January 15, 2010

Karen Rubin
Internal Revenue Service
10715 David Taylor Dr.
Charlotte, NC 28262

Re: $57,250,000 Village Center Community Development District Recreational Revenue Bonds, Series 2003A, and $7,005,000 Village Center Community Development District Recreational Revenue Bonds, Series 2003B

Dear Ms. Rubin:

This letter is written to confirm that the Village Center Community Development District (the "District"), pursuant to Section 5.02 of Revenue Procedure 2010-2 (the "Revenue Procedure"), formally requests technical advice as to whether the District is properly treated as a political subdivision for purposes of section 103 of the Internal Revenue Code. In conjunction with this request, the District also requests that the pre-submission conference provided for in Section 6 of the Revenue Procedure be held in person, as provided for in Section 6.07 of the Revenue Procedure.

Enclosed are the District's proposed statements of pertinent facts and legal analysis, prepared in conformance with Section 6.03 of the Revenue Procedure. We would be happy to discuss these statements further with you prior to submission to the Associate's office.

As you know, this question is of high importance to the District, and we are prepared to do all we can to help move this matter through the technical advice process as quickly as possible.

Very truly yours,

Perry E. Israel

VCCDD Facts

The Village Center Community Development District (the "District") is a community development district as described in the State of Florida's Uniform Community Development District Act of 1980 (the "Act").[1] The District was created by an ordinance adopted by the Town of Lady Lake, Florida, on August 17, 1992. The District has issued several issues of bonds, including bonds issued in 1998 that were the subject of a previous examination by the Internal Revenue Service that closed without change on January 29, 2003. On March 31, 2003, the District issued its $57,250,000 Village Center Community Development District Recreational Revenue Bonds, Series 2003A and $7,005,000 Village Center Community Development District Recreational Revenue Bonds, Series 2003B, which were sold as tax-exempt bonds. It is those bonds that are the subject of the current examination by the Internal Revenue Service.

The District is one of 578 community development districts formed under the Act, which in the aggregate have issued more than $6.5 billion of bonds sold as tax-exempt debt. Under Florida law, community development districts such as the District are separate entities, governed by a separate board of supervisors[2], subject to the same financial planning and reporting requirements applicable to other Florida political subdivisions[3], the same bidding requirements as other Florida political subdivisions[4], and the same open records laws[5] and open meeting laws[6] applicable to the state, counties, and municipalities in Florida. Community development districts are treated as special districts under Florida law[7] and as such are subject to the laws relating to public officers and employees, including the code of ethics[8], open meeting laws[9], and oversight review[10], and possess limited sovereign immunity.[11] They are required to use a qualified public depository, like other Florida political subdivisions,[12] and their properties are exempt from execution and sale by general creditors like other Florida political subdivisions.[13]

The powers that the Act delegates to the District include the power: (1) to hold, control, and acquire by donation, purchase, or condemnation, or dispose of, any public easements, dedications to public use, platted reservations for public purposes, or any reservations for those

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1 FLA. STAT. §§ 190.001-190.049 (2009).

2 FLA. STAT. § 190.006(1) (2009).

3 FLA. STAT. § 190.008(1) (2009).

4 FLA. STAT. §§ 190.033, 287.017, 287.055, and 255.20 (2009).

5 FLA. STAT. § 190.006(7) (2009).

6 FLA. STAT. § 190.006(9) (2009).

7 FLA. STAT. § 189.403(1) (2009); *see also* FLA. STAT. § 189.4035(1) (2009).

8 FLA. STAT. chapter 112 (2009).

9 FLA. STAT. § 189.417(2) (2009).

10 FLA. STAT. § 189.428 (2009).

11 *See, e.g.*, FLA. STAT. § 768.28 (2009).

12 FLA. STAT. §190.007(3) (2009).

13 FLA. STAT. §190.044 (2009).

purposes authorized by the Act;[14] (2) to exercise within the District, or beyond the District with prior approval by resolution of the governing body of the county if the taking will occur in an unincorporated area or with prior approval by resolution of the governing body of the municipality if the taking will occur within a municipality, the right and power of eminent domain over any property within the state, except municipal, county, state, and federal property, for the uses and purposes of the District relating to water, sewer, District roads, and water management, specifically including, without limitation, the power for the taking of easements for the drainage of the land of one person over and through the land of another;[15] (3) to raise, by user charges or fees authorized by resolution of the District board, amounts of money which are necessary for the conduct of the District activities and services and to enforce their receipt and collection in the manner prescribed by resolution not inconsistent with law;[16] and (4) to assess and impose upon lands in the District ad valorem taxes as provided by the Act.[17] Any exercise of either power of eminent domain described above in (1) and (2) results in title to condemned land being transferred to and remaining with the District rather than the State of Florida or any other local government jurisdiction. Additionally, any exercise of either power of eminent domain by the District under the Act is through and in the District's name rather than in the name of the State of Florida or a local government jurisdiction.

Under the Act, the District may (1) construct, operate, and maintain systems, facilities, and basic infrastructures for water management and control, water supply, sewer, and wastewater management;[18] (2) exercise fire prevention and control, including fire stations, water mains and plugs, fire trucks, and other vehicles and equipment, after the local general-purpose government within the jurisdiction of which this power is to be exercised consents to the exercise of such power;[19] (3) adopt and enforce appropriate rules in connection with the provision of one or more services through its systems and facilities;[20] (4) prescribe, fix, establish, and collect rates, fees, rentals, or other charges and to revise the same from time to time, for the facilities and services furnished by the District, within the limits of the District, including, but not limited to, recreational facilities, water management and control facilities, and water and sewer systems; and to provide for reasonable penalties against any user or property for any such rates, fees, rentals, or other charges that are delinquent;[21] and (5) adopt and enforce appropriate rules following the procedures of chapter 120 in connection with the provision of one or more of its systems and facilities.[22] The power to exercise fire prevention and control has been consented to

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14 FLA. STAT. § 190.011(7)(a) (2009).

15 FLA. STAT. § 190.011(11) (2009).

16 FLA. STAT. § 190.011(10) (2009).

17 FLA. STAT. § 190.011(13) (2009). Such tax is assessed, levied, and collected in the same manner and same time as county taxes. FLA. STAT. § 190.021(1) (2009). Only an elected board may levy and assess such a tax. *Id.*

18 FLA. STAT. § 190.012(1) (2009).

19 FLA. STAT. § 190.012(2)(b) (2009).

20 FLA. STAT. § 190.012(3) (2009).

21 FLA. STAT. § 190.035(1) (2009). The District has entered into interlocal agreements with the various general-purpose governments with respect to many of these matters.

22 FLA. STAT. § 190.011(5) (2009).

by the local general-purpose government. The Villages Public Safety Department ("VPSD"), a department of the District, currently operates five stations, staffed 24 hours per day by full-time firefighters and emergency medical technicians. The VPSD provides fire services in Lake, Sumter, and Marion Counties, as well as the incorporated Town of Lady Lake. The VPSD is a voting member of the Sumter County Development Review Committee ("DRC"), which reviews plans for growth and addresses fire safety concerns and fire code compliance for these growth plans. The VPSD, jointly with Sumter County and the Town of Lady Lake, conducts reviews of construction plans for all commercial occupancies, including construction site visits and inspections. The VPSD also conducts annual inspections of commercial occupancies to ensure compliance with fire codes. The Act further provides that the District may provide

> Security, including, but not limited to, guardhouses, fences and gates, electronic intrusion-detection systems, and patrol cars, when authorized by proper governmental agencies; except that the district may not exercise any police power, but may contract with the appropriate local general-purpose government agencies for an increased level of such services within the district boundaries.[23]

The Act further authorizes the District to "determine, order, levy, impose, collect, and enforce special assessments pursuant to [the Act] and chapter 170."[24] The assessments may be imposed for any or all of the District's activities and powers authorized under Florida Statutes § 190.011 and 190.012. These include a number of broad public or governmental purposes, such as:

- Roads[25]
- Water management[26]
- Water supply, sewer, and wastewater management[27]
- Buses, trolleys, transit shelters, ridesharing facilities and services, parking improvements, and related signage[28]
- Investigation and remediation costs associated with the cleanup of environmental contamination[29]
- Conservation areas, mitigation areas, and wildlife habitat including the maintenance of any plant or animal species[30]

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23 FLA. STAT. §190.012(2)(d) (2009) (emphasis added).

