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Innovative Uses for the Special Assessment: Building Infrastructure Without Raising Taxes

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INNOVATIVE USES FOR THE SPECIAL ASSESSMENT: BUILDING INFRASTRUCTURE WITHOUT RAISING TAXES

by Alan M. Burger, Esq.[1]

I. INTRODUCTION

More than seven years ago, the National Council on Public Works Improvement was formed to study and assess the condition of the nation's "infrastructure."[2] The Council's final report concluded existing infrastructure could not sustain a stable, growing economy. In fact, infrastructure growth was woefully insufficient to support future economic growth and development, and capital investment was sufficient to only offset annual depreciation, not to meet new demand. The Council recommended a 100% increase in public works capital expenditures in order to maintain existing services and meet future needs. The Council's report came at a time when states and municipalities were already faced with significant cutbacks in federal allocations, the decreased availability of federal categorical

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[2] Infrastructure is the support system of a community, including some twenty-two different types of urban services and facilities.

grant and loan programs, as well as the impact of the Gramm-Rudman-Hollings Act of 1985.[3]

Little has changed since the Council's report. Many would argue increased federal expenditure restrictions have continued to impact state and local capital expenditures. In light of current fiscal constraints, state and local governments are forced to adopt alternative and innovative strategies to raise and allocate public funds. This trend was recognized by the Council when in its report it stated that "mobilizing adequate financing requires participation by all levels of government,"[4] and in addition to taxation, requiring innovative methods of financing. Suggested methods included increased utilization of user fees, privatization, joint public/private development projects as well as increased use of special assessments.[5]

This paper explores new ways in which the special assessment may be used by local governments to alleviate growing infrastructure deficiencies; the paper explores innovative assessment uses such as indirect assessment benefits, the structuring of benefit districts to indirectly benefit a nonassessed area; benefit swaps, the exchange of assessment benefits between assessed areas; and benefit pools, the contribution of assessment benefits into a pool in exchange for future assessment benefits.

As a precursor to assessment alternatives, the realities of legislative conditioning are explored because each of the proposed assessment ideas involves legislative conditions. The constitutionality of conditioning and special assessments are discussed as a building block to determining if each of the new uses are themselves constitutional. Finally, the political realities surrounding the implementation of the assessment ideas are considered.

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[3] Robert H. Freilich, et al., *Federalism in Transition: The Emergence of New State and Local Strategies in the Face of the Vanishing Tenth Amendment*, 20 URB. LAW. 863, 873-874 (1988).

[4] *Id.* at 876.

[5] *Id.*

II. CAN AN ASSESSMENT BE CONDITIONED?[6]

The process of enacting legislation is vastly different from the process of conditioning legislative action upon an event. Legislative enactment is the process by which laws are brought into effect. It encompasses all influences upon the legislative process, including conditions. Conditioned legislative action occurs when a legislative act is premised upon a unilateral act by another.[7] If this act is deemed to be a delegation of the legislative role, the legislative act and its process are unconstitutional.[8] Thus, there is a fine line between influence and bartering when a legislative act is premised upon conditions. As a result, when a condition appears, inquiry must be made to determine if the legislative process or the resulting legislation is the conditioned event.

A. Conditions and Assessments

Since the power, the amount,[9] the necessity and the reasonableness of an assessment are legislative determinations,[10] judicial decisions regarding other legislative acts are analogous to determine whether the implementation of an assessment for one benefit area can be conditioned upon the provision of similar benefits to other areas.[11]

In *Hartnett v. Austin*,[12] the Florida Supreme Court held an ordinance which conditioned its effectiveness upon the necessity for the subsequent execution of a contract with private parties was vague and imprecise, causing the act to be unconstitutional.[13] This

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[6] The enactment of each assessment alternative discussed in this paper is largely dependant upon the conditioning of the legislative action upon some event.

[7] Note, *Municipal Development Exactions, The Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 1001-1002 (1989). United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

[8] Bruce M. Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29, 45 (1981).

[9] 48 Fla. Jur. 2d *Special Assessments* § 4 (1984).

[10] *Id.* at § 8.

