SPECIAL ASSESSMENTS & MEDICAID FUNDING

Medicaid Funding

Medicaid is a joint federal-state health insurance program that provides medical coverage to a low-income population consisting of children, pregnant women, people over 65, and individuals with disabilities. *See* 42 U.S.C. § 1396, *et seq.* Although the program is administered by the states, Medicaid is jointly funded by states and the federal government through federal matching of state funds. 42 U.S.C. § 1396b.

State general revenue comprises a large share of the funds receiving a federal match. Other forms of revenue collection, however, also qualify for matching. For example, local governments can collect funds and use intergovernmental transfers (IGTs) to send them to the state for federal matching. *See Social Security Act* § 1902(a)(2); 42 CFR § 433.51. IGTs have the advantage of increasing the magnitude of federal spending without a commensurate increase in state general revenue spending. So long as these IGTs comply with federal rules, they are eligible for federal match. *See* Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, PL 102–234, December 12, 1991, 105 Stat. 1793; *Social Security Act* § 1903(w).

Medicaid payments funded by matching serve a vital purpose. Hospitals that provide Medicaid services or other forms of indigent care often fail to receive full compensation for those services. Indeed, the Florida Hospital Association recently estimated that Medicaid reimbursement equates to approximately 66 percent of total procedure costs, leaving hospitals with 34 percent of costs unreimbursed. Unlocking federal funds through IGTs allows hospitals to cover this gap and to continue providing care to Floridians in need.

In November 2020, the Agency for Health Care Administration (AHCA) applied for approval for a directed payment program (DPP) designed to address this Medicaid reimbursement shortfall. As part of the Centers for Medicare & Medicaid Services' review of the Hospital DPP, the agency requested information from AHCA regarding the source of the non-federal share. AHCA stated in its Feb. 9, 2021, response to CMS, "For participating private hospitals, provider tax revenues transferred by counties and generated *through non-ad valorem special assessments* will be the source of the non-federal share. The county will certify that the special assessments will comply with health care related tax rules through the Letter of Agreement." (emphasis added). From the federal perspective, a non-ad valorem special assessment is a provider tax under 42

C.F.R. Part 433 Subpart B. CMS, therefore, is quite aware that the special assessments will be used for this purpose.

Special Assessment Authority

Article VII, Section 9 of Florida's Constitution states that municipalities and counties may levy taxes only if authorized by general law. Notwithstanding this limitation, local governments retain statutory and inherent home-rule authority to charge special assessments without express legislative authorization. *See* Art. VIII, § 6, Fla. Const.; § 125.01(1)(r), Fla. Stat.; *see also City of Boca Raton v. State,* 595 So. 2d 25, 29 (Fla. 1992), *modified sub nom. Collier Cty. v. Fla.,* 733 So. 2d 1012 (Fla. 1999), *and holding modified by Sarasota Cty. v. Sarasota Church of Christ, Inc.,* 667 So. 2d 180 (Fla. 1995).

A special assessment is like a tax in many respects. Like a tax, it is an "enforced contribution" from a property owner. *Klemm v. Davenport,* 129 So. 904, 907 (Fla. 1930). Also like a tax, it is used to fund "usual and recognized [local] improvements and services." *Charlotte Cty. v. Fiske*, 350 So. 2d 578, 580 (Fla. 2d DCA 1977).

Despite these similarities, a special assessment has several distinct characteristics. Although a tax need not provide any specific benefit to property and "may be levied throughout the particular taxing unit for the general benefit of residents and property," *City of Boca Raton,* 595 So. 2d at 29, a special assessment: (1) must confer a specific benefit (2) upon the real property of payors. *Id.*; *City of N. Lauderdale v. SMM Properties, Inc.,* 825 So. 2d 343, 350 (Fla. 2002). Additionally, a lawful special assessment must be fairly and reasonably apportioned according to the benefits received. *Sarasota County*, 667 So. 2d at 183. This requirement is not onerous; the apportionment will be upheld as a legislative determination so long as it is not arbitrary. *Id.* at 184; *see also City of Winter Springs v. State*, 776 So. 2d 255, 257 (Fla. 2001).

