of the participating municipalities would be required. This poses a potential impediment to implementation as it requires the governing body of each municipality to concur with the risk-based assessment policy initiative.

Political Feasibility

The concept of a risk-based assessment is quite novel, as is the notion of financing emergency management services through some means other than general taxes. Political issues are likely to focus on concerns similar to those raised in the legal arena: Is the proposed purpose of the assessment appropriate? Is the method of apportionment acceptable? The existence of case law concerning special assessments indicates that they are not embraced universally by property owners. However, Melnick (1993) suggests that the public generally will support taxes and assessments that are viewed as fair and equitable. Thus where a new service is to be provided and financed through an apportionment process based on benefits consumed, political support often is present. However, when a special assessment is initiated as an alternative method of financing an existing public service, there will be a redistribution of the tax burden. In these instances, political opposition is more likely. Opposition also is likely where administrative costs are perceived to be high relative to the equity benefits to be achieved through a modified system of taxation.

The existence of analogous special assessments in other jurisdictions offers some evidence that political support is possible for a risk-based assessment for emergency services. Stormwater management districts that assess property owners on the basis of impervious surface coverage come closest to approximating a risk-based apportionment method. Wildfire prevention and protection districts in several California communities offer examples of special assessments for emergency management services targeted at a specific natural hazard.⁹

Lee County's collaboration on this project reflects a positive political attitude toward the notion of funding emergency management services through an alternative assessment mechanism. In 1990 the county established an "all-hazards" protection district to provide an additional source of revenue for hazard mitigation and disaster recovery. The district is called a "municipal services taxing unit" (MSTU) under Florida law and is financed through an ad valorem tax on all real property in the unincorporated county. The all-hazards MSTU does not apportion the tax based on risk or any other measure of the differential benefit received by individual property owners.

We do not know, therefore, how receptive the property owners of the county would be to an initiative that reapportions the tax burden for these services. As reported in Chapter 4, the actual tax differentials that would result from a risk-based assessment in Lee County would be small. The median tax increase for all property owners would be \$2.00 per year. Even among higher risk properties the impact typically would be less than \$12.00 per year. There may be some concerns about distributional effects, nonetheless. As we also report in Chapter 4, mobile home owners, who are likely to have lower incomes, would experience the largest tax increases based on structure type. Again, however, the absolute magnitude is small, on the order of \$9.00 to \$11.50

per year. It seems unlikely that such impacts would generate significant opposition.

We have not attempted to estimate the administrative costs of implementing such a system because much depends on the availability of data for calculating the emergency management costs and the risk indices for individual property owners and on the data base management systems and analytic software used to calculate the risk-based assessments. Some changes in department budget practices probably would be necessary to properly document ongoing costs to be covered by the system. Event costs can be estimated readily with the models we have developed (Boswell et al., 1999), but each jurisdiction will have to define probability values for anticipated hurricane strikes and actual strikes. We used widely accessible data base software (Microsoft Access) to calculate property assessments with data from the Lee County Property Appraiser's database. However, significant initial efforts might be needed to integrate the assessment algorithms with a jurisdiction's existing property assessment data base management system.

The cost-effectiveness of implementing such a system might be questioned given the small amount of revenue to be raised. As we report in Chapter 2, the annualized costs of emergency management services necessitated by hurricane hazards in Lee County ranged from \$1.2 to \$1.7 million for 1995, based on current federal and state disaster reimbursement formulas. This represents approximately 0.3% of the county's general revenue budget for that year. Even if local governments were required to pay the entire non-federal share under the federal Public Assistance Program, this amount would only increase to a range of \$1.7 to \$2.7 million.¹⁰

Concluding Thoughts

We have argued that property owners should be assessed for the costs of emergency management services based on relative risk in accordance with the principal of tax benefit equity. We have shown that for hurricane risks it is possible to define differential levels of benefit to developed property based on spatial variation in exposure and variation in the vulnerability of structural improvements. A number of approximations are necessary both in quantifying the costs of services provided and in defining the relative risk attributes of developed properties. However, it seems likely that with some modification of budgeting practices these approximations would be judged to be reasonable within the broad authority local governments have to levy special assessments.