[11] This premise assumes that the conditioned action is not merely one of enactment, but content. It further assumes that benefits derived are not at issue.

[12] 93 So. 2d 86 (Fla. 1956).

[13] *Id.* at 88.

holding did not *per se* establish that all conditioned legislative action is invalid; rather, only when conditions are uncertain in nature is legislative action invalid.

Hartnett was followed by *Herr v. City of St. Petersburg*,[14] in which the Florida Supreme Court upheld legislative action where a public entity and a railroad[15] agreed to condition the reciprocal payments upon future events.[16] Several factors weighed heavily in the court's opinion in upholding the condition. First, unlike *Hartnett*, this case involved two public entities; and second, each entity was exercising its powers to further a public, not private purpose. The court found this to be a primary factor in considering whether a condition invalidates legislative action.

Thus, under *Hartnett* and *Herr*, legislative action may be conditioned as long as it is predicated upon defined and certain conditions. In addition, the entity responsible for performing, and sponsoring the condition, must play an important role in validating a condition. These holdings are consistent with the holdings of other state courts and have been refined by the United States Supreme Court. For example, state courts have upheld municipal exactions which condition the issuance of a building permit upon developers' provisions of public improvements.[17]

In 1987, the United States Supreme Court also upheld such exactions. In *Nollan v. California Coastal Commission*,[18] beachfront property owners granted a public easement for ocean access.[19] The Supreme Court found that as long as there is a "rational nexus" between condition and a legitimate purpose for the condition, the condition is valid.[20] The Court went on to hold,

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[14] 114 So. 2d 171 (Fla. 1959).

[15] The court considered the railroad to be furthering the public welfare and as such it was a public entity.

[16] 114 So. 2d at 174-175 (Fla. 1959).

[17] *See* Martha Lester, *Subdivision Exactions in Washington: The Controversy Over Imposing Fees On Developers*, 59 WASH. L. REV. 289 (1984); Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731 (1988); Note, *Municipal Developments Exactions, The Rational Nexus Test, and the Constitution*, 102 HARV. L. REV. 992 (1989); John P. O'Connor, Jr., *Extortion Loses a Synonym Thanks to Court Ordered Accountability In Land Use Exaction Programs*, 57 U. CIN. L. REV. 397 (1988).

[18] Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

[19] *Id.*

[20] *Id.* at 837.

however, that the condition imposed by the California Coastal Commission did not meet the rational nexus test and therefore constituted a taking.

Therefore under *Nollan, Hartnett* and *Herr*, the legislative conditioning of assessment benefits would be valid as long as: (1) The conditioning of the benefits meets the *Nollan* "rational nexus" test, and (2) the assessment is itself valid. While these requirements may appear to be separate, they are in fact interrelated with the validity of the condition predicated upon the validity of the assessment. Thus, there must be a sufficient relationship between the assessment and benefits conferred[21] before demonstrating a sufficient relationship between the assessment and the condition.

B. Validity of Assessments

The Florida Supreme Court classified assessment districts as permanent or temporary in order to determine whether there is sufficient benefit to property to justify imposition of a tax or an assessment on a property within a district.[22] When the taxing district is created for a special, temporary purpose and the district is a mere instrumentality for collecting the tax by spreading the cost according to assumed benefits, relief will be afforded the taxpayer and the district invalidating if: (1) The effect is to impose a grossly unjust or unequal burden on some of the property taxed,[23] or (2) if there are no benefits resulting directly, specially, or peculiarly from the improvement.[24]

But when benefits flowing from the district are general, and district operations permanent, the fact that the benefit to a particular property may be remote, doubtful, or the burden heavy, will not entitle relief against an authorized levy.[25] Under either scenario, however, the assessment must not exceed the proportional benefits as compared to assessments on other lots and tracts affected by the

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21 *Id.* at 825.

22 John M. Starling, Note, *Special District Taxation*, 13 U. FLA. L. REV. 531 (1960).

23 *Id.*, *citing* Jinkins v. Entzminger, 135 So. 785 (Fla. 1931).