Special Assessments for the Directed Payment Program

Several hospitals in Indian River County support adoption of a non-ad valorem special assessment to collect funds for IGT and federal matching. The county may use the assessment to gather revenue and then transfer it to the state for federal matching. Indian River County's hospitals recognize the benefit of a special assessment, which would charge hospitals only, over traditional forms of taxation as a means to generate a pool of funds capable of drawing down available federal dollars. Faced with the reality that hospitals typically spend more to deliver Medicaid services than they receive in reimbursement–thus restricting incoming revenue and diverting funds that would otherwise be available for improvement of physical plant and patient

services–hospitals appreciate the partnership of local governments to adopt creative strategies that unlock available federal funds to cover the Medicaid reimbursement shortfall.

Whether local governments can use a special assessment for such collection and IGT under Florida law requires analysis of two questions:

1) Does the result of the collection qualify as an appropriate service or benefit to payors?
2) Does the benefit derived from the assessment improve the value of the affected land?

As explained below, the answer to these questions is yes.

Result of the Collection

Under Florida law, "the portion of the community which is required to bear [a special assessment must] receive[] some special or peculiar benefit . . . as a result of the improvement made with the proceeds of the special assessment." *Klemm*, 129 So. at 907. Any such benefit need not be unique to the bearer, but it must be "direct" and "special." *See Lake Cty. v. Water Oak Mgmt. Corp.*, 695 So. 2d 667, 670 (Fla. 1997). Benefits are not limited to capital projects or physical construction (*e.g.*, a new road, new streetlights); provision of vital services suffices. *Madison Cty. v. Foxx*, 636 So. 2d 39, 50 (1st DCA 1994). Neither case law nor statute provides any finite list of benefits that qualify.

An overview of existing case law shows that courts have approved a broad array of services and benefits funded through special assessments. They include:

- Fire protection, *see Fire Dist. No. 1 of Polk County v. Jenkins*, 221 So. 2d 740 (Fla.1969);
- Garbage collection, *see Fiske*, 350 So. 2d 578;
- Recycling services, *see Sockol v. Kimmins Recycling Corp.*, 729 So. 2d 998, 999 (Fla. 4th DCA 1999);
- Erosion control, *see City of Treasure Island v. Strong*, 215 So. 2d 473 (Fla. 1968);
- Sewer improvements, *see City of Hallandale v. Meekins*, 237 So. 2d 318 (Fla. 4th DCA 1970), *aff'd sub nom. Inv. Corp. of S. Fla. v. City of Hallandale*, 245 So. 2d 253 (Fla. 1971). 245 So. 2d 253 (Fla. 1971);
- Street improvements, *see Bodner v. City of Coral Gables*, 245 So. 2d 250 (Fla. 1971);
- Beautification projects, *see City of Winter Springs v. State*, 776 So.2d 255 (Fla. 2001),
- Security guard gate and security services, *see Rushfeldt v. Metropolitan Dade County*, 630 So.2d 643 (Fla. 3d DCA 1994); and

- Law enforcement protection and mosquito control, *see Quietwater Entertainment, Inc. v. Escambia County*, 890 So. 2d 525, 527 (Fla. 1st DCA 2005).

In line with these decisions, local governments around the state have lawfully adopted special assessments to fund many services. Miami-Dade, for example, has adopted special assessments to fund solid waste management, security, lighting, landscape maintenance, aquatic weed control in lakes, and maintenance of community walls and entrance features.

Although the list of projects and services is diverse, the common thread tying this assortment together is the direct and special nature of the benefit to payors. The entities affected by the assessment must obtain some positive impact as a result of their payment. Courts afford great deference to local governments on the question whether projects qualify as providing a proper benefit. Indeed, courts agree that a "legislative determination as to the existence of special benefits . . . should be upheld unless the determination is arbitrary." *See Sarasota Cty.*, 667 So. 2d at 184.

