# Phantom Governments: Multiple Function Special Districts as Substitutes for Municipalities

By

Evan McKenzie

Political Science Department

University of Illinois at Chicago

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# Introduction

Special districts have received relatively little attention from scholars in urban politics and state and local government, and until recently that neglect may have been merited. Special districts have historically been created to play an interstitial role in local government, usually performing only a single function—such as water provision, fire protection, or mosquito abatement--that was largely technocratic and instrumental. It often seems unobjectionable to place these districts under the control of small boards of directors rather than elected city councils. For scholars and the press, they have been relatively invisible, operating outside the political arena where large questions of "who governs?" were decided. Courts have even thought it fair to exempt special districts from the "one person, one vote" rule and sometimes allow voting rights based on land ownership, such as "one acre, one vote."

But this situation has changed, and now several states have endowed special districts with nearly all the powers of municipalities, without the limitations that go along with general purpose local government, and in some cases run by real estate developers with little public accountability or outside scrutiny. Those who control these multiple function special districts issue municipal bonds to build infrastructure in support of extensive residential development; tax district residents to pay the bondholders; govern communities as they wish, largely free from electoral control; and sometimes engage in highly profitable self-dealing between the subdivision they own and the district they control.

These multiple function special districts (which I refer to here as MFSDs) go by different names and have varying powers and limitations in different states. Florida provides some of the most dramatic examples, but events in California and other states demonstrate that this is not a single-state situation.

At its core, the rise of MFSDs represents a new way to solve an old problem: who is to bear the cost and the risk of building infrastructure in large-scale residential development? Infrastructure systems must be constructed before the houses are even built, and if they fail to sell as expected, somebody bears a huge loss. In decades past, municipalities generally assumed that responsibility. More recently, developers would borrow money to build infrastructure, pass the construction cost along to the home buyers, and put maintenance costs and responsibility in the hands of private homeowners' associations. Many developers have defaulted on their loans and bankrupted large projects because the units failed to sell as planned, which is why smaller projects, or phased construction, are viewed as less risky.

The MFSD approach offers a way of building infrastructure for projects with tens of thousands of units. State legislatures, eager to attract large-scale residential real estate construction, are sometimes willing to offer developers their own governments. The developer-controlled MFSD can issue tax-exempt municipal bonds, pay the developer with the bond revenue, and then compel owners to service the bonds for decades. With the low interest rates of municipal bonds, the private developer's personal government can save the developer millions of dollars in borrowing costs as compared with a bank loan.

Taken collectively, MFSDs present a challenge to accepted notions of democratic representation and raise questions about the future of municipalities as the default form of local governance and urban infrastructure provision. (Shoked 2013)

## The Evolution of Special Districts

Special districts have been part of American local government for over 200 years. The recent rapid increase in their total numbers should be one of the most noticeable features in local governance, but it happens to be one of the least studied and least visible, not just to academia but to the citizenry and the media. In his classic work on special districts, John C. Bollens noted that "The general lack of information and knowledge about the location and limits of special districts after their establishment makes even their approximate boundaries unknown." Incoming residents, he said, learn of other governments in the area, but "Many of them do not discover their special district areas until the tax and service bills arrive...In this sense many special districts are phantom governments." (Bollens 1957, 30)

In 2012, the Kentucky Auditor of Public Accounts called special districts "ghost governments," and stated, "It is a scandal that for generations no Kentuckian could answer basic questions as to the number of special districts, nor how much they tax, fee, spend, or hold in reserves. Not anything more than blind guesswork could estimate whether these districts were compliant with the existing reporting requirements of state law, as we have a near-toothless system that treats the law-abiding precisely the same way as those operating outside of it." (Edelen 2012, 1) Si

The same could be said of many other states where special districts have proliferated with little attention being paid to what they were doing, how much they were borrowing, spending, and taxing, or who was benefiting from their actions.

Special districts have in most cases been created to provide an infrastructure-related need that general purpose local governments could not do well, or could not pay for. In 1797, the Rhode Island state legislature created a fire district, and in the early 1800s a number of other special districts were created to fund a number of projects, including draining systems, toll roads, canals, and bridges. Even in those early years, the main reason for creating these districts was that state legislatures believed that "existing local governments were not up to the task of providing certain infrastructure or specific services" and wanted to pay for it in some way other than the budget of a municipality or county. (Shoked 2013, 1978)

Although special districts are sometimes created by a special act of state legislatures, it is more common now for these districts to be established under a general state law that delegates to some state or local agency or government the power to do this. This transition to general acts began in 1887 in California with a law that facilitated creation of irrigation districts, and this approach rapidly spread across the nation, contributing to a rapid increase in the number of districts, so that by 1933, over 8500 special districts had been established. (Shoked 2013) The Progressive Era view of government seemed to favor special districts over municipalities in some respects. Many

progressive believed that cities would be unable to carry out administrative tasks in a professional manner, either because the function was technical and required specialized knowledge, or because they wanted the service to be delivered free from politics, patronage, and corruption.

The New Deal architects had a marked preference for working with special districts instead of municipalities as recipients of federal aid in housing and soil conservation. As law professor Nadav Shoked explains,

> Proponents of the New Deal perceived city government as hopelessly indebted and inefficient. The special district appeared to be a promising alternative. It was all the things the city was not: apolitical, specialized, service oriented, and public interest minded. Unlike the city that played an amorphous and political role in citizens' lives, the special district presented the possibility of expertise-driven government, an idea particularly appealing to the New Dealers who were firm believers in science-driven social policies and management. (Shoked 2013, 1987)

The 2012 Census of Governments found it "particularly noteworthy" that "…special districts over the 60 year time period have increased from 12,340 districts in 1952 to 38,266 districts in 2012." (Hogue 2013, 4) Special districts, not counting school districts, now outnumber the nation's 19,519 municipalities by almost two to one.

*Table 1: Local governments in US, 2012*

- **Total local governments: 90,056**
  - ***Special purpose governments:*** **51,146**
    - Special districts: 38,266
      - Single function 33,031
      - Multi-function 5,235
    - School districts: 12,880
  - ***General purpose governments:*** **38,910**
    - Municipalities: 19,519
    - Townships: 16,360
    - Counties: 3,031

*(Sources: Hogue 2013; Keating 2013)*

It is difficult to determine how much of the nation's total infrastructure, or "public works," financing and management is done by special districts. This is in part because of the difficulty of defining the basic terms, such as "special purpose government," "special district," "special authority," "infrastructure," and "public works." These terms do not have clear, simple definitions that have been agreed upon by scholars and government. ). One study of 105 metro areas conducted in concluded that in 1987 special districts accounted for over 25% of capital outlays for infrastructure. (Nunn and Schoedel 1997).

One estimate done in 1995, based on Census Bureau estimates and other data, concluded that, "…it is likely that special purpose government spending on public works may exceed 43% of total state and local government spending for such purposes. Assuming that states and localities account for 90% of all spending on public works, this puts the national amount attributable to special purpose governments at approximately 39%." (Leigland 1995, 144

Much of the recent growth in special districts involved creation of multiple-function districts to finance infrastructure for residential development. There are at least 5,235 multiple-function special districts in the nation, and they have a variety

of names and specifications in different states. One of the more common designations is "community development district," but the nomenclature varies so widely that accurate classification and counting become difficult. In an interview with *Government Product News*, Stephen Owens, Chief of the Government Organization and Special Programs Branch of the Governments Division at the U.S. Census Bureau, said, "Community development districts that are put in place to finance the infrastructure for new development are growing in several states. These are known by a variety of names, but the underlying principle is the same." (Keating 2013) And that principle is simple: existing general purpose local governments want new development, but they are unable or unwilling to fund the infrastructure needed to support it. So, special districts are created that issue bonds to build infrastructure and tax or assess the residents of the district to pay the bondholders.

