COMMUNITY DEVELOPMENT DISTRICTS

Date: September 28, 2011

RE: IRS Update

The District submitted its legal analysis to the Internal Revenue Service Chief Counsel September 22, 2011.

VCCDD Legal Analysis

I. Issues presented

Whether the Village Center Community Development District (the "Center District") is a political subdivision within the meaning of section 1.103-1(b) of the Income Tax Regulations (the ***"Regulations"***).

a. If being a "division" of a state or local government is a separate requirement to be a political subdivision, whether the Center District is properly treated as a division of the State of Florida, and, in particular, whether having a "wholly public purpose" is a separate substantive requirement for a political subdivision.

b. Whether any sovereign powers were delegated to the Center District when the Developer that caused the creation of the Center District retained, directly or indirectly, possession of a majority of landowner votes that elect the Board of the Center District for an initial period.

II. If it is a separate requirement that a political subdivision be treated as a "division" of a state or local government, the Center District is properly treated as a division of the State of Florida

A. Legal background of "division" requirement

Under Section 103 of the Internal Revenue Code of 1986 (the "Code"), interest on obligations of a state or political subdivision of a state is excluded from gross income (subject to certain restrictions and requirements). Section 103 of the Code does not define "political subdivision." The Regulations under Section 103 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."[1]

Consideration of the issues presented in this matter must be undertaken with recognition that the cases and rulings have given a broad interpretation of the term "political subdivision" under federal tax law[2] because 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.[3] 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. In addition, the regulations under Section 103 do not require that a political subdivision be organized in any particular form, such as a

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1 Reg. § 1.103-1(b).

2 *See, e.g., 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).

3 Reg. § 1.103-1(b).

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.

Historically, in determining whether an organization is a political subdivision, the cases have treated the question of whether there has been a *delegation* of traditional sovereign authority as the crucial factor.[4] As discussed below, the delegation of sovereign power is essential in determining that an entity is a political subdivision. Many of the cases and rulings, however, have also commented on the public function of the governmental entity. For example, as described in the opinion in the *Shamberg* case, in 1914 the Attorney General of the United States delivered an opinion to the Secretary of the Treasury where he stated

> The term "political subdivision" is broad and comprehensive and denotes any division of the State made by the proper authorities thereof, acting within their constitutional powers, for the purpose of carrying out a portion of those functions of the State which by long usage and the inherent necessities of government have always been regarded as public. . . . The purposes to which you refer, namely, the improvement of streets and public highways, the provision of sewerage, gas, and lights, the reclamation, drainage, and irrigation of considerable districts of land, are clearly public and have always been so treated.[5]

The concept of a political subdivision serving a public function is also reflected in Judge Hand's opinion in *White's Estate,* where he notes that the functions of the Triborough Bridge Authority "are as traditional and primary state functions as any one can imagine except those of enacting and enforcing general laws."[6]

The courts have not spent much time determining whether the purported political subdivision serves a public function. However, since at least 1959, the Service in published and private rulings has characterized the "public function" language as an inquiry into whether the entity at question is a "division" of a state or local government and has looked at "the public

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4 *Comm'r v. Estate of Shamberg*, 3 T.C. 131 (1944), *aff'd sub nomine Comm'r v. Shamberg's Estate,* 144 F.2d 988 (2d Cir. 1945); *cert. denied,* 323 U.S. 792 (1945); *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)); *Texas Learning Technology Group v. Comm'r*, 958 F.2d 122 (5th Cir. 1992); *White's Estate v. Comm'r*, 144 F2d 1019 (1944), *cert. denied,* 323 U.S. 792 (1945). *Compare 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).

5 30 Op.Atty.Gen. (1914) p.252, quoted in *Comm'r v. Shamberg's Estate,* 144 F.2d 988 (2d Cir. 1945) at 1004.

6 *White's Estate v. Comm'r, op cit.,* 1020-21.

purposes of the entity" and its "control by a government."[7] The Service began to standardize this approach in Revenue Ruling 78-276, where it began its analysis of the political subdivision question by first determining whether the entity was a "division" of the state or local governmental unit.[8] Since then, the Service seems generally to have taken the position that only "divisions" of states or local governmental units that have been delegated sovereign powers can be political subdivisions.

In determining whether an organization is a "division" of a state or local governmental unit, the Service has identified that the important considerations are (i) the extent the organization performs a public function, (ii) whether the organization's assets or income will inure to private interests, and (iii) the level of control by a state or local government unit.[9] The Service has used these concepts in numerous private letter rulings to determine whether an entity is a division of a state or of a local governmental unit before looking at whether there has been a delegation of sovereign powers.

Revenue Ruling 83-131[10] is frequently cited in private letter rulings for the application of the language "motivated by a wholly public purpose" in determining whether an entity is a political subdivision. However, the language "motivated by a wholly public purpose" appears to be an overly broad and potentially misleading statement of the established standard for determining whether an entity is a division of a state or political subdivision rather than an attempt to articulate or establish some new and independent standard. In Revenue Ruling 83-131, for example, the Service considered the public function performed by the entity in question, the extent to which state law applicable to other state agencies applied to the entity, and whether upon dissolution the entity's assets would remain public assets. In that ruling, the Service reconsidered a prior published ruling[11] in which it had held that certain electric and telephone membership corporations formed under state law as "public agencies" were "political subdivisions" where the assets went to the state upon dissolution. The Service noted in the prior ruling that under the applicable state law, the corporations were treated as public agencies under state law and upon dissolution, all assets remaining after the payment of debts would pass to and become the property of the state. In Revenue Ruling 83-131, the Service states that the state law was subsequently amended so that the electric membership corporations were no longer considered to be public agencies under state law and, importantly, that "[u]pon dissolution, all

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7 Rev. Rul. 59-373, 1959-2 C.B. 37 (July, 1959) (Colorado soil conservation districts created to carry out a recognized public purpose, governed by a board the majority of which is elected by landowners, and vested with limited rule making and taxing powers are political subdivisions where the assets go to the credit of the state upon dissolution); Rev. Rul. 77-164, 1077-1 C.B. 20; GCM 37629 (July 31, 1978). *See, e.g.*, Rev. Rul. 78-276, 1978-2 C.B. 256. *See also* Rev. Rul. 83-131, 1983-2 C.B. 184; PLR 200017018 (2000); PLR 200204032 (2001); PLR 200238001 (2002); PLR 200305005 (2002); PLR 200635009 (2006); TAM 200646017 (2006); PLR 200837004 (2008); PLR 2010500017 (2010).