Here, the *service* provided by the county is the collection of funds and the transfer to the state for federal matching. This service is one local governments—and local governments alone—are uniquely positioned to provide. Because of the nature of federal requirements related to Medicaid-match eligibility, private collection arrangements do not suffice. *See Social Security Act* §1903(w); 42 CFR Part 433 Subpart B. Only funds collected by state entities through permissible mechanisms and transferred through IGTs satisfy the necessary criteria.

Performing mandatory collections, authorized by law or ordinance, is a "usual and recognized" function of local government. *Fiske*, 350 So. 2d at 580. From the genesis of the nation, the government has levied and collected taxes from citizens and businesses. Florida law, combined with the inherent home-rule authority of local governments, bestows the power of special assessment collection on counties. § 125.01(1)(r), Fla. Stat.; *City of Boca Raton*, 595 So. 2d at 29. Just as governments are the "usual and recognized" purveyors of road construction projects and fire service underlying special assessments, so too do they represent the customary assessors and collectors of taxes and other mandatory fees.

Submission of funds via intergovernmental transfer (IGT) is similarly a "usual and recognized" function of local government. Since 2018, the City of Orlando has used IGTs to fund the non-federal share of a directed payment for charity care. Walton County has done so for charity care since 2020. Such transfers are a *service* in that they unlock the available federal matching dollars.

The *benefit* derived from the proposed special assessment is both "direct" and "special." *See Lake Cty.*, 695 So. 2d at 670. Federal funds flow back and directly benefit the payors of the assessment because they offset the cost of providing Medicaid services and other forms of uncompensated care. Because hospitals typically provide such services at a loss, the new form of reimbursement fulfills a critical funding need and frees up revenue streams that can be repurposed for, among other things, physical plant improvements and upgraded patient services. The need for the federal subsidy—the *benefit* conferred as a result of the special assessment—is rooted in the harsh realities of providing indigent care. For these reasons, any county levying an assessment can readily demonstrate the basis for its determination that the special assessment resulted in a benefit to payors of the assessment.

Effect on Land Value

In addition to providing a qualifying benefit, special assessments typically increase the value of assessed real property in some respect. *See Fisher v. Board of County Commissioners*, 84 So.2d 572 (Fla. 1956) ("To constitute a special benefit, the improvement must add something to the usual market value of the assessed property."). However, the test is not rigid, and the Florida Supreme Court has endorsed a benefits analysis that is broader in scope. *See Meyer v. City of Oakland Park*, 219 So. 2d 417, 420 (Fla. 1969) ("The term 'benefit,' as regards validity of improvement assessments, does not mean simply an advance or increase in market value, but embraces actual increase in money value and also potential or actual or added use and enjoyment of the property.").

Beginning in the early 1970s, some courts operated from the premise that the increase-in-value analysis should be divorced from the property's then-current use. In one notable example, the Fourth District Court of Appeal held that "a special use to which property is put cannot be considered" in the value-enhancement calculus; the Fourth District Court of Appeal suggested that the analysis must be blind to the property's usage because the use of the land is voluntary and subject to change. *City of Hallandale*, 237 So. 2d at 322.

That narrow and rigid perspective quickly encountered opposition. In the 1977 case of *Charlotte County v. Fiske*, the Second District Court of Appeal approved a waste-management special assessment distinguishing between residential and commercial property (excluding commercial property from the assessment entirely) because the two types of property required different types of garbage-disposal services. 350 So. 2d at 580. The Florida Supreme Court endorsed this view in the 1995 *Sarasota County* case. Relying on *Fiske*, the Court upheld an assessment for contaminated stormwater treatment services that applied to developed real property but not to undeveloped real property. *Id.* at 185–86. The Court credited the county's

findings that properties with impervious surfaces contributed the polluted stormwater to be treated by the system, while undeveloped properties absorbed runoff and therefore received no benefit. *Id.*