It has not always been this way. There was a time when it was understood that local governments were responsible for building the infrastructure needed for new development, and it would be funded either by increasing taxation or by issuing revenue bonds or general obligation bonds. But from the 1970s to the present, and often with increasing severity, many local governments faced a series of serious fiscal challenges. These include reductions in certain federal grant-in-aid programs; loss of population and tax base to the growing suburban ring; increasing demands for social services, policing, corrections, pensions and other nearly unavoidable costs; and growing resistance to taxation that gave rise to the imposition of tax, debt, and expenditure limitation laws. For many cities, existing levels of indebtedness make new bonded indebtedness impractical, because it would imperil the government's bond rating and increase the cost of further borrowing.

James Leigland concluded that "The ability to sell revenue bonds, and thus circumvent state and local restrictions on public borrowing, appears to be a principal reason for the proliferation of special purpose governments." (Leigland 1995, 165

The fiscal imperative of local governments to grow without paying for infrastructure drove the rise of common interest housing (CIDs) in most rapidly growing parts of the nation, with many local governments requiring the creation of private residential governments in all new subdivisions. Developers would borrow funds needed to build roads, sewer and water systems, and other infrastructure, pay off the loans from the sale of new homes in an inflated market, and put a private residential government in place that would hold all the residents permanently accountable for these infrastructure systems in perpetuity. The residents in these development are subject to "double taxation": paying a full share of property taxes to local government, and also paying private homeowner association assessments. The resulting tax windfall made CID housing a "cash cow" for local governments. (McKenzie 1994)

However, there are limits to the strategy of relying on private residential governments to meet infrastructure needs. The rise of CIDs coincided with a tremendous inflation in the price of new housing, and that bubble created an enormous pool of value in the form of home equity that could be used to finance

infrastructure construction and maintenance. That resource has vanished in many parts of the country. The crash of the housing market in 2007 and 2008 evaporated an estimate $8 trillion in "bubble wealth." (Isodore 2011). This loss of home value and equity produced a wave of foreclosures and bankruptcies that still has not fully run its course. Millions of homeowners were left underwater on their mortgages, and many thousands of homeowner and condominium associations descended into a state of actual or threatened insolvency. Because these associations are entirely dependent on the resources of their homeowners, they have been exposed as much more fragile than was ever contemplated during the boom years. (McKenzie 2011) Thus, private residential governments no longer look like a fiscal panacea for cities and counties looking to develop without having to pay for infrastructure.

In addition, the up-front cost of building entire infrastructure systems has always made large-scale real estate development a risky proposition for banks, developers, and local governments. If projects to not sell out quickly enough, even large developers run the risk of financial disaster, as evidenced by the many "New Towns" that failed in the 1970s, and the numerous developer bankruptcies that occurred during the recent price collapse.

Multiple-function special districts are an increasingly popular vehicle for assuming that risk. They can issue tax-exempt municipal bonds; district property owners must pay what they owe the district as a line item on their property tax bill; districts are often free from tax and expenditure limits that hamper local governments; they are separate entities that have their own bond rating; they are, as Bollens observed, largely invisible and their charges relatively unnoticed and mysterious; local government officials are not held electorally accountable for the costs they impose on residents; they are in many cases controlled by developers rather than voters during their critical early years; and, as is discussed below, they can be set up so as to offer incredible financial windfalls to real estate developers. This is why it is estimated that "bonds finance 40% of new annual infrastructure investing," and why "it is likely that considerably more than half of this revenue debt is issued by special purpose governments." (Leigland 1994, 144)

## Special districts and representative democracy

There is one other advantage that special districts offer to those who wish to operate them. Although they are governments, they are not necessarily subject to popular control through the ballot box in the same way as municipalities, and even homeowner associations, normally are. District directors can make major decisions involving hundreds of millions of dollars free from electoral accountability. Even if residents penetrate the veil of invisibility that surrounds district affairs, they may find that they are unable to change anything.

In the case of *Reynolds v. Sims*, 377 US 533 (1964), the United States Supreme Court held that the equal protection clause of the Fourteenth Amendment requires

that state legislative bodies must be apportioned by population so that the principle of "one person, one vote" is protected. The Supreme Court in *Reynold*s expressly rejected voting based on land ownership, saying, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." (p. 377)

This principle was extended to units of local government in the cases of *Avery v. Midland County*, 390 US 474 (1968), and *Hadley v. Junior College District,* 397 US 50 (1970). But when the Supreme Court was faced with challenges to the electoral systems of special districts , the situation became more complicated, and often special districts have been exempted from "one person, one vote." As law professor Natan Shoked writes,

> The most prominent legal ramification of special district status pertains to the right to vote. Ever since the 1960s, traditional local government entities, such as cities and counties, have been subject to the one person, one vote principle embedded in the Fourteenth Amendment's Equal Protection Clause. Special districts, however, are for the most part exempt from the rule. Accordingly, a special district may, for example, confine voting rights to owners or weigh votes differently to reflect landholding or membership in a specific community. In other words, unlike a city or county, a special district may decide that its governing board be elected by "farms, or cities, or economic interests" and represent "trees or acres," as opposed to people. Not only may the special district avoid the restrictions that the Equal Protection Clause imposes on elections, it may occasionally avoid the elections themselves. The Equal Protection Clause's one person, one vote rule only applies if elections are held. Thus, if a state legislature decides to appoint local officials, rather than elect them, the rule is irrelevant. That is to say, the rule is irrelevant unless there is a basis for forcing a state legislature to hold elections. As a matter of federal law, courts are reluctant to prohibit the appointment, rather than election, of special district boards. For their part, state constitutions and laws routinely limit the requirement that local governments be elected to cities and counties. (Shoked 2013, 1988-89)

If a special district performs only one or a few related functions, voting by acre is sometimes allowed. In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 US 719 (1973), the district's directors were selected by vote of landowners on a per-acre basis. The Supreme Court held that this was constitutional, even though the district had the power of eminent domain and could issue bonds. The court, in an opinion by Justice Rehnquist, found that the district did not exercise other government powers such as schools, housing, transportation, provision of utilities, or other typical functions of local government.