24 FLA. STAT. § 190.011(14) (2009).

25 FLA. STAT. § 190.012(1)(c) (2009).

26 FLA. STAT. § 190.012(1)(a) (2009).

27 FLA. STAT. § 190.012(1)(b) (2009).

28 FLA. STAT. § 190.012(1)(d) (2009).

29 FLA. STAT. § 190.012(1)(c) (2009).

30 FLA. STAT. § 190.011(1)(f) (2009).

- Parks and facilities for indoor and outdoor recreation, cultural, and education uses[31]
- Fire prevention and control[32]
- School buildings and related structures[33]
- Security, including but not limited to guardhouses, fences, gates, electronic intrusion-detection systems, and patrol cars, when authorized by proper governmental agencies[34]
- Control and elimination of mosquitoes and other arthropods of public health importance[35]
- Waste collection and disposal[36]

Special assessments are apportioned among all of the property owners within the District, without regard to whether an individual property owners' land will benefit from the assessment. Any special assessments imposed by the District for these purposes are liens against the property assessed that are coequal with the lien of all state, county, district, and municipal taxes[37] and are enforced in the same manner as other municipal taxes.[38] As with other governmental authorities in the State of Florida, the District's ability to set rates on its systems, including its water and wastewater facilities, are not subject to regulations as a utility by the Florida Public Service Commission, which generally regulates non-governmental utilities.[39]

In addition to special assessments, the District is authorized to levy maintenance special assessments[40] (which have, in fact, been levied) and benefit special assessments.[41] Maintenance special assessments are levied to maintain and preserve the facilities and projects of the District.[42] Each year the District establishes a budget for the maintenance of its projects within the District (*e.g.*, roads and storm water control systems). That budget is then apportioned among all of the property owners within the District, without regard to whether an individual property owners' land will benefit from the assessment. To date, the District has used annual maintenance special assessments to maintain roads, sidewalks, parks and landscaped areas,

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31 FLA. STAT. § 190.012(2)(a) (2009).

32 FLA. STAT. § 190.012(2)(b) (2009).

33 FLA. STAT. § 190.012(2)(c) (2009).

34 FLA. STAT. § 190.012(2)(d) (2009).

35 FLA. STAT. § 190.012(2)(e) (2009).

36 FLA. STAT. § 190.012(2)(f) (2009).

37 FLA. STAT. § 170.021(9) (2009).

38 FLA. STAT. § 173 (2009).

39 FLA. STAT. § 367.022(2) (2009).

40 FLA. STAT. § 190.021(3) (2009).

41 FLA. STAT. § 190.021(2) (2009).

42 FLA. STAT. § 190.021(3) (2009).

security facilities, and District facilities such as town squares, public restrooms, and related structures. The District may also levy benefit special assessments for bonds issued and related expenses to finance District facilities and projects which are levied under this act, which would be apportioned among all of the property owners within the District without regard to whether an individual property owners' land will benefit from the assessment. Both maintenance special assessments and benefit special assessments constitute liens against the property assessed that are coequal with the lien of all state, county, district, and municipal taxes.[43]

The Act also empowers the District to prescribe, fix, establish, and collect rates, fees, rentals, user charges, or other charges for the facilities and services furnished by the District, within the limits of the District, including, but not limited to, recreational services and facilities, security services such as traffic and crowd control for public events, and water and sewer systems.[44] Such rates, fees, rentals, and charges must be just and equitable and uniform for users of the same class, and may be, but are not required to be, based or computed upon some factor affecting the use of the facilities or services furnished.[45] The District has imposed special maintenance assessments to provide for public services that are not measured by the benefits which may be, or have been, derived by a particular user of such services.

Finally, the Act authorizes an elected board of the District to assess and impose upon lands in the District ad valorem taxes.[46] Such tax is assessed, levied, and collected in the same manner and same time as county taxes.[47] To exercise this power, the District must call an election at which members of the board are elected.[48] Although the District is required to have an elected board if it has at least 250 (or in some cases, 500) qualified electors,[49] in the absence of that many qualified electors there is no restriction prohibiting the District from electing a board. The District currently does not have a board elected by qualified electors and in fact does not currently have any qualified electors. However, there are at least two parcels of property in the District that have not been developed, totaling approximately four acres, and zoning and land use within the District allows the construction of multi-family dwellings.

A community development district is required to remain in existence unless it is merged with another district; all of the specific community development systems, facilities, and services that it is authorized to perform have been transferred to a general-purpose unit of local government; or it is dissolved because (1) a development permit has not been obtained within 5 years of being established, (2) the district becomes inactive, or (3) if a district has no outstanding

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43 FLA. STAT. § 190.021(9) (2009).

44 FLA. STAT. §§ 190.035(1), 190.011(10) (2009).

45 FLA. STAT. § 190.035(3) (2009).

46 FLA. STAT. § 190.011(13) (2009).

47 FLA. STAT. § 190.021(1) (2009).

48 FLA. STAT. § 190.006(3)(a)1 (2009).

49 FLA. STAT. § 190.006(3)(a)2.a (2009). A board must be elected if there are 250 qualified electors residing in the district 6 years after the initial appointment of board members (or for a district exceeding 5,000 acres in area or for a compact, urban, mixed-use district, 500 qualified electors residing in the district 10 years after the initial appointment of board members). *Id.*

financial obligations and no operating or maintenance responsibilities, the district is dissolved by a nonemergency ordinance of the general-purpose local governmental entity that established the district.[50] Upon any dissolution, assets and liabilities of a community development district are transferred to another local government or political subdivision.

[50] FLA. STAT. § 190.046(2) (2009).

VCCDD Legal Analysis

I. Issue Presented

Should the Village Center Community Development District (the "District") be treated as a political subdivision of the State of Florida for purposes of Section 103 of the Internal Revenue Code (the "Code")?

II. The District is properly treated as a political subdivision for under Section 103 of the Code.

The District is properly treated as a political subdivision of the State of Florida under Section 103 of the Code because it has been delegated significant sovereign powers, specifically eminent domain, police, and taxing powers. The District only needs to possess a significant amount of any one of these powers to be considered a political subdivision of the State of Florida under Section 103 of the Code. Accordingly, the District is properly treated as a political subdivision for purposes of Section 103 of the Code.