District courts of appeal followed the trend. In 2005, the First District Court of Appeal in *Quietwater Entertainment* upheld an Escambia County special assessment for law enforcement protection and mosquito control for select lands based on the county's legislative findings that the assessed property had "unique tourist and crowd control needs requiring specialized law enforcement services to protect the value of the leasehold property on the island and is subject to mosquito infestation." 890 So. 2d at 527. The continued persuasiveness of this thinking motivated the Florida Supreme Court's 2015 decision in *Morris v. City of Cape Coral*, 163 So. 3d 1174 (Fla. 2015). There, the Florida Supreme Court, in considering a challenge based on apportionment, approved a special assessment for fire-protection services that distinguished between developed and undeveloped property because the developed property derived a greater benefit from the assessment. *Id.* at 1178–79. In reaching its conclusion, the Court relied on reasoning articulated in *Sarasota County v. Sarasota Church of Christ, Inc.* to find that developed property could properly be assessed for fire services at a higher rate than undeveloped property because the cost to replace the respective structures differed and the service therefore provided a greater benefit to the developed property class. 163 So. 3d at 1179.

This line of thinking also has led courts to conclude that the value-enhancement calculus may account for the effect on individuals occupying the assessed land. Courts will not uphold a special assessment ordinance if the initiative provides only a "personal benefit to individuals," but not to property. *See City of N. Lauderdale*, 825 So. 2d at 348, 350 (invalidating an assessment for emergency medical services); *see also Crowder v. Phillips*, 1 So. 2d 629, 631 (Fla. 1941) (en banc) (finding an assessment for construction of a hospital invalid because "there is no logical relationship between the construction and maintenance of a hospital, important as it is, and the improvement of real estate situated in the district"). Likewise, courts will not uphold an assessment if the benefit conferred upon the payors is not "different in type or degree from the benefits conferred to the community as a whole." *Hanna v. City of Palm Bay*, 579 So. 2d 320, 323 (5th DCA 1991).

But where the county can prove some "logical relationship" between the value of the payors' property and the project's purpose, the assessment will survive. *See Lake Cty*, 695 So. 2d at 670 (noting that a logical relationship must exist between the services provided and the benefit to real property). This view has led courts to uphold assessments for services such as garbage collection, fire rescue, and mosquito control—services that add value to land by virtue of enhancing its value and utility to occupants. These services are proper bases for assessments

because they enhance property value by providing derivative benefits, such as lower insurance premiums and increased rent ceilings for occupying tenants. *See Lake Cty.*, 695 So. 2d at 669; *Fire Dist. No. 1 v. Jenkins*, 221 So. 2d 740 (Fla. 1969). Courts agree, therefore, that the "logical connection" hurdle is overcome whenever the local government establishes the increased-value connection in the record.[1]

Even if the determination of enhanced value is subjective in some respects, courts respect that such matters are "questions of fact for a legislative body rather than the judiciary," and that local government's findings "should be upheld unless the determination is arbitrary." *Morris*, 163 So. 3d at 1177 (citing *Sarasota Church of Christ*, 667 So. 2d at 183). As a general matter, courts are deferential because they recognize that "[n]o system of appraising benefits or assessing costs has yet been devised that is not open to some criticism." *S. Trail Fire Control Dist., Sarasota County v. State*, 273 So. 2d 380, 383 (Fla. 1973) (quoting *City of Fort Myers v. State*, 117 So. 97, 104 (Fla. 1928)). So long as the government has some evidence to support enhanced value, suits premised on the notion that value is not enhanced fail. *See Harris v. Wilson*, 656 So. 2d 512, 515 (Fla. 1st DCA 1995), *approved*, 693 So. 2d 945 (Fla. 1997) ("As the County has made its legislative findings as to the existence of special benefits from disposal services, the courts should not substitute their judgment for those determinations."); *City of Hallandale*, 237 So. 2d at 320–21 ("[I]f reasonable men may differ as to whether land assessed was benefited by the local improvement, the determination of the city officials as to such benefits must be sustained."). Only where the city fails to produce *any* competent, substantial evidence that the property value of a parcel actually increased have courts invalidated the assessment. *See, e.g.*, *City of N. Lauderdale*, 825 So. 2d at 350 (invalidating a special assessment for provision of emergency medical services because the city offered "no testimony or expert opinion indicating how the portion of the assessment providing for emergency medical services specially benefits real property"); *Indian Creek Country Club, Inc. v. Indian Creek Vill.*, 211 So. 3d 230, 236 (3d DCA 2017) (rejecting a special assessment for security services because there was "no evidence in the record to show that any of the real property owners (residential or commercial) would get lower insurance premiums as a result of the Village providing general law enforcement to its residents' real property; there appears to be no evidence in the record of an increase in law enforcement capabilities and patrols as a result of the special assessment; [and] there is no data