> We conclude that the appellee water storage district, by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group, is the sort of exception to the rule laid down in Reynolds which the quoted language from Hadley, supra, and the decision in Avery, supra, contemplated.
>
> The appellee district in this case, although vested with some typical governmental powers, has relatively limited authority. Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin. It provides no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body. App. 86. There are no towns, shops, hospitals or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses, or trains. Ibid.
>
> Not only does the district not exercise what might be thought of as "normal governmental" authority, but its actions disproportionately affect landowners. All of the costs of district projects are assessed against land by assessors in proportion to the benefits received. Likewise, charges for services rendered are collectible from persons receiving their benefit in proportion to the services. When such persons are delinquent in payment, just as in the case of delinquency in payments of assessments, such charges become a lien on the land. Calif. Water Code 47183, 46280. In short, there is no way that the economic burdens of district operations can fall on residents qua residents, and the operations of the districts primarily affect the land within their boundaries.
>
> Under these circumstances, it is quite understandable that the statutory framework for election of directors of the appellee focuses on the land benefited, rather than on people as such. (pp. 728-30)

Then, in *Ball v. James* , 451 US 355 (1981), the Supreme Court held that the Salt River Project Agricultural Improvement and Power District did not exercise general government powers and therefore the state of Arizona could provide that only landowners could vote for the district's directors. This, despite the fact that the district was enormous, provided water and electric power, and included half the population of the state. The court wrote,

> [T]he Salt River District includes almost half the population of the State, including large parts of Phoenix and other cities. Moreover, the Salt River District, unlike the Tulare District, has exercised its statutory power to generate and sell electric power, and has become one of the largest suppliers of such power in the State. Further, whereas all the water delivered by the Tulare District went for

> agriculture, roughly 40% of the water delivered by the Salt River District goes to urban areas or is used for nonagricultural purposes in farming areas. Finally whereas all operating costs of the Tulare District were born by the voting landowners through assessments apportioned according to land value, most of the capital and operating costs of the Salt River District have been met through the revenues generated by the selling of electric power. Nevertheless, a careful examination of the Salt River District reveals that, under the principles of the Avery, Hadley, and Salyer cases, these distinctions do not amount to a constitutional difference.
>
> First, the District simply does not exercise the sort of governmental powers that invoke the strict demands of Reynolds. The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.
>
> Second, though they were characterized broadly by the Court of Appeals, even the District's water functions, which constitute the primary and originating purpose of the District, are relatively narrow. (pp. 365-67)

In practice, these precedents allow courts considerable latitude in deciding whether a special district must have elections by registered voters, or whether landowner control should be allowed. The question of whether a district performs "general government functions," or only a limited set of functions, and whether its activities disproportionately affect landowners, is hardly a bright-line rule. State legislatures are able to draft laws with prefatory language that defines districts as having limited purposes, but then in the details of the law the legislature can list an enormous list of governmental powers that the districts are free to exercise. A court that is disposed toward allowing the districts to operate under landowner control can focus on the prefatory language, while another court might look at the list of powers and conclude that "if it walks like a duck, it is a duck." Consequently, state supreme courts have taken different views of these issues. (Briffault 1993)

In the section that follows, I will consider how MFSDs operate in Florida and California. This will include a look at how the supreme courts of Florida and California applied the "general government functions" test to landowner control of MFSDs in their respective states.

## Phantom Governments in Action: Florida and California

Florida and California have substantial numbers of MFSDs that have similar functions and that can function as substitutes for municipalities. However, there are differences in the ways these states view the question of landowner control versus resident voting, and these differences are instructive.

Florida has a few huge districts that were specially created by the state legislature and hundreds of others that were brought into existence through procedures set out in a general statute. In both categories, the actions of the legislature and the courts seem to be aimed at creating a developers' paradise with maximum freedom and minimal oversight. They have given developers the power to act as governments when it suits them, and then to be private corporations when that is more convenient. This hat-swapping has led to astonishing developer behavior that finds no parallel in the actions of any municipality.

In California, the legislature and the courts have taken a different approach. The laws are more protective of the rights of residents living in the districts, and there is more oversight of the actions of MFSDs. However, while developer self-dealing and autocracy are not a major problem, the California experience with MFSDs still raises questions about the extent to which special districts may replace municipalities.

### Ave Maria: the special district as a "ticket to Heaven"

In Collier County, Florida, is a community called Ave Maria. It is home to about 28,000 people on a tract of land totaling 10,805 acres. It is located east of the gulf coast city of Naples and only a few miles from Immokalee, a poor Hispanic community that the US Department of Justice considers to be a hotbed of involuntary servitude.

Ave Maria has all the attributes of a thriving small city, and more. It is home to an eponymous university and law school, it has a burgeoning crop of businesses and a growing population of relatively affluent people. At its center is the only church allowed in town: an enormous and architecturally renowned Catholic church called the Ave Maria Oratory. Political luminaries of the Republican right have made speeches in Ave Maria, including former President George Bush, former Florida Governor Jeb Bush, Senator Ted Cruz, columnist Charles Krauthammer, former Senator Rick Santorum, and Fox News President Roger Ailes.

Ave Maria's residents have many things to appreciate about their community, but participation in local self-governance is not one of them. This is because Ave Maria is not a municipality, but a special district, specifically the Ave Maria Stewardship Community District, authorized under Title 189 of the Florida Statutes.

The residents of the district cannot vote to choose their local government, and it is entirely possible that they never will.

Specially authorized by the Florida legislature and signed into law by Governor Jeb Bush in 2004, Ave Maria is governed by a five person board of directors who are chosen by the developers of the community. These developers are Barron Collier Companies, an organization so large and consequential that its founder, Barron Collier, gave his name to the county, and billionaire Tom Monaghan, the founder of Domino's Pizza, former owner of the Detroit Tigers, and an ultra-conservative Catholic who envisioned Ave Maria as a utopian "ticket to Heaven" for the Catholic faithful. The university and the law school are explicitly and assertively dedicated to restoring the values of a brand of Catholicism that pre-dates Vatican II. Monaghan explained his vision to the *Catholic Register* in 2010:

> Under Monaghan's plan, the seven-year-old university with more than 700 students will by 2077 produce 4,000 priests — "good priests" — 2,500 nuns, 400 "top notch" theologians, 8,000 teachers for U.S. Catholic schools, 1,500 school principals and 40,000 "strong Catholic marriages" which will in turn produce 150,000 children and 500,000 grandchildren. "That's just the beginning," said Monaghan. "The payoff will be the influence we will have had on the other 200-and-some Catholic, so- called Catholic, schools in the country. Hopefully we can be a beacon to bring them back to their roots. This one little mustard seed we've planted can produce not just a big bush but a whole forest of bushes." (Swan 2010)

Monaghan publicly decreed in XX that there would be no pornography on Ave Maria's cable network, and no birth control in its retail stores. Monaghan said,

> We'll own all commercial real estate. That means we will be able to control what goes on there. You won't be able to buy a Playboy or Hustler magazine in Ave Maria Town. We're going to control the cable television that comes in the area. There is not going to be any pornographic television in Ave Maria Town. If you go to the drug store and you want to buy the pill or the condoms or contraception, you won't be able to get that in Ave Maria Town.

Women and reproduction come in for special treatment under Monaghan's rule. At Ave Maria University, Monaghan has mandated that all female employees must wear skirts—slacks and pantsuits are forbidden. It is reported that the one OB/GYN physician in town will not prescribe contraception. (Kapur 2014). The Publix market in Ave Maria does not sell birth control, although they insist it is for lack of shelf space. (Dillon 2009d) And, despite the fact that the university is exempt under the Hobby Lobby decision from having to pay for health insurance contraception coverage for its employees under the Affordable Care Act, it sued the

federal government nonetheless. Ave Maria challenged the workaround requirement that they must simply notify the department of Health and Human Services of their exemption, so that employees can be notified of their right to obtain contraception from their insurer at federal expense, claiming that even this simple act violated their religious beliefs. This so-called "Hobby Lobby II" litigation involves other plaintiffs and has yet to be resolved.