Historically, the term "political subdivision" has been given a broad interpretation under federal tax law.[1] The Regulations define "political subdivision" as "any division of any State or local government unit which is a municipal corporation or which has been *delegated the right to exercise* part of the sovereign power of the unit."[2] The *delegation* of traditional sovereign authority is the crucial factor in determining whether an organization is a political subdivision.[3] Because the definition of "political subdivision" turns on the delegation of sovereign powers, the regulations under Section 103 do not require that a political subdivision be organized in any particular form, such as a corporation or a trust. A political subdivision may be simply a fund or an enterprise that is not a separate entity for state law purposes or, alternatively, a political subdivision may be organized as a separate organization for state law purposes. Government units are thus given broad latitude in devising structures to which they delegate the authority to exercise sovereign powers. The critical question is whether the government unit has delegated to the entity the right to exercise part of the government's sovereign power.

Although the delegation of sovereign power is essential in determining that an entity is a political subdivision, all the facts and circumstances must be taken into consideration, including

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1 *Comm'r v. Estate of Shamberg*, 3 T.C. 131, 138 (1944); *Texas Learning Technology Group v. Comm'r*, 96 T.C. 686, 694 (1991).

2 Reg. § 1.103-1(b) (emphasis added). *See Texas Learning Technology Group v. Comm'r*, 96 T.C. at 694 ("The basic question herein is whether petitioner was *authorized to exercise* any power which could properly be characterized as 'sovereign.'" (emphasis added)).

3 *Texas Learning Technology Group v. Comm'r*, 958 F2d 122 (5th Cir. 1992). *See Seagrave Corp. v. Comm'r*, 38 T.C. 247 (1962) (finding that, although volunteer fire departments perform a public function that is generally carried on by municipal fire departments, it is not enough that they perform a public service; they cannot be called a subdivision of the state unless there has been a delegation to them of some functions of local government); *Philadelphia Nat'l Bank v. United States*, 666 F.2d 834, 839 (3d Cir. 1981), *cert. denied* 457 U.S. 1105 (1982) (holding that Temple University was not a political subdivision because sovereign power had not been delegated).

the public purposes of the entity and control of the entity by a government.[4] In addition to the delegated sovereign powers discussed herein, the District possesses many of the powers and obligations of other political subdivisions in the State of Florida. Under Florida law, community development districts are in fact separate entities, governed by a separate board of supervisors,[5] subject to the same financial planning and reporting requirements applicable to other Florida political subdivisions,[6] and the same open records laws[7] and open meeting laws[8] applicable to the state, counties, and municipalities in Florida. They are treated as special districts under Florida law[9] and as such are subject to the laws relating to public officers and employees, including the code of ethics,[10] open meeting laws,[11] and oversight review,[12] and possess limited sovereign immunity.[13] Community development districts are required to use a qualified public depository, like other Florida political subdivisions,[14] and their properties are exempt from execution and sale by general creditors like other Florida political subdivisions.[15]

Political subdivisions may engage in a broad range of activities. The Regulations provide that a political subdivision of any State or local governmental unit may include special assessment districts delegated sovereign powers in their authorization statutes, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of any such unit.[16] The precise activities of the entity and its precise structure are less important than the delegation of one or more sovereign powers to the entity for purposes of its activities.

The three sovereign powers that the courts and the Service have looked to when determining whether an entity is a political subdivision are the taxation, eminent domain, and police powers[17] In defining these three sovereign powers for purposes of tax exemption, the Service has adopted a broad definition of "sovereign powers" for purposes of qualifying as a

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4 Rev. Rul. 77-164, 1977-1 CB 20; Rev. Rul. 77-165, 1977-1 CB 21; GCM 37629 (July 31, 1978); GCM 36994 (Feb. 3, 1977); FSA 199928011 (Apr. 9, 1999).

5 FLA. STAT. § 190.006(1) (2009).

6 FLA. STAT. § 190.008(1) (2009).

7 FLA. STAT. § 190.006(7) (2009).

8 FLA. STAT. § 190.006(9) (2009).

9 FLA. STAT. § 189.403(1) (2009); *see also* FLA. STAT. § 189.4035(1) (2009).

10 FLA. STAT. chapter 112 (2009).

11 FLA. STAT. § 189.417(2) (2009).

12 FLA. STAT. § 189.428 (2009).

13 *See, e.g.*, FLA. STAT. § 768.28 (2009).

14 FLA. STAT. §190.007(3) (2009).

15 FLA. STAT. §190.044 (2009).

16 Reg. § 1.103-1(b).

17 *Comm'r v. Estate of Shamberg*, 3 T.C. 131 (1944), *acq.* 1945 C.B. 6, *aff'd* 144 F.2d 998 (2d Cir. 1944), *cert. denied* 323 U.S. 792 (1944); *Texas Learning Technology Group v. Comm'r*, 96 T.C. at 694-695; H.R. REP. NO. 97-984 (1982) (Conf. Rep.), 1983-1 C.B. 522; Rev. Proc. 84-37, 1984-1 CB 513; Rev. Rul. 77-164, 1977-1 CB 20.

political subdivision, but a narrower definition for purposes of determining whether an entity is precluded from seeking exemption under Section 501(c)(3) because it is exercising sovereign powers and is, in consequence, not exclusively organized for the purposes enumerated in Section 501(c)(3).[18] Thus, it is necessary to exercise caution in using the guidance available from the Service to determine whether the definition of "sovereign powers" has been issued (1) for the purpose of determining whether an entity is a political subdivision or (2) for the purpose of determining whether an entity that is a political subdivision or an integral part of a political subdivision may also qualify for exemption under Section 501(c)(3). The Service appears to apply a narrower definition of sovereign power for purposes of Section 501(c)(3).[19]

It is essential to recognize that there is a critical difference between a sovereign power and a governmental function or public service.[20] A sovereign power always encompasses a governmental function, but it is one which inheres in a sovereign and is not exercisable by others without the sovereign's authorization.[21] A governmental function, on the other hand, does not always constitute a sovereign power; it includes activities which are often more appropriately carried on by the sovereign but can alternately or additionally be carried on by others.

It is not necessary that all three of these sovereign powers be delegated.[22] Although the Service has occasionally expressed an unwillingness to concede that possession of one sovereign power is sufficient to constitute an entity as a political subdivision, the bulk of its own authority, as well as that of the courts and Congress, has supported the principle that an entity is a political subdivision if it possesses only one sovereign power.[23] However, possession of only an

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18 *See* Aprill, "Excluding the Income of State and Local Governments: The Need for Congressional Action," 26 GEORGIA L. REV. 422, 445 (1992). For purposes of Section 501(c)(3) status, the Service adopts a definition of sovereign powers different from Section 103.

19 *See, e.g.*, Rev. Rul. 67-290, 1967-2 CB 183. Generally, if an organization wholly-owned by a state or municipality, although a separate entity from the state or municipality, is clothed with powers other than those described in Section 501(c)(3), it would not be considered a clear counterpart of a Section 501(c)(3) organization. Rev. Rul. 60-384, 1960-2 CB 172. In Revenue Ruling 67-290, a public hospital corporation was organized under a statute conferring on it the power to acquire by the right of eminent domain any property essential to its purposes. Although wholly-owned by political subdivisions of a state, the Service ruled it was a separate entity and otherwise a counterpart of an organization exempt under Section 501(c)(3) because, although possessing the power of eminent domain, the power was not considered a regulatory or enforcement power beyond the powers of an organization described in Section 501(c)(3).

20 *Seagrave Corp. v. Comm'r*, 38 T.C. 247 (1962). *See also Phil. Nat'l Bank v. United States*, 666 F.2d 834, 839 (3d Cir. 1981), *cert. denied* 457 U.S. 1105 (1982) (university was not a political subdivision because sovereign power had not been delegated); *Old Colony Trust Co. v. United States*, 438 F.2d 684 (1st Cir. 1971) (hospital was not a political subdivision because, inter alia, it did not exercise any sovereign power); CCA 199927036 (July 9, 1999) ("It is not sufficient that an entity performs a public service").