8 Revenue Ruling 78-276 states that the term "political subdivision" has been defined consistently for all federal tax purposes as denoting either (1) a division of a state or local government that is a municipal corporation, or (2) a division of such state or local government that has been delegated the right to exercise sovereign power. *Op cit.* at 256.

9 *See* the rulings cited above in footnote 7.

10 Rev. Rul. 83-131, 1983-2 C.B. 184.

11 Rev. Rul. 57-193, 1957-1 C.C. 364.

assets remaining after the payment of debt will be distributed among the members of the corporation rather than distributed to the state, as was previously provided." The Service revoked the prior ruling in Revenue Ruling 83-131 upon a number of bases: that the corporations were not divisions of a state or local government but are financially autonomous and not controlled by a state or local government, that they were not motivated by wholly public purposes, and that they did not have sufficient sovereign power to qualify as political subdivisions.

Although the last of these elements would have been sufficient basis to conclude that the corporations were not political subdivisions, the Service's subsequent rulings that cite Revenue Ruling 83-131[12] generally do so for the proposition that there is an independent requirement for political subdivisions that they be "divisions" of a state or local government controlled by the state or local government and motivated by wholly public purposes. However, a review of those private letter rulings indicates that the performance of a public function and the disposition of the entity's assets upon dissolution of the entity are determinative in concluding the "division" status of an entity.

With respect to disposition of the assets upon dissolution, if ownership of the assets is retained by non-governmental members of the entity, the Service concludes that the entity is not a division of the state or local governmental unit. However, if the state or local governmental unit becomes the owner of the entity's assets upon dissolution of the entity, the Service concludes the entity is a division of the state or local governmental unit. For example, in a series of technical advices, the Service concluded that as a result of a change in the state statute to provide that the assets of the water districts would be distributed to its members on termination of the districts, the districts were not political subdivisions.[13] Subsequent to the issuance of the adverse technical advices the state statute was again amended so that assets of the water districts would again be distributed to other water districts or to a local political subdivision upon dissolution. In PLR 9230006 the Service ruled that two of the water districts that had been issued an adverse technical advice in the previous year were political subdivisions retroactive to the date the statute was amended.

In these rulings (and prior rulings), the Service has applied a relatively broad standard in determining whether the purpose of the entity appears to serve a public function. Thus, the following have been held to be public purposes:

- Conservation and preservation of natural resources, including the control of wind and water erosion and the reduction of damage resulting from floods.[14]

- Improvements and additions at existing and new port facilities and acquisition and development of the facilities necessary for the transportation, in-state use, and sale of natural gas.[15]

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12 *See, e.g.*, PLR 201050017 (Dec. 17 2010); PLR 9107002 (Nov. 8, 1990); PLR 9103004 (Oct. 18, 1990); PLR 9103005 (Oct. 18, 1990); PLR 9103003 (Oct. 16, 1990).

13 *See* PLR 9103003 (Oct. 16, 1990), PLR 9103004 (Oct. 18, 1990), PLR 9103005 (Oct. 18, 1990), *and* PLR 9107002 (Nov. 8, 1990).

14 Rev. Rul. 59-373, 1959-2 C.B. 37 (July 1959).

- Ownership of hydroelectric generating facilities that provide electricity at a cost-effective rate to the citizens of the state.[16]

- Provision of fire protection and emergency services.[17]

- Management, regulation, and operation of the medical university of a state and its related medical facilities.[18]

- Conservation, development, and utilization of water and energy resources of the state to make the benefit of those resources available to state residents.[19]

- Creation and operation of public school academies.[20]

- Clearance and reconstruction of areas in a city where unsanitary or unsafe housing conditions exist and provision of safe and sanitary dwelling accommodations for persons of low income throughout the city.[21]

The Service potentially strays too far from the established authorities by having attempted to modify the "public function" standard into its revised version, stated as "motivated by wholly public purpose." In most instances where the Service has applied its version, there is little or no discussion of the substance of the application of this standard and there is no practical difference between the standards because the facts show that there exists a public function that is the basis for the Service concluding that the subject entity is motivated by wholly public purpose. However, in the present circumstance, even though there can be no doubt that the Center District operates to fulfill public functions—those that are "as traditional and primary state functions as anyone can imagine"[22]—the Field appears intent on challenging the status of the Center District as a political subdivision of the State based on the pretext that it is not motivated by a wholly public purpose, apparently because the public functions that it performs are allegedly for the benefit of, and control by, the Developer. Thus, in this situation, the application by the Field of the Service's unwarranted and unsupported twist on the public function standard would do damage to, and veer far afield from, the proper application of the public function standard that is established by legal precedent. Thus, even apart from the consideration that the Field does not properly appreciate or analyze the actual facts relating to the Center District, the potential application of a "motivated by wholly public purpose" test, rather than the identification of a "public function," illuminates the impropriety of that standard.

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15 PLR 200017018 (2000).

16 PLR 200204032 (2001).

17 PLR 200238001 (2002). It should be noted that this ruling also apparently considers whether the entity under consideration was formed pursuant to state law and had substantial sovereign power in analysis.

18 PLR 200305005 (2002).

19 PLR 200635009 (2006).

20 TAM 200646017 (2006).

21 PLR 200837004 (2008).

22 *See White's Estate v. Comm'r, op cit.,* 1020-21.

B. The Center District is properly treated as a division of a state or local government

Although the prerequisites for being considered a "division" of a state or local government are not entirely clear from the rulings, as discussed above they are centered around three elements: (i) does the entity perform a public function, (ii) do the assets of the entity transfer to another public entity upon dissolution, and (iii) does the state or local government exercise sufficient control over the entity. The Center District meets all of these prerequisites and accordingly is properly treated as a division of the State of Florida.

1. The Center District serves a public function. The Center District was created pursuant to the State of Florida's Uniform Community Development District Act of 1980 (the ***"Act"***). In Section 190.002(1) of the Act, the Florida State Legislature delineates the public purposes of community development districts, including the Center District.[23] Specifically, the Legislature finds that a community development district constitutes a timely, efficient, effective, responsive, and economic way to manage and finance basic community development services, thereby providing a solution to the State's planning, management, and financing needs for delivery of capital infrastructure in order to service projected growth without overburdening other governments and their taxpayers. The context in which the Florida State Legislature made this finding is that the State faced the potential for extraordinary burdens and challenges to its ability to serve a rapidly expanding population and, therefore, designed community development districts for the specific purpose of shifting the public functions to these entities. Thus, in the view of the Florida State Legislature, the creation and operation of community development district, including the Center District, serves the public function and purpose of economic and community development, which is as much a public function or purpose as those the Service and the courts have previously determined to be public functions. Moreover, the Service has explicitly concluded that economic development is an exclusively public purpose.[24] Exhibit 9 of the Petition to Create Village Center Community Development District further describes some of the public benefits served by the creation of the Center District to the State and its citizens and the Town of Lady Lake and its citizens, including management and financing of basic community development services, delivery of services without overburdening other governments and their taxpayers, development of major infrastructure, and development of a well-planned, well-managed, and well-financed commercial community.