24 Starling, *supra* note 21 (*citing* Martin v. Dade Muck Land Co., 116 So. 449 (Fla. 1928)).

25 Starling, *supra* note 21 (*citing* Jinkins v. Entzminger, 135 So. 785 (Fla. 1931)).

improvement. In addition, the manner of the assessment may vary within the district, as long as the amount of the assessment for each tract is proportional to the benefits received.[26]

C. *Conditioning Assessments*

1. Incidental Benefit Districts

The benefits derived from the assessment may be structured so that some areas receive incidental use, without requiring those incidental users to be assessed.[27] In *Charlotte County v. Fiske*,[28] the Second District Court of Appeal upheld an assessment for garbage collection being challenged because not all county residents were assessed while all residents did benefit from a clean county.[29] The court found the argument unpersuasive, stating that even though some properties benefitted from garbage service, only those properties actually using the service were assessed.[30]

Under *Charlotte County*, an assessment may withstand scrutiny, even if that assessment is purposely designed to incidentally benefit non-assessed property owners. For example, suppose City X desires increased police protection[31] and is willing to assess itself to pay the increased associated costs. Further suppose, that police have substations in City Y, an affluent neighborhood, and City Z, an area with a high crime rate. *Charlotte County* could allow City X to use officers from City Z to protect X. Resulting in increased police presence in Z because the police would have to go through Z to reach City X.

Under both the *Nollan* rational basis and assessment benefit tests, incidental benefit zones may withstand constitutional scrutiny. First, under *Nollan*, the conditioning event need only be based upon demonstrating a rational nexus between the condition and the legislative purpose. Under the X, Z hypothetical, the nexus is

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[26] South Trail Fire Control District, Sarasota County v. Town Hall, 273 So. 2d 380, 386 (Fla. 1973).

[27] Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d Dist. Ct. App. 1977).

[28] 350 So. 2d 578 (Fla. 2d Dist. Ct. App. 1977).

[29] *Id.* at 580-581.

[30] *Id.* at 581.

[31] This example assumes that police protection is a valid assessment purpose.

demonstrated through the benefits afforded City Z under the plan. The second part of the test is much easier to demonstrate because the Florida Supreme Court has already validated an assessment district which incidentally benefits another area.[32] Therefore, it would appear that conditioning the assessment upon providing incidental benefits would survive constitutional muster.[33]

2. Benefit Swaps

Taken to the extreme, can an assessment be structured so the benefits flow to X and Z without "assessing" both X and Z? One option may involve some type of "benefit swap" between the two areas. In one from of swap, one area would bear the cost of assessment and in return receive some comparable benefit.

The theory of reciprocal obligations and burdens was upheld in cases involving eminent domain. In *State v. City of Tampa*,[34] and *Herr v. City of St. Petersburg*,[35] the Florida Supreme Court upheld a plan by the City of Tampa to pay condemnees in substitute properties, rather than cash.[36]

The plan was assailed on two grounds. First, it was asserted that the plan violated the constitutional provision forbidding any city to use its full faith and credit for the benefit of any corporation, association, institution or individual.[37] Second, it was claimed that the plan constituted an impermissible bartering of the police power.[38]

The Florida Supreme Court held as long as the city is receiving property at least equal in value to the property to be conveyed, the city has not violated the constitutional mandate.[39] Since there were

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[32] *Charlotte County*, 350 So. 2d at 581.

[33] It should be noted, however, that conditioning an assessment upon providing incidental benefits may undergo additional review requiring judicial balancing of the benefits and burdens imposed upon the landowner against the benefit to the public health, safety and welfare. *See* Starling, *supra* note 21, at 541-544.

[34] 113 So. 2d 849 (Fla. 1959).

[35] 114 So. 2d 171 (Fla. 1959).

[36] *See, e.g., Id* .

[37] *City of Tampa*, 113 So. 2d at 845; *City of St. Petersberg*, 114 So. 2d at 173-174.

[38] *City of Tampa*, 113 So. 2d at 846; *City of St. Petersberg*, 114 So. 2d at 175.