21 *Texas Learning Technology Group v. Comm'r*, 96 T.C. at 695.

22 Rev. Rul. 77-164, 1977-1 CB 20; Rev. Rul. 77-165, 1977-1 CB 21. *See also Comm'r v. Estate of Shamberg*, 3 T.C. at 138-139 ("It is not necessary that such legally constituted 'division' should exercise all the functions of the State of this character. It is sufficient if it be authorized to exercise a portion of them."); *Texas Learning Technology Group v. Comm'r*, 96 T.C. at 696 ("we think that it is essential that an entity be endowed with at least one of such [sovereign] powers.").

23 *Compare* GCM 37629 (July 31, 1978) (expressing unwillingness to concede that possession of one sovereign power is sufficient to constitute an entity as a political subdivision); GCM 36994 (Feb. 03, 1977) (Same) *with Texas Learning Technology Group v. Comm'r*, 96 T.C. at 696 ("we think that it is essential

insubstantial amount of any or all sovereign powers is not sufficient.[24] An entity will not qualify as a political subdivision unless it possesses substantial sovereign power. In Revenue Ruling 77-165, the Service ruled that a university had been delegated the power of eminent domain but, because such power was not substantial, the university did not qualify as a political subdivision of the state.[25]

Importantly, a power may be substantial even though restricted since the critical inquiry is not whether the power is restricted, but with whom the actual power rests.[26] This principle is illustrated, for example, by Revenue Ruling 78-138.[27] In Revenue Ruling 78-138, a public corporation was vested with the power to acquire real property by condemnation subject to the approval of the chief elected official in the jurisdiction in which the property was located, and could promulgate rules and regulations that have the force and effect of law, subject to review by a regulatory agency and notice to the participating counties. According to the Service, the "powers of eminent domain and regulation rest with the corporation although they may be limited by another authority. Thus, the corporation possesses the substantial, if restricted, powers of eminent domain and regulation."[28] Also implicit in the authority on this issue is that it

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that an entity be endowed with at least one of such [sovereign] powers."), *aff'd* 958 F2d 122 (5th Cir. 1992) ("all of the cases addressing the meaning of the term "political subdivision" under the Internal Revenue Code have required the entity to possess at least one of the three generally recognized sovereign powers in order to be classified as a 'political subdivision.'"); H.R. REP. NO. 97-984 (1982) (Conf. Rep.) (an entity will be treated as a political subdivision of a State if the entity has been delegated the right to exercise "one or more of the sovereign powers" of the government); S. REP. NO. 97-646 (1982), 1983-1 CB 514 ("It is not necessary for a whole range of sovereign powers to be delegated, in order for the subdivision to be treated as a political subdivision of a State; it is sufficient if at least one sovereign power has been delegated."); Rev. Proc. 84-37, 1984-1 CB 513 ("A subdivision of an Indian tribal government that has been delegated one of the generally accepted sovereign powers may qualify as a political subdivision of a state for purposes of 7871(d) of the Code."); Rev. Rul. 61-181, 1961-2 C.B. 21 (authority possessing only the power of eminent domain held to be a political subdivision); PLR 200305005 (Jan. 31, 2003) (Same); PLR 200227023 (July 5, 2002) (Same); PLR 200143025 (Oct. 29, 2001) (same); PLR 8705038 (Nov. 03, 1986) (Same); PLR 8224106 (Mar. 19, 1982) (same); Rev. Rul. 73-563, 1973-2 CB 24 (authority possessing only the police power held to be a political subdivision).

[24] *See* Rev. Rul. 78-276, 1978-2 CB 256 ("In order to qualify as a political subdivision, an entity need not possess all three powers, but whatever powers it does possess must be substantial in their effect."); Rev. Rul. 78-138, 1978-1 CB 314 (same); Rev. Rul. 83-131, 1983-2 CB 184 (same).

[25] Rev. Rul. 77-165, 1977-1 CB 21; PLR 200923005 (June 5, 2009).

[26] GCM 36994 (Feb. 3, 1977) ("The critical inquiry is not whether the power is somewhat restricted but with whom the actual power to exercise rests. A substantial, though restricted, power of eminent domain would be sufficient....").

[27] 1978 CB 314.

[28] *See also* Rev. Rul. 61-181, 1961-2 CB 21 (involving a transit authority which had been delegated only the power of eminent domain but was held to be a political subdivision; although only one sovereign power had been delegated to the authority, its delegation was "limited only with reference to the purpose for which the authority was created."); PLR 200151015 (Sept. 17, 2001) (restricted power of eminent domain limited to a five block area considered a substantial power); PLR 200305005 (Jan. 31, 2003) (restricted power of eminent domain where entity could exercise the power only with respect to private lands, and the land condemned must be used by the entity in the performance of its functions in the acquisition, construction, and operation of facilities for a State university considered substantial); PLR 200837004 (Sept. 12, 2008) (Authority possessing restricted power of eminent domain, where real property belonging

is the delegation of sovereign power (i.e. with whom the actual power rests) that is critical to the analysis, not whether the power is actually exercised,[29] a point made explicitly in legislative history.[30] No authority could be found that based characterization of an entity as a political subdivision on whether a sovereign power was actually exercised or not. In fact, in Field Service Advice, the Service indicated that case law does not require an entity to actually exercise a sovereign power before it can be considered a substantial delegation of the power.[31]

A. The District possesses sufficient eminent domain powers to be treated as a political subdivision for purposes of Section 103 of the Code.

Eminent domain, the authority to acquire property for government purposes, is one of the three sovereign powers. Eminent domain gives the public entity the right to acquire property for a public purpose without the consent of that property's owner. Whether the right to acquire property in this manner is a sovereign power depends on the extent of the power and the nature and extent of the limitations imposed on it.

When analyzing whether sufficient powers of eminent domain have been delegated, the Service has looked at the following factors: (1) whether power is delegated by specific legislation limiting its use or by general grant of power; (2) whether title remains with the entity exercising the power or with the state; and (3) whether the power is exercised through the entity's name or the state.[32]

In the case of the District, the Act contains two specific delegations of the power of eminent domain: (1) the power to acquire by condemnation any public easements, dedications to public use, platted reservations for public purposes, or any reservations for those purposes authorized in the Act[33] and (2) the power to take by eminent domain any property within the state, except municipal, county, state, and federal property, for the uses and purposes of the District relating solely to water, sewer, District roads, and water management, specifically

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to City or State could not be acquired by Authority without their consent, determined to be a political subdivision).

29 *See Seagrave Corp. v. Comm'r*, 38 TC 247, 250 (1962). In *Seagrave*, a volunteer fire company was held not to be a political subdivision. It was not created by special legislative statutes and received no delegation of any part of the state's power. Although fire protection has been recognized as a sovereign police power, the court stated that it is not enough that the fire company performed a public service by providing fire protection services (*i.e.*, exercising a non-delegated police power); the fire company could not be called a subdivision of the state unless there had been a delegation to it of some sovereign power.

30 S. REP. NO. 97-646 (1982), 1983-1 CB 514 ("Also, it is not necessary that the subdivision in fact exercise that [sovereign] power at any given time, so long as the [government] has in fact delegated to the subdivision the right to exercise the power.").

31 FSA TL-N-3313-95, 1995 FSA LEXIS 154 *13 (July 12, 1995) ("[The Service does] not believe that case law requires the entity to actually exercise the specific power of eminent domain before it can be considered a substantial delegation of the power.").