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23 FLA. STAT. § 190.002 (2010).

24 *See, e.g.*, Rev. Rul. 79-323, 1979-2 C.B. 106 (promoting the general economic health of a region serves an exclusively public purpose); PLR 200820012 (May 16, 2008) ("We further conclude that the term 'exclusively public purposes' includes the promotion of economic development"); PLR 200736022 (Sept. 7, 2007) (stimulating economic development is an essential governmental function); PLR 200426017 (June 25, 2004) (the promotion of economic development and relief of unemployment are essential government functions); PLR 200351006 (Dec. 19, 2003) (entity organized for purpose of promoting economic development is exercising an essential governmental function); PLR 9009063 (Dec. 8, 1989) (entity created to promote and coordinate orderly development in a rapidly growing region of a state is performing an essential governmental purpose); PLR 8951057 (Sept. 27, 1989) (entity is serving an exclusively public purpose by exercising the essential governmental function of providing low-income housing and community development).

In addition, the Center District is specifically charged with water management and control under Section 190.012(1)(a), which involves drainage,[25] and preventing flooding and erosion. As early as 1959, the Service has ruled that the control of wind and water erosion and the reduction of damage resulting from floods is a public purpose.[26]

2. Upon dissolution, all assets of the Center District transfer to another governmental entity. The Act requires that the Center District, like all other community development districts, remain in existence unless (a) it is merged with another community development district; (b) 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 (c) it is dissolved because (i) a development permit has not been obtained within 5 years of being established, (ii) it becomes inactive pursuant to Section 189.4044 of the Florida Statutes, or (iii) if, it has no outstanding financial obligations and no operating or maintenance responsibilities, it is dissolved by a nonemergency ordinance of the general-purpose local governmental entity that established the district.[27] Upon any dissolution, assets and liabilities of the Center District, like any other community development district, would be transferred to another local government or political subdivision for a public purpose.[28] Thus, the laws governing the Center District satisfy the determining factor highlighted in Revenue Ruling 83-131 and subsequent private letter rulings that, for an entity to be considered a division of a state or local governmental unit, a state or local governmental unit must become the owner of the entity's assets upon dissolution of the entity.

3. The laws of the State of Florida result in the State exercising ample control over the Center District. The extent to which state or local government control over a division is required is not clear under the cases and rulings. Obviously, control in this case cannot require that the state or local government appoint the controlling body of the division; if that were required, then no entity that has a board elected by landowners or citizens could be a political subdivision of a state. On the other hand, the mere fact that an entity is a creature pursuant to state law cannot be enough either, or a for-profit corporation would meet the control requirement. However, the extent of public control of the Center District and all community development districts exercised by the State of Florida and local governmental authorities pursuant to the laws of Florida is equivalent to the elements and degree of control imposed on all governmental entities within the State, goes far beyond the level of governmental control exercised over private corporations under State law, and leads to the conclusion that the Center District is controlled by the State.

Under State law, the Center District, like all community development districts, is designated as a special district under the Act.[29] This is similar to the fact situation in the ruling overturned by Revenue Ruling 83-131, where under the prior state law, the corporations were treated as public agencies. Under Florida law, the Center District is a distinct entity governed by

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25 *See* FLA. STAT. § 190.011(11) (2010)

26 Rev. Rul. 59-373, 1959-2 C.B. 37 (July 1959).

27 FLA. STAT. § 190.046 (2010).

28 FLA. STAT. §§ 190.046(2)(b), 190.046(2)(c), and 189.4044 (2010).

29 FLA. STAT. § 190.002(3) (2010).

a separate board of supervisors,[30] subject to the same financial planning and reporting requirements applicable to other Florida political subdivisions,[31] the same bidding requirements as other Florida political subdivisions,[32] and the same open records laws[33] and open meeting laws[34] applicable to the State, counties, and municipalities in Florida. The Center District is required to submit its annual budget, for purposes of disclosure and information, to the local governmental authority or authorities having authority over the area included in the Center District.[35] The Center District is treated as a special district under Florida law and, as such, is subject to the laws relating to public officers and employees, including the code of ethics,[36] open meeting laws,[37] and oversight review, [38] and possesses the same limited sovereign immunity applicable to other subdivisions of the State.[39] Although authorized to adopt and enforce appropriate rules and orders necessary for the conduct of the business of the district and the provision of one or more services through its systems and facilities, the Center District is required to comply with the same requirements of Florida's Administrative Procedure Act that apply to all political subdivisions in Florida. [40] The Center District is required to use a qualified public depository, like other Florida political subdivisions,[41] and its properties are exempt from execution and sale by general creditors like other Florida political subdivisions.[42] The Center District must submit its audits to the State each year.[43] The Act also provides that the local general purpose government within whose boundaries the Center District lies may adopt a nonemergency ordinance providing for a plan for the transfer of a specific community development service to the local general purpose government.[44] All of the foregoing provisions of the Act indicate that the Center District is controlled by the State of Florida or the local

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30 FLA. STAT. § 190.006(1) (2010).

31 FLA. STAT. § 190.008(1) (2010). FLA. STAT. Chapter 218, to which 190.008(1) refers, contains the rules concerning financial matters applicable to all political subdivisions of the State of Florida.

32 FLA. STAT. §§ 190.033, 287.017, 287.055, 255.20 (2010).

33 FLA. STAT. § 190.006(7) (2010). FLA. STAT. Chapter 119, to which 190.006(7) refers, contains the rules concerning public records applicable to all political subdivisions of the State of Florida.

34 FLA. STAT. § 190.006(9); *see also* FLA. STAT. §§ 286.0105 and 286.011 (2010).

35 FLA. STAT. § 190.008(2)(b) (2010).

36 FLA. STAT. Chapter 112 (2010). FLA. STAT. § 190.007(1) makes a special exception to the general rules of Chapter 112 to allow a board member, district manager, or other employee of the district to be stockholder, officer, or employee of a landowner or an affiliate to a landowner.

37 FLA. STAT. § 190.006(9) (2010). FLA. STAT. Chapter 286, to which Section 190.006(9) refers, contains the rules concerning public meetings applicable to all political subdivisions of the State of Florida.