[39] *City of Tampa*, 113 So. 2d at 845; *City of St. Petersberg*, 114 So. 2d at 173-174.

to flow reciprocal benefits, burdens and obligations, and the transaction accomplished municipal purposes, the city had not bartered away its police powers.[40]

If a benefit swap is the condition to enacting a special benefit district, the swap, like substituted compensation, should be constitutionally valid, since each area is to receive benefits of equal values while also being strapped with equivalent burdens. In order to do so, however, the substance and not the form must be scrutinized. Further, under the *Nollan* test, a nexus between the condition and the purpose for the condition could be demonstrated.

The logical extreme to this scenario would be for City X to be assessed and provide a benefit to both City X and City Z. In return, City X would receive a benefit already available in City Z. This would also be constitutional as long as the property within each benefit district receives equivalent benefits. As the Florida Supreme Court stated: "The term "benefit," as regards [the] validity of improvement assessments, does not mean simply an advance or increase in market value, but embraces actual increase in money value and also potential or actual or added use and enjoyment of the property."[41]

Unfortunately, the *Meyer* court does not focus upon detriment, but instead focuses upon benefit received. The court in essence, ignores one of the fundamental aspects of assessments: That the benefit received and the amount of assessment must be equivalent.[42] The equation does not contemplate the situation in which the benefit received exceeds the amount of assessment. As a result, if the amount of assessment is not as great as the amount of benefit received, the case law derived from the traditional challenge to an assessment may be inapplicable.[43]

Even under current law, however, the plan is viable because under the plan, the determination as to the amount of assessment cannot be made until after a determination as to the amount of

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[40] *City of Tampa*, 113 So. 2d at 846; *City of St. Petersberg*, 114 So. 2d at 175.

[41] Meyer v. City of Oakland Park, 219 So. 2d 417, 420 (Fla. 1969).

[42] Treasure Island v. Strong, 215 So. 2d 473 (Fla. 1968); Atlantic C.L.R. Co. v. Gainesville, 91 So. 118 (Fla. 1922).

[43] *Treasure Island*, 215 So. 2d 473 (Fla. 1968); Cape Development Co. v. Cocoa Beach, 192 So. 2d 766 (Fla. 1966); Ft. Meyers v. State, 117 So. 97 (Fla. 1928).

benefit has been made.[44] The legislature could determine differing values for the same benefits received resulting in differing assessments for essentially the same benefits.[45] This value benefit disparity could allow the legislature to "fix" assessment determinations. Since these determinations are legislative functions[46] which are conclusive both on property owners and the courts, unless palpably arbitrary, grossly unequal and confiscatory, or devoid of any reasonable basis as to be essentially an abuse of power,[47] they will not be disturbed if fairly debateable.[48] Thereby undermining the requirement that assessments and benefits be equivalent.

Would the legislative act, however, withstand constitutional muster? It appears so. The Florida Supreme Court held that apportionment of special assessments within a district by the legislature is a proper function of lawmakers and that a legislative finding of benefits cannot be reviewed judicially unless it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power.[49]

While the court addressed the provision of benefits within a single district, the court's holding is certainly analogous to the assessment swap. Each is a benefit to property and each is the result of legislative determination. Therefore, each should enjoy judicial equality.

3. Benefit Pools

A third alternative is to establish assessment "benefit pools." These pools serve as receptacles for benefit points earned by providing benefits to another area and would allow for bartering of

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[44] *Treasure Island,* 215 So. 2d at 477; *Cape Development Co.,* 192 So. 2d at 772.

[45] South Trail Fire Control District v. State, 273 So. 2d 380 (Fla. 1973); Hays v. Tampa, 154 So. 687 (Fla. 1934); Richardson v. Hardee, 96 So. 290 (Fla. 1923).

[46] Lot Numbers 1685 v. Defuniak Springs, 174 So. 2d 8 (Fla. 1937); *Treasure Island,* 215 So. 2d at 478.

[47] State Board of Supervisors v. Warren, 57 So. 2d 337 (Fla. 1951); Bannerman v. Cats, 85 So. 336 (Fla. 1920).