Yet, although the university and law school are private corporations that are exercising their Hobby Lobby religious freedom rights, the District itself is a public government. The infrastructure at Ave Maria was financed by the sale of $820 million in tax-exempt municipal bonds. (Dillon 2009a) Under the authority of its enabling legislation, the Ave Maria Stewardship Community District (AMSCD) can build and maintain infrastructure and provide services for:

- Water management and control
- Construction of roads and bridges
- Water supply, sewer, and wastewater
- Public transportation, including buses and parking
- Environmental cleanup
- Conservation and wildlife habitat
- Contracting and working with other governments and homeowner associations
- Parks and cultural and recreation facilities
- Health care facilities
- Fire prevention and control
- School construction
- Security, including guardhouses, gates, fences, patrol cars, and other related activities, but without directly exercising law enforcement powers, for which it is authorized to contract with other governments, presumably Collier County
- Mosquito control
- Garbage collection

Despite having all these government powers, Ave Maria's five-person Board of Supervisors that governs the District is not elected by the residents of the district, but instead supervisors are chosen for four-year terms by the developers, because voting is done on a one acre, one vote basis and the developers own most of the land in the district. The supervisors need not live in Ave Maria and must only be Florida residents and United States citizens.

Not only are these supervisors picked by the developers rather than the residents—it is entirely possible that this situation will never change. The residents of Ave Maria may be forever denied the right to vote for the leadership of their local government, and that the developers will be in control as long as Ave Maria exists.

It is understandable, and necessary, that developers of new communities have total control when the project is created and for some time thereafter. They need to be able to subdivide the property, create the infrastructure and connect those systems to the residential lots, set up and run the sales and marketing

operation, and in general launch the new community before there are enough residents to carry out any of these activities. And of course the developer is intensely and legitimately interested in controlling the new community in order to make sure the sales operation is successful. The developer's interest at this early stage is understood by the law to outweigh the interests of the owners, which is why developers are always authorized to control the project for some term of years that varies from state to state.

However, it is always contemplated that developers will eventually relinquish their control over the development and that unit owners—residents and home owners—will take over their own local government. In the case of homeowner association-run subdivisions, the law always clearly sets out when and how this transfer of control will take place. But with legislatively-authorized special districts created under Chapter 189 of the Florida Statutes, such as Ave Maria and Celebration, the Disney development in Orlando, the turnover arrangements are much murkier and appear in those cases to have been set up so that developers can control in perpetuity.

In the case of Celebration, which is governed overall by the legislatively-created Reedy Creek Improvement District, Disney set up an arrangement by which the corporation would have veto power over all homeowner association decisions as long as Disney owned any property within the development. Because Disney owns all the commercial property, and has no intention of selling it, in effect Disney can maintain control of the homeowners' decisions forever. (Frantz and Collins 1999, 167; Foglesong 2001,164)

At Ave Maria, the control issue is more complex, and even disputed. But internal memos circulated among the parties involved in the development process make it clear that they intended to keep indefinite, possibly perpetual control of Ave Maria. This issue was thoroughly plumbed by Liam Dillon, an investigative reporter for the Naples News, in a three-part series of articles collectively titled, "Ave Maria: A Town Without a Vote." (Dillon 2009 a, 2009b, 2009c) As Dillon wrote,

> The law gives Monaghan and Barron Collier Cos. more power than any Florida developers in at least 24 years, perhaps not seen since the days of the early 20th century land boom. The law makes landowners, not registered voters, the ultimate authority in Ave Maria. The law ensures Monaghan and Barron Collier Cos., as the largest landowners, can control Ave Maria's government forever. (Dillon 2009a)

Monaghan and Barron Collier formed a equal partnership called Ave Maria Development, and the partnership is run by an executive committee that has the power to make all important decisions, including selecting the members of the AMSCD Board of Supervisors. Two of the five seats on the board were scheduled eventually to be occupied by representatives elected by the residents of Ave Maria, but a controlling majority of three of the five seats would remain in the hands of the majority property owners—the developers—forever. Barron Collier executives and

their attorney deny that they wish to maintain control forever, and insist that they will voluntarily relinquish control to the residents eventually. (Dillon 2009b, 2009c) But interestingly, no public statement of Monaghan to that effect can be found. Given his stated interest in making Ave Maria a religious utopia and a beacon of conservative Catholicism to the world, and given that his master plan runs through the year 2077, it is easy to imagine that he or his anointed successors may not view turnover to resident governance with the same equanimity as a professional real estate development company like Barron Collier.

And in the development stage, the issue of perpetual control was central to the planning process. In an internal memo dated September 4, 2003, Barron Collier executive Tom Sansbury, who later served as a developer representative on the AMSCD board, wrote to Paul Marinelli, president of Barron Collier, as follows, in a memo that was headed "*Re: Ave Maria Stewardship Community District – Size Determination"* that focuses on whether the district should contain 5000 or 10,000 acres:

> I believe we are all in agreement that the major decision factor on the size of the district is the control issue. At what point do the residents (electors) have the power to control the decisions of the board and affect the value of the undeveloped land?
> **1. Pro 10,000 acres: Control**: With the control language Ken *[note: a reference to the developers' attorney Ken Van Assenderp]* has placed in the act the original landowner will control the board for a very long period of time and with the preserve areas and university votes we could control it in perpetuity. If for some unknown reason the control becomes an issue we could always take the step to remove undeveloped lands.
> ….
> **4. Con 10,000 Acres: Public Perception**: As more units are sold and residents increase there may be a feeling of taxation without representation at some point. Whether that would be in 5, 10, 25 years or ever we do not know. A well-managed program of disclosure and a well-operated district that keeps the resident informed of operations should minimize this potential opposition.
> ….
> I believe it is the opinion of our Attorney, District Management Consultant and myself that we should include the 10,000 acres. There are many examples throughout the state, Acme at Wellington, Weston, Northern Palm Beach County to name a few in which a well disclosed and managed district has had minimal problems with residents. (italics and underlining added)

In a later memo dated December 14, 2004, Sansbury writes to Van Assenderp with a draft memo to be sent to others stating,

> It may seem far in the future that we would be concerned regarding the control of the District with the amount of land we own and the many safeguards we have built into the act but we must remain cognizant of the number of votes we continue to control each time we transfer property. The act allows 1 vote per acre and 1 vote for any fraction of an acre thus as land is sold and lots are subdivided the total number of votes increases…I suggest we keep a centralized log of the ownership as it relates to voting. The log would be periodically updates as landownership passes to second and third parties. (underlining added)

Ultimately, the convoluted language of the enabling act that the developers' lawyer drafted leaves the control issue firmly in the developers' hands. As Dillon put it, "According to Ave Maria's law, the district's registered voters gain control over the district when more than half of it is developed. The town, at its completion, doesn't meet that mark." Only if the developers build residential lots outside the town will it be possible for the registered voters to control the district. (Dillon 2009c)

## Florida CDDs and developer enrichment: The Villages

Ave Maria and Celebration were created as "stewardship districts" by a specific legislative act under Chapter 189 of the Florida Statutes. It could be argued that these are unique situations, and that any lack of democratic accountability in those districts is the result of special lobbying efforts by the developers, which included drafting the enabling legislation and including confusing language whose meaning was understood only by the developers.