32 FSA TL-N-3399-96, 1996 FSA LEXIS 377 *8-9 (July 17, 1996) (citing Rev. Rul. 77-165 and GCM 38503); FSA TL-N-397-96, RIA 1783 (Apr. 11, 1996); FSA TL-N-3313-95, 1995 FSA LEXIS 154 *6 (July 12, 1995).

33 FLA. STAT. § 190.011(7)(a) (2009).

including, without limitation, the power for the taking of easements for the drainage of the land of one person over and through the land of another.[34] The Act defines "water, sewer, district roads and water management" to include a broad range of purposes for which the District may exercise its eminent domain powers.[35] The only limitation on the Florida Statutes section 190.011(11) power to take by eminent domain is that, if the District exercises the power beyond the geographic boundaries of the District, it must get prior approval by resolution of the governing body of the county if the taking will occur in an unincorporated area or prior approval by resolution of the governing body of the municipality if the taking will occur within a municipality.[36] Any exercise of either power of eminent domain authorized by the Act results in title to condemned land being transferred to and remaining with the District rather than the State of Florida or any other local government jurisdiction. Additionally, any exercise of either power of eminent domain by the District under the Act is through and in the District's name rather than in the name of the State of Florida or a local government jurisdiction.

In determining whether the District is a political subdivision, it is not relevant that the power of eminent domain delegated to the District by the State of Florida is restricted to takings for certain purposes or, in the case of the power under Florida Statutes section 190.011(11), to the prior approval of another governmental unit if the power is exercised outside of the geographic boundaries of the District. A power may be substantial even though restricted since the critical inquiry is not whether the power is restricted, but with whom the actual power rests.[37] Rulings and cases that held an entity did not possess a sovereign power where one ostensibly had been delegated underscore that the necessary determination to be made is where the sovereign power actually resides. For example, under the facts in Revenue Ruling 77-165,[38] the applicable state law provided that the legislature could only make limited and specific delegations of the state's power of eminent domain to the university seeking status as a political subdivision.[39] Each such delegation was required to be made by specific legislation stating the purpose to which the exercise of the power by the university was restricted. Similarly, in *Philadelphia National Bank v. United States*, the court held that a university seeking status as a political

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34 FLA. STAT. § 190.011(11) (2009).

35 "Water system" includes plants, systems, facilities, property, additions, extensions, and improvements useful for development of sources, treatment, or purification and distribution of water, and includes dams, reservoirs, storage, tanks, mains, lines, valves, hydrants, pumping stations, chilled water distributions systems, laterals, and pipes. FLA. STAT. § 190.003(22) (2009).

"Sewer system" includes facilities for the treatment of industrial wastes resulting from any process of industry, manufacture, trade or business or from the development of any natural resource. FLA. STAT. § 190.003(20) (2009).

"District roads" means highways, streets, roads, alleys, sidewalks, landscaping, storm drains, bridges, and thoroughfares of all kinds and descriptions. FLA. STAT. § 190.003(11) (2009).

"Water management and control facilities" includes lakes, canals, ditches, reservoirs, dams, levees, sluiceways, floodways, curbs, gutters, pumping stations, or any other works, structures, or facilities for the conservation, control, development, utilization, and disposal of water. FLA. STAT. § 190.011(21) (2009).

36 This limitation does not apply to the Florida Statutes section 190.011(7)(a) power.

37 *See supra* note 26.

38 1977-1 CB 21.

39 Rev. Rul. 77-165, 1977-1 CB 21.

subdivision did not possess a substantial power of eminent domain because, when the university wished to erect additional facilities, it was required to request a general state authority to procure the property.[40] The court found the power to condemn selected property was vested in the state authority, and the fact that the authority had cooperated with the university by accepting and implementing the university's suggestions did not constitute a grant of sovereign power to the university. The facts in the Revenue Ruling and *Philadelphia National Bank* differ from the facts concerning the Florida community development districts, such as the District, where, although the delegation of the power of eminent domain is limited to certain specified purposes, the exercise of that power does not require specific request of, or approval by, the Florida legislature or a local government each time it is to be exercised. The power is vested in the community development districts.

Consequently, the restriction of the power of eminent domain to the uses and purposes of the District relating solely to water, sewer, District roads, and water management as those purposes are broadly defined (which correlate to the special powers the Florida legislature created such districts to exercise)[41] or to public easements, dedications to public use, plated reservations for public purposes, or any reservations for those purposes authorized by the Act[42] does not affect the determination of the substantiality of the District's power of eminent domain.[43] Likewise, the geographic size of the area over which the power of eminent domain may be exercised is not relevant to the political subdivision determination.[44]

Additionally, the requirement that the District obtain prior approval if it takes property outside of its geographic boundaries under Florida Statutes section 190.011(11)[45] does not render the District's power of eminent domain under that provision insubstantial.[46] For example, in

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40 *Phil. Nat'l Bank v. United States*, 666 F.2d 834, 839 (3d Cir. 1981), *cert. denied* 457 U.S. 1105 (1982).

41 FLA. STAT. § 190.012(1) (2009).

42 FLA. STAT. § 190.011(7)(a) (2009).

43 *See* Rev. Rul. 61-181, 1961-2 CB 21 (transit authority delegated power of eminent domain "limited only with reference to the purpose for which the authority was created;" held to be a political subdivision); PLR 200305005 (Jan. 31, 2003) (power of eminent domain considered substantial where entity could exercise the power of eminent domain only with respect to private lands, and the land condemned could only be used by the entity in the performance of its functions in the acquisition, construction, and operation of facilities for a State university); PLR 200204032 (Jan. 25, 2002) (power of eminent domain considered substantial where agency could only exercise powers of eminent domain to carry out its authorized purposes and only within specified boundaries).

44 PLR 200151015 (Sept. 17, 2001) (power of eminent domain limited to a five block area considered a substantial power). *See also supra* note 26.

45 The prior approval to take property outside of the geographic boundary of the District must be obtained from the county if a taking under Florida Statutes section 190.011(11) occurs in an unincorporated area or from the municipality if the taking occurs within a municipality. FLA. STAT. § 190.011(11) (2009).

46 In addition to *White's Estate*, discussed in the text, *see* Rev. Rul. 78-138, 1978-1 CB 314 (public corporation vested with the power to acquire real property by condemnation subject to the approval of the chief elected official in the jurisdiction in which the property was located; "powers of eminent domain and regulation rest with the corporation although they may be limited by another authority. Thus, the corporation possesses the substantial, if restricted, powers of eminent domain and regulation."); PLR 200837004 (Sept. 12, 2008) (Authority was determined to be a political subdivision where it possessed a

Commissioner v. White's Estate[47] the Triborough Bridge Authority was found to be a political subdivision even though it could only exercise the power of eminent domain with the consent of the city in which it was exercising that power. The Service, in PLR 8014098 (1980), commented on *White's Estate*, saying

> Similar to the situation in *White's Estate*, the District may exercise the power of eminent domain subject to the approval of the board of supervisors of the county. Therefore, the District has a substantial power of eminent domain and is a political subdivision of the State within the meaning of section 1.103-1(b) of the regulations.