[1] Courts, however, will not find an adequate logical connection established where the local government presents only abstract testimony that the proposed benefit "generally renders real property more valuable and more marketable," without providing evidence of any specific increase in actual value of affected lots. *See Donnelly v. Marion Cty.*, 851 So. 2d 256, 265 (5th DCA 2003). In *Donnelly*, the court invalidated an assessment, noting that even the "defendants' own expert testified he was unable to say with any exactitude what the increase in the value of any particular lot in the [area subject to assessment] was as a result of provision of the services at issue, even though he was confident that the lots 'are more valuable and more marketable.'" *Id.* at 266; *id.* at 265 n.10 ("Even the defendants' expert could not find any relationship between lower insurance rates [a purported benefit] and the services being provided.").

to show that property values would increase as a benefit of the general law enforcement provided to the Village and Club").

In contrast, where the local government's findings are supported by competent, substantial evidence, they are "entitled to a presumption of correctness." *Desiderio Corp. v. City of Boynton Beach*, 39 So. 3d 487, 493–94 (Fla. 4th DCA 2010) (citing *City of Winter Springs*, 776 So. 2d at 261–62); *Ass'n of Cmty. Organizations for Reform Now/ACORN v. City of Fla. City*, 444 So. 2d 37, 38 (Fla. 3d DCA 1983) (stating that a challenger cannot succeed unless he bears his burden of overcoming the presumption). Courts will accept legislative determinations supported by testimony of experts. Thus, in *City of Winter Springs v. State*, the Fourth District Court of Appeal upheld an assessment for district beautification projects based on findings from a consultant and appraiser hired by the city that a "positive and certain influence on the market value for properties [exists] in areas where such improvements are made." 776 So. 2d at 258.

Comparable testimony supporting the value-enhancing benefit of a hospital special assessment is readily available. Properties eligible for the increased federal match are more valuable than their non-qualifying counterparts in neighboring districts without such assessments. When hospital systems seek to expand into Florida or a given region of the state or consider whether to stay, they will target lands in counties that levy the assessment and offer the federal match. This is so because the assessment results in a benefit: federal matching dollars. The resultant subsidy enables a "uniform percentage increase" in the reimbursement rate for each hospital's Medicaid services. As a result, the payments offset the Medicaid reimbursement shortfall each hospital faces and therefore diminishes the magnitude at which hospitals provide such services at a loss.

Desire for lands offering this benefit will drive up the value, just as provision of certain services, such as fire protection or waste management, do. This assertion is supported by appraisal using the income method of property valuation. Applying that method, the net income generated by the property is measured in conjunction with certain other factors to calculate its value on the current market if the property were to be sold.

Moreover, indirect benefits necessarily become available to payors and their properties as a county implements IGTs that result in payout of federal funds. Payors may apply funds received through matching to increase the value of the affected real property in myriad ways: capital improvements, facility expansion, and covering the costs of maintenance and upkeep. Legislative findings and expert reports to this effect will render the assessment defensible against challenge.