[48] Meyer v. Oakland Park, 219 So. 2d 417 (Fla. 1969); Rosche v. Hollywood, 55 So. 2d 909 (Fla. 1952); Martin v. Dade Muck Land Co., 116 So. 449, 467 (Fla. 1928).

[49] *See* Starling, *supra* note 21, at 544.

assessment benefits. Like the "swap," the pools allow the benefits to be provided at the most efficient rate by allowing for decreased cost due to wide-scale improvement.

For example, City X needs its streets repaved. City X has ten miles of street and the paving cost is ten dollars per mile. Cities Y and Z also need their streets repaved, however, they can not currently afford to repave and an assessment is out of the question. To accomplish the project, City X would assess its landowners for the cost of the entire project and in return the landowners would receive assessment credits from Y and Z for future benefits of equivalent value.

There are of course several constitutional restraints on the use of such a pool. First, since the right to receive future benefits is a legislative condition, the conditioning event (receipt of reciprocal benefits) must be definite and certain to occur.[50] Even if definite and certain to occur, however, a constitutional taking may occur if the benefits are not received in a timely manner.[51]

Several cases do shed light on the subject. In *Anderson v. City of Ocala*,[52] the Florida Supreme Court upheld an assessment for work already performed. In *Davidson v. New Orleans*,[53] the Supreme Court upheld an assessment made prior to the provision of benefits. The assessment amount was estimated and judicially approved. The Court held that as long as due process requirements are satisfied in making the assessment, the assessment is valid. Several state courts have held that unless the question of time is specially or impliedly dealt with by legislation, the time when the assessment is to be made rests with the discretion of the assessing authority.[54] The Florida Supreme Court, however, has yet to decide whether an assessment may be predicated upon the receipt of future benefits. Unfortunately, as in *Meyer*, all current decisions do not focus upon when the benefits are received, but rather concentrate

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[50] Hartnett v. Austin, 93 So. 2d 86, 88 (Fla. 1956). *See also,* Herr v. City of St. Petersburg, 114 So. 2d at 174 (Fla. 1959).

[51] *See* Treasure Island v. Strong, 215 So. 2d 473 (Fla. 1968); 70A AM. JUR. 2d *Special or Local Assessments* § 25 (1987).

[52] 91 So. 182 (Fla. 1922).

[53] 96 U.S. 97 (1877).

[54] 48 FLA. JUR. 2d *Special Assessments* § 11 (1984); 70A AM. JUR. 2d *Special or Local Assessments* § 13 (1987).

upon the timing of an assessment. Therefore, it would appear, under *Anderson*, that as long as benefits are eventually afforded to the landowner, the determination of when those benefits will attach is a legislative function which will not be disturbed absent legislative abuse.[55]

A second issue presented by pooling is whether assessment rights are transferrable. The United States Supreme Court recognized that legislatively created rights may be transferrable in the landmark case of *Penn Central Transportation Co. v. New York City*.[56] In *Penn Central*, the Supreme Court upheld New York City's Landmark Preservation Law which prohibited the destruction of historic landmarks and neighborhoods by denying building permits. In place of building permits, developers were granted development rights which were transferrable to other properties.[57]

The Court found that no taking had occurred, stressing that in a wide variety of contexts the government may execute laws or programs that adversely affect recognized economic values without its action constituting a "taking."[58] In deciding whether a particular governmental action has affected a "taking," the character of the action and nature and extent of the interference with property rights are focused upon, rather than discrete segments thereof.[59] Since property rights were not substantially affected due to the granting of transferrable rights,[60] the legislative validity of the permit denial was upheld.[61]

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[55] *See supra* notes 43 - 45.

[56] 438 U.S. 104 (1978). Several other state courts have made similar findings, *e.g.*, Corrigan v. City of Scottsdale, 720 P.2d 528 (Ariz. Ct. App. 1985); West Montgomery County Citizens Association v. Maryland - National Capital Park & Planning Comm., 522 A.2d 1328 (Md. 1987); Fred F. French Investigating Co. v. New York, 350 N.E.2d 381 (N.Y. 1976).