The limitation on the power of eminent domain in Revenue Ruling 77-164[48] and in *Philadelphia National Bank*[49] can be distinguished from the power granted to the District. In Revenue Ruling 77-164, the authority was only empowered to enter into agreements with the county in which it was located whereby the county could in its discretion acquire property by eminent domain for the authority. Clearly, in Revenue Ruling 77-164, the power of eminent domain resided in the county; the county acquired the property for the authority. Similarly, in *Philadelphia National Bank* Temple University was not delegated any power to exercise eminent domain in its own name; rather, it could only ask the General State Authority to condemn certain property, and apparently only on a case-by-case basis. By contrast, in the case of District, although consent of the county or municipality may be required, it is not the case that the county or municipality will be acquiring the property and giving it to District.[50] In any event, the District is not subject to any such limitation on the exercise of eminent domain within its geographic boundaries.

The Form 5701 with respect to the political subdivision status of the District makes some point about the limited amount of property inside the District that is not owned by the developer or related parties or by the District. Although that point is actually irrelevant because the District can exercise the power of eminent domain over property owned by the developer and related parties, it should be noted that the property in the District owned by persons unrelated to the District or the developer is more than 40 acres, which is substantially more than the five-block area approved as sufficient in PLR 200151015 (Sept. 17, 2001).

B. The District possesses sufficient police powers to be treated as a political subdivision for purposes of Section 103 of the Code.

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restricted power of eminent domain; real property belonging to City or State could not be acquired without their consent).

47 144 F2d 1091 *cert. denied*, 323 U.S. 792 (1944).

48 1977-1 CB 20.

49 666 F.2d 834 (3d Cir. 1981).

50 The critical inquiry is not whether the power is restricted, but with whom the actual power rests. GCM 36994 (Feb. 3, 1977). *But see* Rev. Rul. 73-563, 1973-2 CB 24 (finding substantial power of eminent domain; "[a]lthough the authority in the instant case is not authorized to exercise directly the power to tax and the power of eminent domain, the State legislature has conferred the benefit of such powers on the authority by providing channels through which such powers may be exercised by the participating local governmental bodies to assist the authority.")

The United States Supreme Court has defined police power as the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."[51] It has also been called "an exercise of the sovereign right of government to protect the lives, health, morals, comfort, and general welfare of the people."[52]

Police powers, ranging from law enforcement to regulatory authority, will also be treated as sovereign powers based more on their scope and extent than on any essential or inherent characteristics. In *Commissioner v. Estate of Shamberg*, the court ruled that the Port Authority of New York had broad police powers, as well as eminent domain power, and could enforce its police power through action in criminal courts, and that these sovereign powers supported its treatment as a political subdivision.[53] In contrast, in *Philadelphia National Bank*, the district court ruled that Temple University had only limited police powers to regulate traffic on campus and to make arrests on campus, and these limited police powers did not support treatment of Temple University as a political subdivision of Pennsylvania.[54]

The Service has stressed that police power is a legislative function.[55] In characterizing the various types of power, it is acknowledged that state police powers include the authority to promulgate and enforce transportation regulations.[56] The authority to set rates and determine routes in a fashion similar to a state public utility commission is also a police power.[57] Additionally, in the legislative history of Section 7871, Congress states that powers such as control over zoning and fire protection are sovereign police powers.[58]

Although the Act states that "the district may not exercise any police power," that language appears within Florida Statutes section 190.012(2)(d), which authorizes the District to provide:

> "Security, including, but not limited to, guardhouses, fences and gates, electronic intrusion-detection systems, and patrol cars, when authorized by proper

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51 *See* GCM 37771 (Nov. 30, 1978) (citing *Barbier v. Connelly*, 113 U.S. 27, 31 (1885)); FSA 199928011 (Apr. 9, 1999) ("The police power of a state encompasses regulations designed to promote public health or public safety.").

52 *Id.* (citing *Manigault v. Springs*, 119 U.S. 473, 480 (1905)).

53 *Comm'r v. Estate of Shamberg*, 144 F2d 998 (2d Cir. 1944), *cert. denied* 323 US 792 (1945).

54 *Phil. Nat'l Bank v. United States*, 666 F2d 834 (3d Cir. 1981).

55 GCM 36994 (Feb. 3, 1977); GCM 37771 (Nov. 30, 1978).

56 *Estate of Shamberg v. Comm'r*, 3 T.C. 131, 143 (1944), *aff'd* 144 F.2d 998 (2d Cir. 1944), *cert. denied* 323 U.S. 792 (1944).

57 GCM 39280 (Sept. 13, 1984). *See also* GCM 37637 (Aug. 7, 1978) (citing GCM 35273 for the proposition that police powers include the authority to set rates and determine routes in a fashion similar to a state public utility commission); GCM 37771 (Nov. 30, 1978) (Same); PLR 8213117 (Dec. 31, 1981) (Same).

58 H.R. REP. NO. 984, 97th Cong., 2d Sess. 15 (1982) (Conf. Rep.), 1983-1 C.B. 522. See also PLR 200148038 (Nov. 30, 2001) (citing to H.R. REP. NO. 984). In Private Letter Ruling 9041060 (July 18, 1990), an entity possessing the authority to investigate and order fire hazards remedied, and to enforce state and local ordinances relating to the prevention of fires, was considered to exercise "limited police powers."

governmental agencies; except that the district may not exercise any police power, but may contract with the appropriate local general-purpose government agencies for an increased level of such services within the district boundaries."

In this context, it appears that the police power denied to the District is solely the power to arrest. Of course, the statement in the statute is no more definitive in determining whether the police power has been delegated for tax purposes than a statement that the power had been delegated. Instead, we must examine the actual powers delegated to the District to determine whether it has been delegated the police power for purposes of Section 103 of the Code. In the case of the District, the Act authorizes the District to (1) prescribe, fix, establish, and collect rates, fees, rentals, or other charges and to revise the same from time to time, for the facilities and services furnished by the District, within the limits of the District, including, but not limited to, recreational facilities, water management and control facilities, and water and sewer systems; and to provide for reasonable penalties against any user or property for any such rates, fees, rentals, or other charges that are delinquent,[59] (2) exercise fire prevention and control, including fire stations, water mains and plugs, fire trucks, and other vehicles and equipment, after the local general-purpose government within the jurisdiction of which this power is to be exercised consents to the exercise of such power,[60] (3) adopt and enforce appropriate rules in connection with the provision of water management and control facilities, water and sewer systems, and fire protection services,[61] and (4) adopt and enforce appropriate rules following the procedures of chapter 120 of the Florida Statutes in connection with the provision of one or more of its systems and facilities.[62]

The State of Florida has delegated to the District the power to prescribe and collect rates or other charges for water management and control facilities, and water and sewer systems. The District is also empowered to adopt and enforce appropriate rules in connection with the provision of these services.[63] These powers are akin to the authority to set rates and terms of service in a manner similar to a state public utility commission. The Service has determined that such powers are police powers.[64]

Although the power to exercise fire prevention and control is restricted in that it requires consent of the local general-purpose government within the jurisdiction of which this power is to be exercised, such a restriction is similar to restrictions on the power of eminent domain where property owned by a local government could not be acquired without consent of that local government. Such restrictions have not caused the power of eminent domain to be considered

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59 FLA. STAT. § 190.035(1) (2009).