We also have suggested that the imposition of such a property assessment might serve as an incentive for property owners to reduce the vulnerability of their structures and as a disincentive to new development in hazardous areas. The median tax increase of \$11.25 for the most high-risk properties in Lee County seems unlikely, on its own, to effect such behavioral changes, given the median 1995 assessed value of these properties of \$72,000. Even if local governments were held accountable for the entire non-federal share of disaster response and recovery costs under the federal Public Assistance Program, which would result in about a 58% increase in the median tax differential for high-risk properties to \$17.78 per year, incentive effects are likely to be minor.

Despite these caveats, we would argue that a risk-based property assessment

can serve important policy and fiscal purposes. While the magnitude of the assessment may not be great, the equity principals upon which it is based are widely embraced. Such a policy initiative would be an important step towards establishing greater expectations for individuals to assume responsibility for the risks they incur by developing land in hazardous areas. A risk-based assessment also offers a means for local governments to raise revenues for financing a disaster contingency fund, an initiative that many communities have not yet taken. Moreover, if local governments are held accountable for a greater share of the costs of recovery, there is likely to be both greater demand for tax benefit equity from local taxpayers, and a greater need for communities to set aside funds for disaster response and recovery.

Endnotes

1. This section is based on Florida Senate Finance, Taxation, and Claims Committee (1991).
2. This section of the *Florida Constitution* requires that a transfer of any function or power of a county, municipality, or special district to another county, municipality, or special district must have approval of the electorate through referendum in both jurisdictions affected or as otherwise provided by law. There are techniques for addressing and implementing the transfers without referenda in general law. The predominant approach is by the execution of an interlocal agreement (Part I, Chapter 163, *F.S.*) or the exercise of extraterritorial powers by a municipality (Chapter 180, *F.S.*). In Florida, municipal annexation and incorporation require referenda approval.
3. The exceptions listed in section 166.021(3) *F.S.* are (a) the subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to section 2(c), Article VIII of the *Florida Constitution*; (b) any subject expressly prohibited by the constitution; (c) any subject expressly preempted to state or county government by the constitution or by general law; (d) any subject preempted to a county pursuant to a county charter adopted under the authority of sections 1(g), 3, and 6(e), Article VIII of the *Florida Constitution*.
4. The case addressing franchise fees is *Santa Rosa County v. Gulf Power*, 645 So. 2d 452 (Fla. 1994). *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976) addresses the levy of an impact fee.
5. While the statutory authority for this tax refers only to municipalities, the power of charter counties to levy the tax stems from a Supreme Court decision in which charter counties were declared to have the powers of municipalities (*State ex rel. Volusia County v. Dickinson*, 269 So. 2d 9 (Fla. 1972)).
6. Florida law authorizes a variety of special assessments. Here we address only the use of special assessments by general-purpose local governments in the funding of infrastructure and services.

7. The actual wording in the statute is “Levy and collect taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit, and special assessments . . .”
8. Resolution Number 96, Initial Stormwater Improvement Assessment, Sarasota County (adopted July 9, 1996).
9. The City of Oakland, California, established a wildfire prevention and suppression district in portions of the city after the 1991 firestorm (C. West, personal communication, October 2, 1996). The district provides annual vegetation inspections, curbside brush chipping, and supplemental fire patrols during hazardous weather conditions. The City of Berkeley and Ventura County reportedly have similar property assessments for wildfire hazards.
10. Few legislative proposals have been advanced to hold local governments more accountable for their costs of disaster response and recovery. To date, no federal proposals have departed greatly from the current Stafford Act formula of 75% federal aid. For examples, see Federal Emergency Management Agency (1995) and the Disaster Mitigation Act of 2000 (Public Law 106-390). Florida’s Legislature recently reaffirmed its policy of only paying half the non-federal share after picking up the entire balance from several hurricanes in the early and mid 1990s.