38 FLA. STAT. § 189.428; *see also* FLA. STAT. § 190.008(2)(c) (2010).

39 *See, e.g.*, FLA. STAT. §§ 190.043 and 768.28 (2010).

40 FLA. STAT. §§ 190.011(5), 190.012(3). Chapter 120 (2010).

41 FLA. STAT. §190.007(3) (2010).

42 FLA. STAT. §190.044 (2010).

43 FLA. STAT. §§190.008, 218.39 (2010).

44 FLA. STAT. §190.046(4)(2010).

government units within whose boundaries it lies in the same manner as other Florida political subdivisions.[45]

The Center District is governed by a Board elected by landowners, pursuant to Section 190.006(2) of the Act.[46] A majority vote of landowners determines the Board's members and landowners are provided with one vote per acre or fraction thereof until the requisite numbers of qualified electors exists within the District. At one time, in connection with the initial creation of the Center District, the majority of the landowner votes were possessed by a private developer and related parties. However, the Developer did not possess a majority of the landowner votes at the time the Bonds were issued, nor has it possessed a majority of such votes over the past several years.[47] The Field has argued that because the Developer possessed a majority of the landowner votes for a period of time, the Developer and the Center District should be treated effectively as alter egos.[48] However, that conclusion is contrary to the actual facts and the case law.[49]

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45 *Compare* PLR 200204032 (2001), where the fact that an entity was created pursuant to state legislation was considered important for purposes of determining whether entity was a division of the state, and PLR 200635009 (2006), where the fact that an entity was required to submit an annual financial statement and complete report of its business activities to the state was considered important in determining whether the entity was a division of the state.

46 FLA. STAT. § 190.006(3)(a)2.a (2010) requires that the election of the board members of a community development district be transferred to an election by residents if a district has at least 250 qualified electors. The Center 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 Center District that have not been developed, totaling approximately four acres, and zoning and land use within the Center District allows the construction of multi-family dwellings which could result in there being sufficient qualified electors at some time in the future.

47 As discussed below, the Developer and related parties now own about 13.4% of the total lands within the Center District and 21.5% of the total lands not owned by the Center District. At the time the Bonds were issued, the Developer and related parties owned land accounting for either 49 or 51 of the total landowner votes of 103, in either event, less than a majority of the votes. (There is some confusion as to whether the Developer or an unrelated party controlled two of the votes.)

48 Related to this argument is the issue of whether the status of an entity as a political subdivision is determined at a single point in time (*e.g.*, at formation of the entity or at the time bonds are issued) or whether future developments or the potential for future developments are relevant in determining political subdivision status. This concept is referred to as the "progression concept." For reasons discussed in greater detail in the following text, we believe that based on the facts and circumstances related to the Center District, this issue is moot because the Center District had been granted substantial sovereign powers at the time of its formation and the Center District was not Developer controlled at the time the Bonds were issued. Nevertheless, we believe substantial authority does supports the conclusion that the status of an entity as a political subdivision should be based upon the legal powers delegated to it and the control over it established under state law. The determination of political subdivision status is a facts and circumstances analysis looking at those factors; if those legal factors change, political subdivision status should be retested. This was the case in Revenue Ruling 83-131, where a change in state law resulted in an entity losing its political subdivision classification. *See* Rev. Rul. 83-131, 1983-2 C.B. 184.

49 *See Comm'r v. Birch Ranch and Oil Co.*, 192 F.2d 924 (9th Cir. 1951) *and Rutland v. Tomlinson*, 63-1 U.S.T.C. ¶ 9173 (D.C. Fla. 1963), *aff'd per curium sub nomine Tomlinson v. Rutland*, 327 F.2d 669 (5th Cir. 1964). *See also* GCM 36401 (September 5, 1975).

Moreover, the fact that the Developer and related parties at one time possessed a majority of the landowner votes does not obviate the fact that the State of Florida exercises control over the Center District from its creation. Rather, such circumstance is entirely consistent with the significant level of control of the Center District residing in and exercised by the State, as the Act specifically contemplates that ownership of a substantial amount of the land in a community development district by a private developer entity is normal for an initial period of time in order for economic development to occur. The Service has previously concluded that a board where some members are elected by property owners of a district was important in determining control by the state[50] and has similarly held that a district where a majority of the members were elected by a single landowner was controlled by a state for this purpose where it was subject to state statutes controlling other political subdivisions.[51]

In any event, from the moment that the Center District was created, the State had substantial control over it even for the initial period of time when the members of the Board were all elected by the Developer. All property of the Center District became public property, subject to transfer on dissolution to other public entities, not to the Developer. The members of the Board were prohibited by State law from acting as mere alter egos of the Developer under Chapter 112 of the Florida Statutes, which applies to all public officers and employees, including members of the Board of any community development district. Chapter 112 provides that public officials must be independent and impartial and that public office may not be used for private gain other than the remuneration provided by law,[52] must properly discharge their duties in the public interest,[53] and must act as agents of the people in holding their positions for the benefit of the public.[54] Among other things, that chapter of the Florida Statutes establishes an enforceable code of ethics applicable to members of the Board of the Center District, including restrictions on the employment of relatives, full and public disclosure of financial interests, reporting requirements and prohibitions relating to gifts, and other conflicts of interest provisions, with applicable penalties (including felony provisions relating to the breach of public trust) and enforcement mechanisms.[55] It also contains provisions relating to the suspension and removal of public officers, including members of the Board of the Center District.[56] Thus, from the beginning of their election to the Board, the members of the Board were subject to State mandated standards of conduct for public benefit and the control and removal by the State. In addition, as illustrated in Exhibit 9 of the Petition to Create Village Center Community Development District, the establishment of the Center District imposed burdens on the Developer because of the effect of State law that would not otherwise have existed.

The degree of State control over the Board mandated by State law is substantive and of real significance. For example, there are currently a number of proceedings in the State of

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50 PLR 200238001 (2002).

51 Rev. Rul. 59-373, 1959-2 C.B. 37 (July 1959).

52 FLA. STAT. § 112.311(1) (2010).

53 FLA. STAT. § 112.311(5) (2010).

54 FLA. STAT. § 112.311(6) (2010).

55 FLA. STAT. § 112.311 *ff.*

56 FLA. STAT. § 112.40 *ff.*

Florida where the members of a board of supervisors of a community development district that has experienced financial difficulties have been required to institute foreclosure proceedings on the majority landowner of the district, even though they may have been elected by that majority landowner. Thus, these are real substantive elements of State control over the Center District that have applied since the inception of the Center District.