In order to evaluate what is being done with MFSDs in Florida, it is necessary to step beyond these specially-chartered Chapter 189 stewardship districts and consider the hundreds of MFSDs that were created under Chapter 190, the general law for creation of Community Development Districts (CDDs). A massive project called The Villages was developed using Section 190 CDDs. Despite provisions in that law that mandate eventual turnover of CDDs from developer/landowner control to district directors elected by registered voters, no such transition has taken place. Moreover, the developer was able to use his control over the district and the subdivision to enrich himself to the tune of hundreds of millions of dollars.

> In 1980 the Legislature enacted the Uniform Community Development District Act, which substantially revised the provisions of the New Communities Act of 1975. The general thrust of both pieces of legislation was to provide a method for financing and managing the construction, maintenance and operation of the major infrastructures necessary for new communities. A central element in

> the approach taken initially in 1975 was to grant to private developers limited governmental status as a special improvement district in order to operate and finance the cost, delivery, and maintenance of certain predevelopment capital improvements such as water, sewer, road and drainage systems and other community facilities. The 1980 revision withdrew a few of the sheep from the custody of the wolves, but retained the attribute of providing exclusive procedures for the creation of special districts which might carry out the purposes delineated in the Act. (Hudson 1982, 64)

Chapter 190 was enacted in 1980 in order to simplify the process by which multiple function special districts were created, eliminate the need for special legislative action, and standardize the structure and powers of these districts. Of the 1635 special districts in the state of Florida, 575 are CDDs. The list of functions and powers of CDDs is spelled out at length in Section 190.012, and the language closely parallels Ave Maria's enabling legislation. As explained by a law firm that represents CDDs, the functions of these districts are in most respects those of municipalities:

> CDDs are empowered by general law to finance, construct, acquire, operate and/or manage, among other infrastructure: water and sewer facilities; water management and control facilities; roads; streetlights; landscaping; hardscaping; the undergrounding of utilities; bridges; remediation costs; conservation and mitigation areas; projects within or outside a district's boundaries required by a local government development order; projects required by a development approval, interlocal agreement, zoning condition, or permit; etc. With permission of the local government with jurisdiction, CDDs may also provide such things as parks, recreational amenities, security, waste collection and mosquito control. (Hopping, Green, and Sams )

Districts of 1000 acres or larger are created by the Florida Land and Water Adjudicatory Commission upon petition by the developer, and districts of under 1000 acres are created by the county commission of the county where the majority of the land is located. Under Chapter 190, a CDD is governed by a five-person board of directors. The original landowners within 90 days after creation of the district and choose the board of directors on a one acre, one vote basis. Because this first meeting takes place before lots are sold, the developer has all the votes and fills the board with developer representatives. The directors do not need to live in the district or be qualified electors. Two members serve for two years and three serve for four years. Elections take place thereafter every two years, at which either two or three directors are up for election.

The transition to resident control, with elections by qualified electors in a public election, begins at 6 years after creation of the district, if it is smaller than 5000 acres, or at 10 years after creation if the district is 5000 acres or larger. But only two of the directors are replaced by vote of qualified electors at 6 or 10 years. Moreover, this election is held only if there are enough qualified electors, i.e, residents of the district eligible to vote. There must be at least 250 electors in the under-5000 acre districts, and at least 500 electors in the over-5000 acre districts. If there are not sufficient electors, then landowner control of the board continues.

The net effect is that developers control the majority of the five seats on the board of small districts for at least 8 years, and with large districts for at least 12 years. This means that all the important financial decisions about bond issuance and other matters are made by a developer-controlled board.

The Florida law creating CDDs was challenged on the grounds that by prescribing one acre, one vote elections it violated the equal protection clause under the rule of *Reynolds v. Sims*. The Florida Supreme Court ruled on this challenge in the case of *Florida v. Frontier Acres Community Development District*. Even though Section 190 gives CDDs a long list of specific powers, the court held that they were single purpose districts nonetheless, because the legislature had a "narrow objective" in creating this enabling act:

> …to address this State's concern for community infrastructure and to serve projected population growth without financial or administrative burden to existing general purpose local governments…Consistent with this objective, the powers exercised by these districts must comply with all applicable policies and regulations of statutes and ordinances enacted by popularly elected state and local governments. Moreover, the limited grant of these powers does not constitute sufficient general governmental power so as to invoke the demands of Reynolds. Rather, these districts' powers implement the single, narrow legislative purpose of ensuring that future growth in this state will be complemented by an adequate community infrastructure provided in a manner compatible with all state and local regulation. (emphasis added)

This ruling, then, took a strange approach to applying the legal standard used for deciding whether special districts should be held to the one person, one vote standard. According to the US Supreme Court, the critical issue is whether the district has a single limited function or a few related powers. If is does, it is exempt from one person, one vote and can have elections by property owners on a one acre, one vote basis. But if, on the other hand, the district exercises general government powers it is required to adhere to one person, one vote. However, the Florida Supreme Court reframed the issue to be whether or not the *enabling legislation* had a single purpose. Instead of considering the wide range of government functions

CDDs were authorized to perform under Section 190, the court focuses on the legislature's intent in passing the law.

The Florida Supreme then Court went on to explain the legislature's rationale behind allowing developers to control the board of directors, to the exclusion of the citizens who live there, who are referred to as those who "merely reside in the district":

> A community development district created under chapter 190 does not exercise general government functions. Its activities however, have a disproportionate effect upon the landowners of the district because they are the ones who must bear the initial burden of the district's costs. Under these circumstances, it is reasonable for the Florida legislature to have concluded that these landowners, to the exclusion of other residents, should initially elect the board of supervisors. We therefore conclude that nothing in the equal protection clause precludes the legislature from limiting the voting for the board of supervisors by temporarily excluding those who merely reside in the district. (emphasis added)

The reference to "landowners, to the exclusion of other residents" appears to reflect a misunderstanding that the landowners must reside in the district in order to vote or serve on the board, which is not the case. Under Section 190, the developer and developer representatives on the board can live anywhere, as long as they are legally "residents of the state and citizens of the United States."

It should be noted that attorney Ken Van Assenderp co-wrote the first draft of Florida's community development district law in 1980, represented Frontier Acres CDD in the appeal to the Florida Supreme Court that affirmed the legality of voting by acre, and wrote the law creating the Ave Maria Stewardship Conservation District. (Van Assenderp 2012)

And how has this institution fared in the state of Florida, with real estate developers given control of their own local governments? A study of CDDs in Florida showed that as of July 2014, 221 of the 575 then in existence were in financial distress, in that they were in default on their bond obligations or otherwise not meeting their financial obligations (Ayers 2014). The report found that,

> Notwithstanding expressed legal requirements in the state-created charter and other related general laws, there are structural inadequacies that have enhanced the impact of the financial decline of CDDs. Such structural inadequacies include: (1) uninformed and counterproductive sales and marketing of parcels; (2) ineffective ongoing financial disclosure; (3) "over-leveraged" non-ad valorem assessments imposed and levied on real property by district boards; (4) inadequate and ineffective validation proceedings; and (5) unclear

> disclosure of the demarcation between home owner associations and CDDs. (Ayers 2014, 1)

Perhaps the most troubling findings in the report concern the lack of reporting or accountability to, or oversight by, any other agency of state government:

> For various reasons, there is little use, reliance and enforcement of reporting from CDDs to state and local governments. This has eroded the ability of state and local governments to exercise applicable oversight…The major legislative reforms that occurred in the 1980s were predicated on accountability. We find inconsistencies concerning the degree to which CDDs are held accountable by outside entities…Accountability of CDDs is, to the extent that state government has involvement with the operations of CDDs, poorly defined and fragmented. We identify the fragmentation noting that seven different arms of the state possess some involvement or decision-making with CDDs…It is unclear how CDDs are accountable, when they experience property foreclosure, or the developer of lands within the District experiences bankruptcy, thereby leaving the District with limited revenue sources to amortize its debt…As with all units of government, state law requires CDDs to report annually on their finances, and our research shows that there has been a noticeable decline in reporting since the 2005-2006 fiscal year. (Ayers 2014, 2)

The amounts of these defaulted or delinquent CDD bonds are staggering (Schifrin 2009). As noted by *Florida CDD Report*, a newsletter dedicated to following the state of these bonds published by *Forbes* magazine columnist Richard Lehmann:

> They have issued $6.5 billion in municipal bonds to finance their infrastructure. Since the collapse of the housing market, over 168 of these districts are in default on $5.1 billion of bonds and, in many cases, the project developer is in financial distress as well. Since some 204 of these projects were launched in 2006 through 2008, all have not yet completed their infrastructure build out, so they have not yet defaulted. However, given the slow turnaround in housing this is often only a matter of time.

## The Villages: Special districts and developer enrichment

The fact that developers are allowed to control the boards of directors of CDDs and also entirely control the subdivision within it creates an obvious conflict

of interest situation. It has been observed that this gives rise to the potential for abuse:

> The Florida Legislature determined that since a developer was assuming most of the risks when developing property, it would allow obvious conflict of interest votes by developer-controlled boards. The Florida Supreme Court agreed. However, the Legislature failed to allow for the possible financial harm that a developer-elected board could cause a district and the residents within its boundaries, by permitting conflict of interest votes that resulted in financial harm to the district and the residents. Furthermore, the developer does not assume all the risks when a district is formed since it is shielded from liability by the district, which assumes many of the risks, while the developer reaps the benefits. That makes it much easier for the developer to walk away from a troubled development, leaving the residents holding the proverbial bag. (Asfour 2013, 14)

This situation is illustrated in the most compelling terms by a development known as The Villages, located in central Florida in Sumter County. This development began its life as a mobile home park that was eventually taken over in 1983 by H. Gary Morse, who saw the potential for a seniors' community there. Morse acquired a great deal of additional land, and the community now known as The Villages was founded in 1992. It is an age-restricted community, where nobody under the age of 19 is permitted to reside, and where 80% of the homes must have at least one resident over the age of 55. As of the 2010 Census, the population was 51,442, but it has doubled since then. The US Census Bureau emphasized its growth rate in a press release, noting that it was the fastest-growing metro area in the nation and had reached a population of 114,000. (US Census Bureau 2015) It has 63 recreation centers, 540 holes of golf in numerous courses, 216 softball teams in 17 leagues, a polo stadium, a 2200-student charter school for employee children, seven fire stations, and eight major grocery stores. (Erisman 2013)

Morse funded the infrastructure for The Villages by creating a dozen CDDs and that issued about $900 million in CDD bonds. At the time he did this, he was in complete control of the CDDs boards of directors, being the sole landowner. He was also the developer/owner of the property in the subdivisions that would eventually be occupied by residents of the Villages. At the crucial time when these financial decisions were made, the land was unoccupied, so Morse totally controlled both the CDDs and the subdivisions. He proceeded to engage in a series of complicated transactions between the CDDs and the subdivisions. The essence of these transactions was that, wearing his developer/subdivision-owner hat, Morse sold subdivision assets to the CDDs. These assets included the common areas of the subdivisions—golf courses, swimming pools, and many other facilities—and the most valuable asset was the assessment stream—the power to collect payments

from the owners for the right to use these recreational facilities. He priced these assets using his own appraiser.

Acting through the boards of directors of the CDDs, Morse issued municipal bonds to pay the subdivisions for these assets. The eventual residents of the subdivisions are obligated to pay the bondholders for 30 years. And an enormous amount of money went into Morse's pockets.

*Orlando Sentinel* reporter Lauren Ritchie has been following this situation for years, (including an IRS inquiry that began with questioning $64 million of the bonds issued by one of the 12 CDDs, about which more below). She summarized the situation as follows:

> Here's the short version of how The Villages developed -- with the help of a state law that spurs growth:
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> The developer builds a community. The law lets him create his very own government, which has the power to borrow breathtaking sums of cash by selling bonds. The developer-controlled government uses the bond money -- bonds are nothing more than loans -- to buy the developer's investment in amenities such as golf courses and pools. But the biggest percentage of the cash from recreational bonds goes to purchase the right to collect fees every month from residents. For example, of the $64 million worth of bonds the IRS is examining, $53.1 million bought nothing concrete. It went to purchase the rights to the future amenity fees.
>
> As of Aug. 31, 10 of the 12 governments in The Villages owed a stunning $709 million on outstanding loans they took out partly to pay developer Gary Morse for everything from future fee collections to retention ponds, sewer plants, clubhouses, swimming pools and golf courses. A developer typically wraps the cost of amenities and infrastructure such as sewer lines into the price of a house. Morse didn't do that, which is why residents are paying now, according to the manager of The Villages' governments.
>
> Well, at least that's the theory. If so, residents should have gotten pretty sweet deals on the prices of their homes, shouldn't they? Morse becomes almost unfathomably rich from the bond proceeds. And residents are saddled with 30 years of payments on $709 million worth of loans. (Ritchie 2008)

Ritchie asks, was this legitimate? There was an obvious conflict of interest in the developer pricing and selling the developer's subdivision assets to the developer-controlled district. There was also a question as to whether the residents of the district are paying for the same recreational and infrastructure assets twice:

once as part of the purchase price of their homes, and then again in the form of 30 years of bond payments to the district. In any normal real estate sale of units that carry with them the right to exclusive use of recreational facilities, the sale price reflects the cost of the amenities. After all, that is what the purchaser is buying—a unit in a subdivision with certain amenities and infrastructure that they can use. With The Villages, the residents purchased their units for market prices that presumably reflected the existence of these amenities and infrastructure. But because Morse had already sold the amenities and assessment stream (in essence, the cash flow) to the CDD, he argued that the sales price didn't include the recreational assets. Is this actually true, Ritchie asks, or is it just a slight of hand? And, because they were living in the CDD, the residents acquired the burden of paying off the bonds. Were they paying the bondholders for real assets, or for what amounted to simply a vast ocean of money that went directly into Morse's pocket? As Ritchie put it, "Those are things the residents already paid for in the price of their house, and they're not necessary infrastructure, such as a road or wastewater plant. The ownership and maintenance of the things bought by the bonds should have been simply transferred to the CDD where they are situated, along with the right to collect the amenity fees to cover the expenses. Instead, the residents paid ridiculously inflated prices for their golf courses and pools a second time, and then, because of the interest on the bonds, they paid thrice." (Ritchie 2013)