60 FLA. STAT. § 190.012(2)(b) (2009).

61 FLA. STAT. § 190.012(3) (2009).

62 FLA. STAT. § 190.011(5) (2009).

63 FLA. STAT. § 190.012(3) (2009).

64 *See supra* note 57. *See also* PLR 8049046 (Sept. 10, 1980) (municipal utilities authority created for public purpose of water distribution, waste management and pollution control with power to charge and collect rents, rates, fees or other charges in connection with, or the use, products or services of, the water system qualifies as political subdivision).

insubstantial.[65] The power to exercise fire prevention and control has been delegated to the District and, subject to consent of a local general-purpose government, will be exercised in the name of the District. The power of fire protection is a police power.[66]

The power to exercise fire prevention and control has been consented to by the local general-purpose government. The Villages Public Safety Department ("VPSD"), a department of the District, currently operates five stations, staffed 24 hours per day by full-time firefighters and emergency medical technicians. The VPSD provides fire services in Lake, Sumter, and Marion Counties, as well as the incorporated Town of Lady Lake. The VPSD is a voting member of the Sumter County Development Review Committee ("DRC"), which reviews plans for growth and addresses fire safety concerns and fire code compliance for these growth plans. The VPSD, jointly with Sumter County and the Town of Lady Lake, conducts reviews of construction plans for all commercial occupancies, including construction site visits and inspections. The VPSD also conducts annual inspections of commercial occupancies to ensure compliance with fire codes. Thus, the District has been delegated, and currently exercises, police powers.

Finally, the power to adopt rules with respect to its services and facilities seems to be in the middle of the normal concept of "police powers." Rules adopted by the District pursuant to this delegation are of broad application and govern use of land and facilities. They are enforceable by the District board in both law and at equity, and the District may institute any appropriate action or proceeding to prevent, restrain, or correct any violation of those rules, including an unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use; the rules may be used to prevent the occupancy of such building, structure, land, or water and to prevent any illegal act, conduct, business, or use in or about such premises, land, or water.[67] Thus, the rules adopted by the District effectively have the force of law, and the ability to adopt such rules is a delegation of the police power.

C. The District has sufficient taxing powers to be treated as a political subdivision for purposes of Section 103 of the Code.

Taxing power is a sovereign power when it involves the power to collect tax, not simply to advise with respect to an appropriate tax rate.[68] The Service has not issued specific guidance concerning what forms of revenue collection constitute a tax for this purpose, however, the Service has described the term "tax" as including every burden that may lawfully be laid upon the citizen by virtue of the taxing power.[69] A tax is an enforced contribution, exacted pursuant to legislative authority in the exercise of the taxing power, and imposed and collected for the purposes of raising revenue to be used for public or government purposes, and not as a payment

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65 PLR 200837004 (Sept. 12, 2008) (Authority was determined to be a political subdivision where it possessed a restricted power of eminent domain; real property belonging to City or State could not be acquired without their consent).

66 *See supra* note 58.

67 FLA. STAT. § 190.041 (2009).

68 Rev. Rul. 74-15, 1974-1 CB 126.

69 Rev. Rul. 61-152, 1961-2 CB 42.

for some special privilege granted or service rendered.[70] Taxes are, therefore, distinguishable from various other charges imposed for particular purposes under particular powers or functions of government. The power to impose and collect service and user fees that merely act to increase the value of the users' property is not analogous to the power to tax.[71] In view of such distinctions, the question whether a particular charge is to be regarded as a tax depends upon its real nature. If it is in the nature of a tax, it is not material that it may be called by a different name; conversely, if it is not in the nature of a tax, it is not material that it may be so called. The critical analysis is whether the charges for services are measured by the benefits which may be, or have been derived therefrom, in which case, the charge is not a tax. Thus, in order to constitute a tax, assessments must be imposed and collected for the purpose of raising revenues to be used for public or governmental purpose rather than merely benefiting the property owners of one community by increasing the value of their property.[72]

In Revenue Ruling 61-152, the Service differentiated between charges imposed for a special privilege and charges imposed for public or government purposes. In the ruling, a state legislature provided that the municipal corporations within the state that furnish any essential or special municipal service, including police and fire protection, parking facilities on the streets or otherwise, recreational facilities, street cleaning, street lighting, sewerage and sewer disposal, and the collection and disposal of garbage, ashes or other waste materials, could by ordinance provide for the continuance, maintenance, installation or improvement of such service, may make reasonable regulations with respect thereto, may impose upon the users of such service reasonable rates, fees and charges to be collected in the same manner as municipal taxes are collected or in some other manner specified in the ordinance.[73] A city enacted such an ordinance, which imposed charges upon the "users of such service" for the continuance, maintenance and improvement of the fire department of the city as an essential municipal service. The "service charges" were exacted at a uniform rate from all owners of designated property.

In finding that such "service charges" were taxes, the Service established that nothing in the facts of Revenue Ruling 61-152 supported the view that the charges were payments for a special privilege. It noted there was nothing which indicated any reasonable relationship between the "service charge" and the extent of the services provided to those on whom the charges are imposed, even though they are stated to be levied upon the "users of such service." Intangible personal property, as well as individual citizens, were afforded fire protection, but neither was subjected to the "service charge." The charges were imposed irrespective of whether an individual owner wished or availed himself of such services, and even though he may have procured similar services from private sources. Further, no variation was made in the rate of the charges to allow for properties subject to varying degrees of risk. Neither was there an adjustment in the rates although experience may have shown that particular kinds of construction, or certain areas, or activities demand a higher level of fire protection services than the average. The Service distinguished such charges from situations in which municipal charges

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70 *Id.*

71 Rev. Rul. 77-164, 1977-1 CB 20.

72 *Id.*

73 *Id.*

for services are measured by the benefits which may be, or have been derived from such services, citing to the case in *Benjamin Mahler v. Commissioner*,[74] in which water charges were based on front footage of buildings, number of tenants, baths, hose connections, particular use, *etc*. It was there held that such charges on property owned and occupied as a personal residence, could not be deducted as taxes.

The Act authorizes the District to "determine, order, levy, impose, collect, and enforce special assessments pursuant to [the Act] and chapter 170."[75] The assessments may be imposed for any or all of the District's activities and powers authorized under Florida Statutes sections 190.011 and 190.012. These include a number of broad public or governmental purposes, such as:

- Roads[76]
- Water management[77]
- Water supply, sewer, and wastewater management[78]
- Buses, trolleys, transit shelters, ridesharing facilities and services, parking improvements, and related signage[79]
- Investigation and remediation costs associated with the cleanup of environmental contamination[80]
- Conservation areas, mitigation areas, and wildlife habitat including the maintenance of any plant or animal species[81]
- Parks and facilities for indoor and outdoor recreation, cultural, and education uses[82]
- Fire prevention and control[83]
- School buildings and related structures[84]

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74 119 F.2d 869 (2d Cir. 1941), *cert. denied* 314 U.S. 660 (1941).

75 FLA. STAT. § 190.011(14) (2009).

76 FLA. STAT. § 190.012(1)(c) (2009).

77 FLA. STAT. § 190.012(1)(a) (2009).

78 FLA. STAT. § 190.012(1)(b) (2009).

79 FLA. STAT. § 190.012(1)(d) (2009).

80 FLA. STAT. § 190.012(1)(c) (2009).

81 FLA. STAT. § 190.011(1)(f) (2009).

82 FLA. STAT. § 190.012(2)(a) (2009).

83 FLA. STAT. § 190.012(2)(b) (2009).

84 FLA. STAT. § 190.012(2)(c) (2009).

- Security, including but not limited to guardhouses, fences, gates, electronic intrusion-detection systems, and patrol cars, when authorized by proper governmental agencies[85]
- Control and elimination of mosquitoes and other arthropods of public health importance[86]
- Waste collection and disposal[87]

Special assessments are apportioned among all of the property owners within the District, without regard to whether an individual property owners' land will benefit from the assessment. Any special assessments imposed by the District for these purposes are liens against the property assessed that are coequal with the lien of all state, county, district, and municipal taxes[88] and are enforced in the same manner as other municipal taxes.[89] Thus, because the assessments can be imposed for general public purposes and are collected in the same manner as taxes imposed by other taxing subdivisions, the power of the District to impose the assessments is properly treated as a taxing power for analysis under Section 103 of the Code.[90]