The substantial control the State of Florida exercises over the Center District, similar to the control it exercises over other political subdivisions, is not dependent upon who votes for the members of the Board. Moreover, to the extent that it is relevant, it should be noted that the Developer has not possessed a majority of the landowner votes for many years.[57] The majority of the land in the Center District was, at the creation of the Center District in 1992, owned by the Developer or a partnership controlled by the Developer. As contemplated by the Act, over the years, land ownership has transferred from the Developer, and, as discussed above, the Developer and related parties control less than 50% of the landowner votes at the time the Bonds were issued. Today, the largest landowner in the Center District is the Center District, which owns 63.62 acres.[58] The Developer and all its affiliates (*i.e.*, entities in which the Developer has a majority in ownership or is on the board of directors) or related parties (within the meaning of Regulations section 1.150-1(b)) collectively own only 22.29 acres in the Center District, or approximately 13.4% of the total lands within the Center District, accounting for only 36, or a small minority (approximately 28%), of the 128 total landowner votes according to the Center District's landowner votes list as of September 30, 2010. Of the acreage not owned by the Center District, the substantial majority (78.5%) is held by landowners that are not the Developer or related parties to the Developer, as is the substantial majority (72%) of the voting interests.[59] This progression of ownership away from the Developer is consistent with, although not required by, the purposes of the Act.

The Field argues that the fact that the Developer made profits on sales to the Center District shows that the Center District was created specifically to benefit the Developer. Yet, at the time the Bonds were issued, the Developer did not possess a majority of the landowner votes,

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57 *See* Exhibit U.

58 Although the Center District owns property in the Center District, it has no votes with respect to the Board or in any landowner election. The second largest landowner after the Center District is Lazy B Cattle Venture, Ltd., which owns 40.10 acres and gets 43 votes. Lazy B Cattle Venture, Ltd. is approximately 40% owned by the same entities and individuals that own the Developer. The third largest landowner is TMW Weltfonds Rolling Acres Plaza L.P., with 19.61 acres and 20 votes. The remaining land (and votes) is held by 10 other landowners (not including the Center District).

59 The Field appears to argue that the actions taken by the Board relating to boundary changes of the Center District demonstrate that the Developer's plan is to retain control over the Center District into the future. This argument is flawed for a number of reasons, not the least of which is that, under the Act, the Developer has never had control over the decisions of the members of the Board of the Center District and moreover has not even possessed a majority of the landowner votes for some time. In addition, the boundary changes have been made upon petition by the Board and in at least one of those cases at a time when the Developer did not control a majority of the landowner votes in the Center District. Because the petitions were made upon a vote of the Board, the Board members were acting as State officials and were subject to the ethics and conflicts of interest laws contained in the Act and in Chapter 112 of the Florida Statutes. The Board's stated intent in modifying the boundaries was to keep residential owners from being subject to the higher assessments levied upon commercial owners.

and the actions of the Board indicate that the members thought they were purchasing the assets from the Developer for fair market value, supported by appraisals received from two independent appraisers. In addition, because the actions of the Board members were official actions in approving the purchases, they were subject to State law ethics and conflicts of interest laws that effectively required them to purchase the assets at fair market value. Any profit earned by the Developer by sale of assets at fair market value does not indicate a specific benefit to the Developer. The Field also says that the Developer has benefited by receiving preferential rights to allow future homeowners to utilize the Amenity Facilities prior to the assignment of future Amenities Fees. Again, the actions of the Board in approving these contracts were official acts, subject to the State ethics and conflicts of interest laws and the Developer actually paid for the right to allow future homeowners to use those Amenities Facilities. Accordingly, these two arguments are without basis.

4. Conclusion. Thus, all facts and circumstances show that the Center District was created to, and in fact does, perform public functions. Further, even applying the Service's variation of the public function standard, those facts and circumstances establish that the Center District was created for a wholly public purpose. The transfer of the Center District's assets to another local government or political subdivision for a public purpose upon the Center District's dissolution and the extent of public control of the Center District by the State of Florida and local governmental authorities is further evidence of that public purpose. Accordingly, the Center District must properly be characterized as a division of the State of Florida.

III. The Center District has been delegated sufficient sovereign powers to be a political subdivision

A. Legal background

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.[60] In defining these three sovereign powers for purposes of tax exemption of interest on bond, the Service has adopted a broad definition of "sovereign powers" for purposes of qualifying as a political subdivision. By contrast, the Service has applied 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, as a consequence, not exclusively organized for the purposes enumerated in Section 501(c)(3).[61] 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

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60 *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.

61 *See* Aprill, "Excluding the Income of State and Local Governments: The Need for Congressional Action," 26 GEORGIA L. REV. 421, 445 (1992). For purposes of Section 501(c)(3) status, the Service adopts a definition of sovereign powers different from Section 103.

under Section 501(c)(3). The Service appears to apply a narrower definition of sovereign power for purposes of Section 501(c)(3).[62]

It is not necessary that all three of these sovereign powers be delegated.[63] 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.[64] However, possession of only an insubstantial amount of any or all sovereign powers is not sufficient.[65] 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 the university was only able to exercise the power upon specific approval of each taking

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62 *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).

63 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.").

64 *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 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).

65 *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).

by the state legislature, such power was not substantial and the university did not qualify as a political subdivision of the state.[66]

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.[67] This principle is illustrated, for example, by Revenue Ruling 78-138.[68] 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."[69] Also implicit in the authority on this issue is that it 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, a point made explicitly in legislative history.[70] We have been unable to find any authority 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.[71]

B. The Center 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

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

67 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….").

68 1978 CB 314.

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

70 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.").

71 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.").

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.[72]

In the case of the Center District, the Act contains two specific delegations of the power of eminent domain. The first, contained in Section 190.011(7)(a) of the Act, is 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.[73] Apart from the limitation that the property acquired by eminent domain under this power be used for those purposes authorized in the Act, the power under Section 190.011(7)(a) is unlimited. In particular, there is no requirement that the Center District get prior approval from any entity before exercising this delegated power.

The second delegation of eminent domain power to the Center District is in Section 190.011(11) of the Act, and consists of 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 Center District relating solely to water, sewer, Center 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.[74] The Act defines "water, sewer, district roads and water management" to include a broad range of purposes for which the Center District may exercise its eminent domain powers.[75] The only limitation on the Center District's ability to exercise its eminent domain power for this purpose is that, if the Center District exercises the power beyond the geographic boundaries of the Center District, it must get prior

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72 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).