And the Internal Revenue Service was concerned as well. As Ritchie put it, "Now, along comes the IRS in a quest to answer a single question: Was this one particular developer-controlled government, the Village Center Community Development District, qualified to issue tax-exempt bonds? In other words, is this a cross-your-heart legitimate government? Or just a fiendishly brilliant legal dodge designed to enrich the developer?" (Ritchie 2008)

The IRS had raised questions about these bond transactions as early as 2003, saying that their decision to close an earlier case "…should not be construed as an approval of your method of operations. We have concerns regarding: the amount of control the developer has over the issuer; the questions of value of the assets sold by the developer to the issuer as these are not arm's length [transactions]; the treatment of income and expenses…;compliance with state law." (quoted in Ritchie 2008). And the IRS eventually turned its attention to The Villages again. Just as the developers of Celebration and Ave Maria sought to create perpetual control of their special districts, so had Morse done similar things with the CDDs in The Villages, seeking to contravene the intent of the law that CDDs should eventually transition to owner control. There would never be enough resident votes to move from landowner control to resident election by qualified electors of the district. In 2013, the IRS ruled that the Village Center CDD was not, in fact, a political subdivision, and was instead a private activity, stating, "We believe that an entity that is organized and operated in a manner intended to perpetuate private control, and to avoid indefinitely responsibility to a public electorate, cannot be a political subdivision of a state," under Section 103 (c) (1) of the Internal Revenue Code. The effect of this ruling is to render $426 million in Villages bonds taxable, as private activity bonds

This bombshell ruling threatened not only the hundreds of millions of dollars in bonds issued by The Villages CDDs, but in fact worried developers of many other special districts in Florida where they had set up the acreage so as to remain in perpetual control. Those concerned included Disney, developer of Celebration. (Garcia 2013) Morse died in 2014, but his company appealed the IRS ruling and it remains on appeal as of this writing. To deal with the uncertainty the ruling created in the bond market, the company switched to an issuance of $257 million in new taxable bonds instead, pending the outcome of the ruling. (Olorunnipa 2014)

## California: Community Services Districts

Florida's policies regarding MFSDs seem to reflect an almost desperate desire to attract large-scale real estate development, regardless of the potential for undemocratic, self-serving, and ethically-questionable actions by the developers who control these governments. California provides a contrast, in that the state's policies have historically reflected the legacy of Progressive traditions of open and democratic government and public oversight of business. Yet, even California has expanded the powers of special districts and set them up to be permanent alternatives to municipal incorporation.

California's MFSDs are called "Community Services Districts, " or CSDs. Unlike the CDDs and stewardship districts in Florida, California CSD directors are chosen in public elections by registered voters of the district. The California Supreme Court addressed the issue of voter control of special districts in *Burrey v. Embarcadero Municipal Improvement District*, 5 Cal. 3d 671 (1971). This district was created in 1960 and failed to develop as intended. By the time the suit was filed it had about 200 residents, 47 of whom were the plaintiffs. The district had a five-person board of directors, chosen in a scheme in which a voter had one vote for each dollar of assessed valuation of land. The result was that the new developer, who owned 65% of the value of all the land, could choose the entire board of directors and issue general obligation municipal bonds. The California Supreme Court applied the precedents discussed above, and held that the district was bound by the one person, one vote rule:

> Applying these principles to the EMID, it is apparent that its powers within the geographic area controlled by it exceed in potential impact and pervasiveness the powers exercised by the junior college district in *Hadley*, and, in fact, come close to those exercised by the county commissioners in *Avery* .A brief review of the EMID's powers establish their general governmental character. As recited above, the EMID may issue regulations which have the force of law, operate a police force and fire department, exercise the power of eminent domain, tax, incur bonded indebtedness, and create and maintain all manner of public

> utilities. In short, the EMID is for most purposes a small but growing city and lacks few of the powers normally held by municipal governments. Its powers are more general than those exercised by the junior college district because it is the sole local governmental unit entrusted with carrying out the basic municipal functions which directly affect and benefit each of the district's residents. (p. 676-677)

This is an important precedent, because the Court looked at the actual powers and functions of the district, rather than deciding based on the legislature's stated purpose for creating the district, which is what the Florida Supreme Court did in deciding that voting by acreage was permissible.

The Court also disapproved of the district's voting arrangement because there was not provision for turnover to control by resident voters:

> The EMID Act, unlike the Estero Municipal Improvement District Act, was never amended to provide for a transfer of power from nonresident property owners to resident registered voters. It might be argued that the purpose of the weighted voting system was to provide such a transition since the developer loses voting power and the vote is spread more evenly as the district's property is transferred to potential residents. But this "built-in" transfer has no necessary correlation to the rate at which the district becomes a developed community and the state's interest in development disappears. The developer could for example retain large parcels of valuable land, such as the proposed yacht harbor, a shopping center or other business properties long after the community had developed. We cannot abandon the residents' right to full and equal participation in the EMID community to so haphazard and fickle a transfer scheme. (p. 683)

Not only are California's judicial policies more protective of residents' political rights, but so are the administrative oversight provisions of California's special districts. California has a complex system of local government that includes two different types of counties, County Service Areas, municipalities, and many different types of special purpose districts and taxing bodies. Each of California's 58 counties has a Local Agency Formation Commission (LAFCO) that regulates the creation of special districts, rules on annexation of land into existing cities, discourages sprawl, and facilitates orderly division of function among all forms of local government. In 2005, there were about 3300 special districts in the state, and 318 of them were multiple-function CSDs. The California legislature set up a working group to rewrite and consolidate what had become a bewildering array of statutes covering the state's CSDs:

> Contemporaneous with the half-century of California's greatest sustained population growth, since 1951 the CSD Law has been the legal basis for the special districts that deliver public services to hundreds of neighborhoods, rural towns, and sprawling suburbs. Legislators originally passed the CSD Law in 1951 and re-enacted it in 1955. In the last 50 years, the Legislature amended the CSD Law scores of times, resulting in a convoluted statute that by 2005 had more than 300 separate sections.
> (CALAFCO 2006)

Yet, there were some remarkable features of this new law that went far beyond legal housecleaning. The law begins with a statement of the legislature's views concerning the reasons for the revision, and then proceeds to itemize the purposes for establishing CSDs. At the outset it is apparent that CSDs are seen as permanent alternatives to municipal incorporation.:

> The Legislature finds and declares that for many communities, community services districts may be any of the following:
> (1) A permanent form of governance that can provide locally adequate levels of public facilities and services.
> (2) An effective form of governance for combining two or more special districts that serve overlapping or adjacent territory into a multifunction special district.
> (3) A form of governance that can serve as an alternative to the incorporation of a new city.
> (4) A transitional form of governance as the community approaches cityhood. (Calif. Government Code Section 61001 (b) (2) [emphasis added]

So, CSDs under the revised statute a CSD could be created as "a permanent form of governance that can provide locally adequate levels of public facilities and services," and "a form of governance that can serve as an alternative to the incorporation of a new city." In order to do this, a CSD would need the powers of a municipality, and the revised law provides that potential. CSDs have a list of 31 powers to hire staff, issue bonds, provide a wide range services and infrastructure, and exercise eminent domain. They can provide 31 different kinds of services and functions, including: water, sewer, fire and rescue, parks and recreation, street lighting and landscaping, mosquito and vector control, police and security, libraries, streets and bridges, emergency medical, airports, flood control, cultural facilities, weed and graffiti abatement, hydroelectric generation, television, snow removal, animal control, pest control, mail delivery, and cemeteries. (California Government Code Section 61100)

It is important to stress that under the new law, CSDs have the power to create not just a security force, but a real police department of sworn peace officers under California Penal Code Section 830.1 (a), with law enforcement powers outside their district. Moreover, CSDs now have the power to enact ordinances, violation of which would be a crime justifying arrest under California Penal Code Section 853.5.