[57] Such rights may be used to increase the density or uses of other properties. For a general description of Transferable Development Rights (TDR's) *see* David Alan Richards, *Downtown Growth Control Through Development Rights Transfer*, 21 REAL PROP. PROB. TR. L.J. 435 (1986); Londa Bozung and Deborah J. Alessi, *Recent Developments in Environmental Preservations and the Rights of Property Owners*, 20 URB. LAW. 969 (1989).

[58] *Penn Central*, 438 U.S. at 124-125.

[59] *Id.* at 130-131.

[60] *Id.* at 135-137.

[61] *Id.* at 125.

The concepts of *Penn Central* are applicable to the pooling of benefit rights. Thus, as long as the benefits are enacted to promote the general health, safety and welfare of the citizens and the assessed party will eventually receive a benefit, the pool arrangement should be valid.

It is important to note two distinctions between *Penn Central* and the instant scenario. First, *Penn Central* involves the legislative body and a private developer while the instant matter involves only legislative bodies. This should not inhibit the availability of pooling rights, but rather enhance it. As noted earlier, actions between governmental units are often given more favorable treatment by the courts.[62] Secondly, the rights transferred under TDR's are known and fixed at the time the permit is denied, while benefits pooled under the pooling scheme may not be known until some time in the future.[63] This distinction may enhance a temporary taking argument for the landowner. The assessed landowner will be unable to determine the extent of property rights affected until the pool rights are assigned to his property.[64]

While a valid attack, the challenge cannot be judicially reviewed until damages can be ascertained, which cannot be done unless the entire transaction is examined.[65] Therefore, a challenge is not viable until benefits are allocated. Additionally, damages may only be recoverable if there is a disparity between benefit and assessment which could possibly be offset by the landowners pro rata share of all pooled benefit rights available at the time of the challenge.[66] If the value of these future rights are equivalent to the amount of the alleged taking, the entire challenge in essence is moot. In short, "benefit pools" are a viable use of assessment benefits as long as the pool rights attach and are used within a reasonable time period.

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62 *See supra* note 34.

63 As discussed *supra*, this may present some constitutional difficulties.

64 First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304 (1987).

65 *Penn Central*, 438 U.S. at 130-131.

66 *See* Corrigan v. City of Scottsdale, 720 P.2d 513 (1985).

III. POLITICAL REALITIES[67]

The enactment and use of any of the assessment alternatives is dependent on legislative action; action which must be weighed against influences upon the political process itself. A vote for one of these assessment uses may be the political process itself. A vote for one of these assessment uses may be political suicide for a legislator since many of the benefits sought to be provided can be implemented through general taxation. As federal cutbacks continue, however, and states limit the ability of local government to raise revenues,[68] legislatures will be forced to explore alternative methods of benefit provision.

The discussed assessment uses are also subject to other attacks. Primarily, the benefits could be provided by simply assessing the landowner. There is no need to use a pool or swap. While a valid point, it fails to recognize several important reasons for using an alternative assessment method. First, use of an assessment method may result in lower overall assessments because a large project is involved, thereby reducing cost. Secondly, it may be less expensive to use an assessment method than to provide the benefit by raising taxes. Finally, use of an assessment method may allow the legislature a method to provide benefits to impoverished areas without taxing the residents.[69]

IV. CONCLUSION

Each of the assessment methods discussed in this article seeks to build or rebuild infrastructure by using current resources in a more

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[67] It should be noted that a monetary special assessment for an impoverished area will merely add to the poverty problems. Since many minority households are rented, assessment costs are simply passed on to the tenant through increased rent.

[68] Fla. Const. Art. I (forbidding state property tax); Fla. Const. Art. VII § 5 (a) (forbidding state income tax); Fla. Const. Art. VII § 9 (b) (limiting ad valorem taxes to 10 mills).

[69] It has been argued that minority representation is continuously subject to political gerrymandering, thereby undermining the political strength of minorities. *See* Peter H. Schick, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

economical fashion. Each method faces similar obstacles, legislative action, landowner and judicial challenges. Whether or not viable, they represent a means of providing needed benefits without raising taxes.