73 FLA. STAT. § 190.011(7)(a) (2010).

74 FLA. STAT. § 190.011(11) (2010).

75 "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) (2010).

"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) (2010).

"District roads" means highways, streets, roads, alleys, sidewalks, landscaping, storm drains, bridges, and thoroughfares of all kinds and descriptions. FLA. STAT. § 190.003(11) (2010).

"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. § 190.003(21) (2010).

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.[76] This limitation does not apply to the power under Section 190.011(11) if the taking is within its geographical boundaries.

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 Center District rather than the State of Florida or any other local government jurisdiction. Additionally, any exercise of either power of eminent domain by the Center District under the Act is through and in the Center District's name rather than in the name of the State of Florida or a local government jurisdiction.

In determining whether the Center District is a political subdivision, it is not relevant that the power of eminent domain delegated to the Center District by the State of Florida is restricted to takings for certain purposes or, in the case of the power under Section 190.011(11), to the prior approval of another governmental unit if the power is exercised outside of the geographic boundaries of the Center 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.[77] 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,[78] 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.[79] Each such delegation was required to be made by specific legislation stating the specific purpose (and specific property) 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 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.[80] 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 Revenue Ruling 77-165 and *Philadelphia National Bank* differ from the facts concerning the Florida community development districts, such as the Center 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 Center District relating solely to water, sewer, Center District roads, and water management as those purposes are broadly defined (which correlate to the inherent powers the Florida

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76 FLA. STAT. § 190.011(11) (2010).

77 *See supra* note 67.

78 1977-1 CB 21.

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

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

Legislature empowered such districts to exercise)[81] or to public easements, dedications to public use, plated reservations for public purposes, or any reservations for those purposes authorized by the Act[82] does not affect the determination of the substantiality of the Center District's power of eminent domain.[83] 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.[84]

Similarly, the requirement that the Center District obtain prior approval if it takes property outside of its geographic boundaries under Section 190.011(11) of the Act[85] does not render the Center District's power of eminent domain under that provision insubstantial.[86] For example, in *Commissioner v. White's Estate*[87] 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 8015098 (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[88] and in *Philadelphia National Bank*[89] can be distinguished from the power granted to the Center District.

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81 FLA. STAT. § 190.012(1) (2010).

82 FLA. STAT. § 190.011(7)(a) (2010).

83 *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).

84 PLR 200151015 (Sept. 17, 2001) (power of eminent domain limited to a five block area considered a substantial power).

85 The prior approval to take property outside of the geographic boundary of the Center District must be obtained from the county if a taking under Section 190.011(11) of the Act occurs in an unincorporated area or from the municipality if the taking occurs within a municipality. FLA. STAT. § 190.011(11) (2010).

86 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 restricted power of eminent domain; real property belonging to a city or a state could not be acquired without their consent).

87 144 F2d 1019 *cert. denied*, 323 U.S. 792 (1944).

88 1977-1 CB 20.

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 Center District, although consent of the county or municipality may be required to exercise that power generally, once consent has been received the Center District has the power to condemn property and take title in its own name.[90] In any event, the Center District is not subject to any such limitation on the exercise of eminent domain within its geographic boundaries.

The Field has specifically pointed to PLR 8630027 and argued that it mandates a conclusion that the Center District has not been delegated the power of eminent domain. That ruling, which is more than 25 years old, concluded that no effective eminent domain power had been delegated when all of the property in the district under question was owned by a single entity and that entity also appointed the board of the district. The ruling states that the purported delegation of eminent domain gave no public entity any more control over the property than the owner already possessed. Regardless of whether this old private letter ruling should be respected as a proper statement of legal principles, the factual scenario to which it applied in the ruling is substantially different from that of the Center District. First, the ruling does not describe what the effect of a taking by the district would have been, but, in the case of the Center District, Florida law would require that any property taken by the Center District permanently become public property, which is a result different from the Developer using the land for its own purposes and distinguishes PLR 8630027 on the basis of the legal effect of the taking. Second, the factual comparison with PLR 8630027 regarding sole property ownership is incorrect. From at least as early as November 1994, at least 9.64 acres in the Center District has been owned by entities other than the Developer, related entities, or the Center District.[91] At the time the Bonds were issued, the Developer and related entities owned land accounting for less than 50% of the landowner votes in the Center District,[92] and the amount of land in the Center District today that is not owned by the Developer, a related entity, or the Center District is more than 60 acres,[93] which is substantially more than the five-block area approved as sufficient in PLR 200151015. Third, the Center District's conferred powers of eminent domain would allow it to take property that is outside its borders, which would include property that is not owned by the Developer. Fourth, as previously described, as a consequence of the significant responsibilities and restraints

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89 666 F.2d 834 (3d Cir. 1981).

90 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.")

91 *See* Exhibit U.

92 *Id.*

93 *Id.*

imposed on the Center District's Board under Florida law, where the public interest is served, the Board would be obligated to exercise its power of eminent domain against the property owned by the Developer. This type of required action is evidenced by the several currently active proceedings whereby the boards of supervisors of community development districts have been required to institute foreclosure proceedings on property of the majority landowner of the district. Accordingly, PLR 8630027 should not be considered controlling in this case.

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

Neither Section 103 nor the Regulations define "police power." 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."[94] 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."[95]

The Service has stressed that police power is a legislative function.[96] In characterizing the various types of power, it is acknowledged that state police powers include the authority to promulgate and enforce transportation regulations.[97] The authority to set rates and determine routes in a fashion similar to a state public utility commission is also a police power.[98] Additionally, in the legislative history of Section 7871, Congress states that powers such as control over zoning and fire protection are sovereign police powers.[99]

Police powers will 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.[100] In contrast, in *Philadelphia National Bank*, the district court ruled that Temple University had only limited

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94 *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.").

95 *Id.* (citing *Manigault v. Springs*, 199 U.S. 473, 480 (1905)).

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

97 *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).

98 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).

99 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."

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

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.[101]

Whether the powers granted to an entity amount to a delegation of the police power is, of course, determined based upon federal tax law rather than state law, just as we determine whether an entity is a political subdivision not based on how it is characterized in the enabling legislation but upon an analysis under federal tax law. The Act states that "[a community development] district may not exercise any police power." However, that language appears within Section 190.012(2)(d), which authorizes the Center District to 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.

In this context, it appears that the police power denied to the Center District by Florida law is solely the power to arrest. This is only a single element of the much broader scope of police powers that have been recognized for purposes of the federal tax law. 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.[102] Instead, we must examine the actual powers delegated to the Center District to determine whether it has been delegated the police power for purposes of Section 103 of the Code.