In sum, where the record contains sufficient evidence of benefit to property, courts caution only that special assessments cannot be unreasonable, arbitrary, used to generate profit for the local government,[2] or borne unequally by those affected unless their benefits are proportionally unequal, as well. *See Fiske*, 350 So. 2d at 581. These pitfalls render an assessment invalid. However, the proposed special assessment for hospitals does not present these dangers. The assessment results in a benefit: federal matching dollars that offset the Medicaid reimbursement shortfall each hospital faces and therefore diminishes the magnitude at which hospitals provide such services at a loss.[3]

Comparable Special Assessments in Other Florida Jurisdictions

Recognizing that a hospital special assessment comports with existing legal parameters, two jurisdictions in Florida currently collect assessments to support Medicaid-related IGTs. The City of Orlando collects an assessment based on the gross outpatient revenues of hospitals within the city limits that provide uncompensated charity care. These funds go to the state and then increase the draw-down from the Low-Income Pool. Collection began in 2018, and it remains intact. Walton County, too, adopted a special assessment in 2020 designed to collect funds for IGT and federal matching. The City of Pensacola previously also used a special assessment for the same purposes.

To date, no payor has challenged these assessments in court. Entities with standing to levy such challenges are limited to the pool of payors of the assessment, and paying hospitals desire to continue contributing to the fund to obtain federal matching dollars.[4] *See Hays v. City of Tampa*, 154 So. 687 (Fla. 1934) (concluding that a complaint against a special assessment is subject to dismissal if a plaintiff does not allege facts showing it has an interest that will be

[2] The *Fiske* court did not elaborate on what constitutes a "profit" for the local government. The confines of this boundary remain untested.

[3] Because the rate of assessment is based on net patient revenue, the benefit conferred is connected proportionally to amount due.

[4] Even if a challenge were asserted, Florida courts have held that refunds may not be appropriate if "equitable considerations" would preclude them. *See Gulesian v. Dade Cty. Sch. Bd.*, 281 So. 2d 325, 326 (Fla. 1973). Such considerations include whether the assessment was levied in good faith and whether refunding "would impose an intolerable burden" on the government entity. In *Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997), the Florida Supreme Court specifically held that "[w]here an invalid tax scheme applies across the board and confers a commensurate benefit . . . 'equitable considerations' may preclude a refund." *Dryden*, 696 So. 2d at 730 (citing *Gulesian*, 281 So. 2d at 325). In *Dryden*, the plaintiffs were not entitled to refunds because the special assessments, though invalid, "were non-discriminatory (i.e., they applied across the board to all property owners in the county), and they conferred a commensurate benefit (i.e., they provided for garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further, the county acted in good faith in imposing these assessments." Id. at 730. The case against any kind of a refund should the proposed assessment here be invalidated is even stronger in light of the receipt and distribution of matching federal funds. Unwinding the funding process would likely prove insurmountable and lead a court, in light of the actual benefit received, to refuse to order a refund.

adversely affected by the challenged assessment). As a result, these programs have continuously generated valuable federal matching funds for affected hospitals.

Other jurisdictions around Florida are in the process of adopting ordinances designed to generate funds for IGTs that will obtain federal matching to cover the Medicaid shortfall.[5] The availability of these local programs will attract hospitals seeking to expand into the state to assessing counties. Because Florida law allows for use of special assessments to generate funds for such IGTs, counties across the state can partner with local hospitals—stalwarts of the community, providers of indigent care, and large-scale employers—to provide much needed benefit and financial relief. Indian River County should follow the example of the state's entrepreneurial localities and pass the assessment ordinance.

[5] On April 22, 2021, Escambia County adopted an ordinance authorizing the hospital local provider participation fund. Brevard County adopted a similar ordinance on May 18, 2021. The counties have not yet passed the resolutions specifying the rate for collection for the current fiscal year.