In addition to special assessments, the District is authorized to levy maintenance special assessments[91] (which have, in fact, been levied) and benefit special assessments.[92] Maintenance special assessments are levied to maintain and preserve the facilities and projects of the District.[93] Each year the District establishes a budget for the maintenance of its projects within the District (*e.g.*, roads and storm water control systems). That budget is then apportioned among all of the property owners within the District, without regard to whether an individual property owners' land will benefit from the assessment. To date, the District has used annual maintenance special assessments to maintain roads, sidewalks, parks and landscaped areas, security facilities, and District facilities such as town squares, public restrooms, and related structures. The District may also levy benefit special assessments for bonds issued and related expenses to finance District facilities and projects which are levied under this act, which would be apportioned among all of the property owners within the District without regard to whether an individual property owners' land will benefit from the assessment. Both maintenance special assessments and benefit special assessments constitute liens against the property assessed that are coequal with the lien of all state, county, district, and municipal taxes.[94] Because the maintenance special assessments, as well as the special assessments discussed above, are

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85 FLA. STAT. § 190.012(2)(d) (2009).

86 FLA. STAT. § 190.012(2)(c) (2009).

87 FLA. STAT. § 190.012(2)(f) (2009).

88 FLA. STAT. § 170.021(9) (2009).

89 FLA. STAT. § 173 (2009).

90 *See* Rev. Rul. 77-164, 1977-1 CB 20; *see also* PLR 7937077 (1979).

91 FLA. STAT. § 190.021(3) (2009).

92 FLA. STAT. § 190.021(2) (2009).

93 FLA. STAT. § 190.021(3) (2009).

94 FLA. STAT. § 190.021(9) (2009).

imposed for the purpose of raising revenues to be used for public or governmental purpose (rather than merely benefiting the property owners of one community by increasing the value of their property) and the amount each property owner is assessed is not measured by the benefits which may be, or have been derived from the public or governmental purpose or service funded, these assessments are properly characterized as taxes.[95]

The Act also empowers the District to prescribe, fix, establish, and collect rates, fees, rentals, user charges, or other charges for the facilities and services furnished by the District, within the limits of the District, including, but not limited to, recreational services and facilities, security services such as traffic and crowd control for public events, and water and sewer systems.[96] Such rates, fees, rentals, and charges must be just and equitable and uniform for users of the same class, and may be, but are not required to be, based or computed upon some factor affecting the use of the facilities or services furnished.[97] In the case of the District, as in Revenue Ruling 61-152, special maintenance assessments have been imposed by the District to provide for public services, and they are not measured by the benefits which may be, or have been, derived by a particular user of such services. The District's assessments and service charges can be distinguished from the service and user fees in Revenue Ruling 77-164, in that the service charges and user fees imposed by the District are collected to be used for public or governmental purposes rather than for the purpose of benefiting the property owners by increasing the value of their property.[98] Thus, these special maintenance assessments and service charges are properly characterized as taxes.

In addition, the Act authorizes an elected board of the District to assess and impose upon lands in the District ad valorem taxes.[99] Such tax is assessed, levied, and collected in the same manner and same time as county taxes.[100] To exercise this power, the District must call an election at which members of the board are elected.[101] Although the District is required to have

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95 The assessments are apportioned among all of the property owners within the District according to the percentage of assessable area (as measured by habitable square foot) each property owner owns within the District as a part of the total habitable area within the District. Non-assessable lands are non-habitable areas, such as roads, storm water retention areas, and similar areas, which are similar to areas that are exempted by the State of Florida from ad valorem taxes. These assessments are not analogous to the front foot benefit charge noted in Revenue Ruling 79-201, 1979-1 CB 97, or Revenue Ruling 75-455, 1975-2 CB 68, which is a "tax assessed against local benefits" of a kind tending to increase the value of the property assessed. *See* Reg. § 1.164-4 (referring to "so-called taxes for local benefits" as "more properly assessments" imposed because of and measured by some benefit inuring directly to the property against which the assessment is levied, and where the property subject to the tax is limited to property benefited). The assessments are not imposed because of and measured by some benefit inuring directly to the property against which the assessments are levied. Nor is the property subject to the assessments limited to the property benefited. Thus, the assessments are properly characterized as a tax rather than a tax assessed against local benefits, user charge, or fee for services.

96 FLA. STAT. §§ 190.035(1), 190.011(10) (2009).

97 FLA. STAT. § 190.035(3) (2009).

98 Rev. Rul. 77-164, 1977-1 CB 20.

99 FLA. STAT. § 190.011(13) (2009).

100 FLA. STAT. § 190.021(1) (2009).

101 FLA. STAT. § 190.006(3)(a)1 (2009).

an elected board if it has at least 250 (or in some cases, 500) qualified electors,[102] in the absence of that many qualified electors there is no restriction prohibiting the District from electing a board. The District currently does not have a board elected by qualified electors and in fact does not currently have any qualified electors. However, there are at least two parcels of property in the District that have not been developed, totaling approximately four acres, and zoning and land use within the District allows the construction of multi-family dwellings. Thus, the District could have qualified electors in the future and could exercise the power to assess and impose ad valorem taxes. Accordingly, while the District currently cannot exercise that power, it could do so in the future. Moreover, the critical inquiry is not whether the power is actually exercised, but with whom the actual sovereign power rests (*i.e.* whether the possibility to exercise the power exists).[103] No authority was found that based characterization of an entity as a political subdivision upon a determination of whether a sovereign power was actually exercised or not. Clearly, if there is no possibility for an entity to exercise a sovereign power, then such power effectively has not been delegated.[104] Although the probability of the District exercising its delegated power to tax may be low, the essential question is whether District possesses the possibility to tax and is capable of practical exercise of that power. The possibility for the District to elect a board, and by doing so to exercise the sovereign power of taxation, exists so long as there is a possibility of qualified electors residing in the district, which there is.

D. Conclusion

As discussed above, the District has been delegated significant eminent domain, police, and taxing powers. The District only needs to possess a significant amount of any one of these powers to be considered a political subdivision of the State of Florida under Section 103 of the Code. Even if it were determined that the District did not possess a significant amount of any of these powers, the Service has taken the position that two or more sovereign powers that are marginal on grounds of substantiality can be aggregated to support a determination that an entity has substantial authority to exercise sovereign power.[105] In fact, however, the District has significant amounts of all three sovereign powers. Accordingly, the District is properly treated as a political subdivision for purposes of Section 103 of the Code.

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102 FLA. STAT. § 190.006(3)(a)2.a (2009). A board must be elected if there are 250 qualified electors residing in the district 6 years after the initial appointment of board members (or for a district exceeding 5,000 acres in area or for a compact, urban, mixed-use district, 500 qualified electors residing in the district 10 years after the initial appointment of board members). *Id.*

103 *See supra* note 26.

104 S. REP. NO. 97-646 (1982), 1983-1 CB 514 ("A sovereign power in order to be taken into account for purposes of these rules, must be one that is capable of practical exercise. For example, the power of eminent domain over privately owned land is not to be taken into account if none of the land within the jurisdiction of the subdivision is privately owned.").

105 *See, e.g.*, FSA TL-N-3313-95, 1995 FSA Lexis 154 *20 (July 12, 1995) (aggregating eminent domain and police power delegated to a university).