1. The Central District has been delegated substantial rulemaking authority. The Act delegates to community development districts the power to "adopt and enforce appropriate rules following the procedures of chapter 120, in connection with the provision of one or more services through its systems and facilities."[103] The systems and facilities that a community development district may control, and for which it may adopt substantive rules, include water management facilities, water supply, sewer, and wastewater management and reclamation systems, bridges and culverts, district roads, cleanup of actual or perceived environmental contamination with the district, and conservation areas, mitigation areas, and wildlife habitat[104] and, after the local general-purpose government within the jurisdiction of which a power specified is to be exercised, parks and facilities for indoor and outdoor recreational, cultural, and educational uses, fire prevention and control, school buildings, security, control and elimination of mosquitoes and other arthropods, and waste collection and disposal.[105] Thus, under the Act, the Center District has been authorized substantial rulemaking authority over many areas of general government.

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

102 *See Burnett* v. *Harmel*, 287 U.S. 103, 110 (1932).

103 FLA. STAT. § 190.012(3) (2010).

104 FLA. STAT. § 190.012(1) (2010).

105 FLA. STAT. § 190.012(2) (2010).

Within this broad range, it is instructive to focus on fire protection as an example. Although the power to exercise fire prevention and control is restricted in that it requires consent of the local general-purpose governments 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 insubstantial.[106] The power to exercise fire prevention and control has been delegated to the Center District and, subject to consent of a local general-purpose government, will be exercised in the name of the Center District. Moreover, the power of the Center District to exercise fire prevention and control has specifically been consented to by the local general-purpose government. In addition to actually providing fire protection (discussed below), the Villages Public Safety Department ("VPSD"), a department of the Center District, is a voting member of the Sumter County Development Review Committee, 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.

In addition to the substantive rulemaking and enforcement authority exercised by the Center District with respect to fire prevention and control, the Center District has substantive rulemaking and enforcement authority over other systems and facilities, including water management and control, which is a matter of central concern in the State of Florida. This control is very similar to the rule-making authority of the soil conservation districts discussed in Revenue Ruling 59-373,[107] where the districts with the authority to make rules relating to wind and water erosion and flooding and limited taxing or assessment powers were held to be political subdivisions.

The power to adopt rules with respect to its services and facilities seems to be well within the normal concept of "police powers." Rules adopted by the Center District pursuant to this delegation are of broad application and govern use of land and facilities. They are enforceable by the Center District in both law and at equity, and the Center 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.[108] Thus, the rules adopted by the Center District effectively have the force of law, and the ability to adopt such rules is a delegation of the police power.

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106 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 a city or a state could not be acquired without their consent).

107 1959-2 C.B. 37 (July 1959).

108 FLA. STAT. § 190.041 (2010).

2. The Center District has been delegated and exercises substantial fire protection authority. In addition to the rulemaking and enforcement authority relating to fire protection discussed above, the Center District actually performs fire protection services. The Act specifically provides that a community development district has the power to 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.[109] Pursuant to this authority, the VPSD 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. These services are funded through Amenities Fees, tax assessments, and ad valorem taxes. The VSPD provides fire prevention and control services to approximately 42,700 residences and to nonresidential buildings totaling 5,852,471 square feet. These services are substantial: in fiscal year 2009-2010, for example, the VSPD responded to approximately 9,000 calls. The Service has previously determined that the authority to investigate and order fire hazards remedied and to enforce state and local ordinances relating to the prevention of fires constitute "limited police powers,"[110] sufficient together with other limited sovereign power to conclude that an entity possessing them is a political subdivision. The more extensive powers of the Center District relating to fire protection lead to the conclusion that the Center District similarly has been granted police powers.

3. The Center District has a power to prescribe and collect rates sufficient to constitute a delegation of police powers. The Act authorizes the Center District to 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 Center District, within the limits of the Center 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.[111] Thus, under the Act, the State of Florida has delegated to the Center District the power to prescribe and collect rates or other charges for water management and control facilities, and water and sewer systems and empowered it to adopt and enforce appropriate rules in connection with the provision of these services.[112] 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,[113] and should similarly hold that the Center District has been delegated sufficient police powers to be treated as a political subdivision.

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109 FLA. STAT. § 190.012(2)(b) (2010).

110 PLR 9041060 (July 18, 1990).

111 FLA. STAT. § 190.035(1) (2010).

112 FLA. STAT. § 190.012(3) (2010).

113 *See supra* note 98. *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).

D. The Center 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.[114] 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.[115] 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 for some special privilege granted or service rendered.[116] 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.[117] 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.[118]

In Revenue Ruling 61-152,[119] 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.[120] 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.

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

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

116 *Id.*

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

118 *Id.*

119 1961-2 C.B. 42.

120 *Id.*

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, was 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. Nor 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 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*,[121] 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.

1. The special assessments authorized by the Act are taxes and are not in the nature of benefit assessments. The Act authorizes the Center District to "determine, order, levy, impose, collect, and enforce special assessments pursuant to [the Act] and chapter 170."[122] The assessments may be imposed for any or all of the Center District's activities and powers authorized under Sections 190.011 and 190.012 of the Act. These include a number of broad public or governmental purposes, such as:

- Roads[123]
- Water management[124]
- Water supply, sewer, and wastewater management[125]
- Bridges and culverts[126]
- Buses, trolleys, transit shelters, ridesharing facilities and services, parking improvements, and related signage[127]
- Investigation and remediation costs associated with the cleanup of environmental contamination[128]

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121 119 F.2d 869 (2d Cir. 1941), *cert. denied* 314 U.S. 660 (1941).

122 FLA. STAT. § 190.011(14) (2010).

123 FLA. STAT. § 190.012(1)(d)(1) (2010).

124 FLA. STAT. § 190.012(1)(a) (2010).

125 FLA. STAT. § 190.012(1)(b) (2010).

126 FLA. STAT. § 190.012(1)(c) (2010).

127 FLA. STAT. § 190.012(1)(d)(2) (2010).

- Conservation areas, mitigation areas, and wildlife habitat including the maintenance of any plant or animal species[129]
- Parks and facilities for indoor and outdoor recreation, cultural, and education uses[130]
- Fire prevention and control[131]
- School buildings and related structures[132]
- Security, including but not limited to guardhouses, fences, gates, electronic intrusion-detection systems, and patrol cars, when authorized by proper governmental agencies[133]
- Control and elimination of mosquitoes and other arthropods of public health importance[134]
- Waste collection and disposal[135]

Under the Act, special assessments are apportioned among all of the property owners within the Center District, without regard to whether an individual property owner's land will benefit from the assessment.[136] Any special assessments imposed by the Center District for these purposes are liens against the property assessed that are coequal with the lien of all State, county, district, and municipal taxes[137] and are enforced in the same manner as other municipal taxes.[138] Thus,

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128 FLA. STAT. § 190.012(1)(e) (2010).

129 FLA. STAT. § 190.011(1)(f) (2010).

130 FLA. STAT. § 190.012(2)(a) (2010).

131 FLA. STAT. § 190.012(2)(b) (2010).

132 FLA. STAT. § 190.012(2)(c) (2010).

133 FLA. STAT. § 190.012(2)(d) (2010).

134 FLA. STAT. § 190.012(2)(e) (2010).

135 FLA. STAT. § 190.012(2)(f) (2010).

136 The assessments are apportioned among all of the property owners within the Center District according to the percentage of assessable area (as measured by habitable square foot) each property owner owns within the Center District as a part of the total habitable area within the Center 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.

137 FLA. STAT. § 190.021(9) (2010).

138 FLA. STAT. §§ 190.021(9), 197.363, AND 197.3632 (2010).

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 Center District to impose the assessments is properly treated as a taxing power for purposes of analysis under Section 103 of the Code.[139]

2. The maintenance special assessments, the benefit special assessments and the rates and other charges authorized by the Act are taxes and are not in the nature of benefit assessments. In addition to special assessments, the Center District is authorized to levy maintenance special assessments[140] (which have, in fact, been levied) and benefit special assessments.[141] Maintenance special assessments are levied to maintain and preserve the facilities and projects of the Center District.[142] Each year the Center District establishes a budget for the maintenance of its projects within the Center District (*e.g.*, roads and storm water control systems). That budget is then apportioned among all of the property owners within the Center District, without regard to whether an individual property owner's land will obtain any special benefit from the assessment. To date, the Center District has used annual maintenance special assessments to maintain roads, sidewalks, parks and landscaped areas, security facilities, and additional Center District facilities such as town squares, public restrooms, and related structures.

The Center District may also levy benefit special assessments for bonds issued and related expenses to finance Center District facilities and projects which are levied under the Act, which would be apportioned among all of the property owners within the Center 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.[143] Because the maintenance special assessments, as well as the special assessments discussed above, are 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,[144] these assessments are properly characterized as taxes.

The Act also empowers the Center District to prescribe, fix, establish, and collect rates, fees, rentals, user charges, or other charges for the facilities and services furnished by the Center District, within the limits of the Center District, including, but not limited to, recreational services and facilities, security services such as traffic and crowd control for public events, and

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

140 FLA. STAT. § 190.021(3) (2010).

141 FLA. STAT. § 190.021(2) (2010).

142 FLA. STAT. § 190.021(3) (2010).

143 FLA. STAT. § 190.021(9) (2010).

144 As with the special assessments described above in footnote 136, the annual maintenance special assessments have been apportioned according to percentage of assessable area, and not on the basis of benefit that tends to increase the value of property.

water and sewer systems.[145] 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.[146]

In the case of the Center District, as in Revenue Ruling 61-152, special maintenance assessments have been imposed by the Center 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 Center 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 Center 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.[147] It should be noted that even if these service charges and user fees were treated as payment for particular services (which the Center District does not concede, because they are not imposed on the basis of use), the maintenance special assessments would appear to be deductible "taxes" under Section 164 of the Code and Treasury Regulation section 1.164-4(b)(1).[148] Thus, these special maintenance assessments and service charges are properly characterized as taxes.

3. The Act authorizes community development districts to assess and impose ad valorem taxes. Finally, the Act authorizes an elected board of the Center District to assess and impose upon lands in the Center District ad valorem taxes.[149] Such tax is assessed, levied, and collected in the same manner and same time as county taxes.[150] To exercise this power, the Center District must call an election at which members of the board are elected by qualified electors rather than by landowners.[151] Although the Center District is required to have a board elected by qualified electors if it has at least 250 (or in some cases, 500) qualified electors,[152] in the absence of that many qualified electors, there is no restriction prohibiting the Center District from having a board elected by qualified electors. The Center District currently does not have a board elected by qualified electors and in fact does not currently have any qualified electors, a situation contemplated by Section 190.006(2)(a) which provides that in that case the members of the board continue to be elected by landowners. However, there are at least two parcels of

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145 FLA. STAT. §§ 190.035(1), 190.011(10) (2010).

146 FLA. STAT. § 190.035(3) (2010).

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

148 *See* Rev. Rul. 76-45, 1976-1 C.B. 51 (taxes imposed by a municipal utility district formed and controlled by a single taxpayer would not be deductible to the extent they were used to pay for capital assets that tended to benefit the property taxed, but would be deductible to the extent they could be shown to be allocable to maintenance or interest charges); *see also* GCM 36401 (September 5, 1975) (discussing the proposed ruling that became Rev. Rul. 76-45and noting that the Service had lost cases arguing that the taxpayer and the district were one and the same when the taxpayer controlled the district).

149 FLA. STAT. § 190.011(13) (2010).

150 FLA. STAT. § 190.021(1) (2010).

151 FLA. STAT. § 190.006(3)(a)1 (2010).

152 FLA. STAT. § 190.006(3)(a)2.a (2010). 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.*

property in the Center District that have not been developed, totaling approximately four acres, and zoning and land use within the Center District allows for the construction of multi-family dwellings. Thus, the Center District could have qualified electors in the future and could exercise the power to assess and impose ad valorem taxes. Accordingly, while the Center District currently cannot exercise that power, it could do so in the future.

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).[153] 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. If there is no possibility for an entity to exercise a sovereign power, then such power may not have been effectively delegated.[154] However, although the probability of the Center District exercising its delegated power to tax may be low, it is not impossible, and the essential question is whether Center District possesses the possibility to tax and is capable of practical exercise of that power. The possibility for the Center 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 Center District, which there is.

IV. Conclusion: The Center District is properly treated as a political subdivision of the State of Florida.

As discussed above, if it is a separate requirement that a political subdivision be treated as a "division" of a state or local government, the Center District is properly treated as a division of the State of Florida. In addition, the Center District has been delegated significant eminent domain, police, and taxing powers. The Center District only needs to possess more than an insubstantial 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 Center District did not possess a substantial 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.[155] In fact, however, the Center District has significant amounts of all three sovereign powers. Accordingly, the Center District is properly treated as a political subdivision for purposes of Section 103 of the Code.

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153 *See supra* note 67.

154 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.").

155 *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).