The new statute was opposed by the League of California Cities because it changed existing law concerning the activation of "latent powers," which would be powers from the list of 31 that a district was not originally exercising, but wished to activate. In a communication from the legislative director of LCC to Senator Christine Kehoe, head of the working group, the League said:

> Under existing law, (Sec. 61601 Gov't Code) a district may only exercise a latent power not listed in its original documents of formation with the approval of the voters and LAFCO. SB 135 removes the voter approval requirement, and requires only LAFCO to approve. Further, this bill lists 31 separate latent powers that a community services district may now exercise in the future with simple LAFCO approval. While LAFCO may be the appropriate body to consider service delivery ***outside*** the boundaries of incorporated cities, this bill – which is presented as a statutory clean-up vehicle – should not be permitted to weaken protection for city authority ***inside*** a city's boundaries. Cities are not special districts. Cities are empowered through their traditional police powers to provide a wide array of services to their residents. We do not believe that LAFCO should be empowered to approve additional services within the city limits without at least the consent of the affected city. This change could create confusion among the city's residents and the voters regarding service delivery and accountability. (Carrigg 2005) [emphasis in original]

So, the new law permitted CSDs, with LAFCO's approval, to provide new services from the list to district residents even within the borders of existing municipalities, without the residents of the city having the opportunity to vote on it. The complications that can ensue with CSDs, even with LAFCO to oversee the intergovernmental relationships, can be seen with a CSD known as Rossmoor. Located in Orange County, Rossmoor has resolutely refused to incorporate as a municipality (an incorporation effort failed in 2008) or to be annexed by the nearby cities of Seal Beach or Los Alomitos. (Mickadeit 2012) Orange County supervisors have tried to force Rossmoor to move beyond CSD status because they believe it is a drain on county services, but the managers and residents of the district prefer their permanent CSD arrangement. They like the ability to pick and choose which services they will provide through their CSD and which they will contract for with the county. The conflict between the district and the country has been quite acrimonious, with demands for a grand jury investigation and personal invective:

> At a meeting this week, the district's board asked for a closed session next month with an attorney. They want to explore what to do about [Orange County Supervisor John] Moorlach's various proposals, including his suggestion that the unincorporated area lose an important corner to the city of Los Alamitos. One resident angry with Moorlach suggested Tuesday night that the issue merits a grand jury investigation. Taboada said the board will discuss with an attorney what that would entail, along with other possible venues at its next meeting. Moorlach could not be reached for comment Wednesday. Rick Francis, his chief of staff, said: "Usually grand juries are charged with investigating impropriety within government. We don't have that here. What we have here is a group of people who want to dictate their own terms on their governance. And this office and LAFCO, (Local Agency Formation Commission), have not done anything illegal to prevent that." In an e-mail to his constituents Wednesday, Moorlach said: "(Rossmoor) residents seem to be manipulated by RCSD staff and board members who are more concerned about keeping their jobs than doing what may be the appropriate course of action for the taxpayers. (Orange County Register 2012)

## Conclusion: Private Values in Public Institutions?

In her study of special district formation, Nancy Burns concluded that special districts represent "private values in public institutions." She found that they are "often created for reasons that impair their ability to be democratic training grounds," a function that local governments are assumed capable of performing. Instead, special districts "discourage participation" because of their invisibility. They are created by small, self-interested groups, often a single real estate developer or a few manufacturers, and their private values are institutionalized as the values of the government. (Burns 1994, 116.)

Her concluding observations hold up well when applied to the rise of multiple function special districts:

> Americans have also created a realm of particularly unaccountable and unrepresentative politics that has attendant benefits and problems. The benefits of special districts are that they can fund and provide services and infrastructure; they are able to get things done in a fragmented American polity. The difficulties are two: They do this while no one watches except interested developers, and they are gradually becoming the realm where much of the substance of local politics happens. Thus local politics becomes quiet, not necessarily through the consensus that the earlier studies of suburbia noted, but

rather through the invisibility of special district politics." (Burns 1994, 117).

James Leigland concluded that, "Particularly with regard to borrowing, many special purpose governments appear to operate virtually without guidance, coordination, or oversight of parent government officials." And he found that much of the money flowing through special districts may not be going to address the most important needs, because these special purpose governments are "isolated from broader policy planning frameworks." (1995, 165)

The problems with special district politics that Burns and Leigland recognized are even more pressing when the districts in question are not a multiplicity of single-purpose districts, but large multiple function districts entrusted with a whole range of government functions and the powers to carry them out. The proliferation of these districts that can take the place of municipalities frames questions that, surprisingly, are not being asked: what are the essential, important differences between cities and MFSDs? Why should we care if MFSDs replace municipalities? Do cities still matter, and if so, why?

There are at least three important ways in which the politics of government by MFSD differs from what we typically expect from municipal governance:

*Invisibility:* The literature on special districts is replete with terms such as "invisible," "ghost," and "phantom." Everybody who has seriously studied this subject has noticed that the public knows little about the special districts in their area, what they do, who runs them, or how much they cost. This lack of knowledge suggests that people are ultimately unable to understand the real costs of housing. And the media, with few exceptions, do not bother trying to cover special district politics. Those who do have a herculean task ahead of them, because they must penetrate the dense thicket of legislation, financial data, and rationalizations thrown up by the developers and their lawyers and managers, all of whom are profiting behind this cloak of invisibility. At the end of this tortuous inquiry is the reality of confronting powerful and wealthy interests who fiercely defend their position.

*Lack of oversight and accountability*: Although it seems possible in theory for a state to create an oversight system for special districts, the complexity of the web of special districts, the variety of their activities, and their independence, all make this a challenging prospect. Nearly all special districts are, by definition, independent governmental entities. Dependent special districts that are governed by a county board of supervisors or a city council are few. These independent districts have their own directors, managers, staff, auditors, records, meetings, rules, and procedures. They hire lawyers and sue to defend their interests, and create lobbying organizations to protect themselves in state legislatures. Moreover, state legislatures are not enthusiastic about taking on this responsibility, nor do they find support for paying the cost of trying to supervise or oversee the activities of a host of special districts across a state. It is conceivable that the Internal Revenue Service

could eliminate the deductibility of the revenues from MFSD bonds, but it remains to be seen whether that will happen or what the consequences would be.

*Lack of electoral democracy*: State legislatures often make it possible for special districts to operate free from meaningful electoral control. Some directors are appointed instead of elected. In other cases there are elections, but the voting is based on ownership of acres instead of being a "mere resident of the district," as the Florida Supreme Court so delicately put it. And that phrase underscores the likely futility of expecting courts to make special districts more accountable to the voters. The constitutional precedents that govern special district elections evidence a judicial policy of deference to state legislatures, especially when contravening legislative intent would upset complex multi-million dollar and the "general government functions" test is sufficiently vague that it is. It has been a long time since we had a judiciary that took responsibility for expanding the ability of ordinary voters to exercise control over their governments. And even where there are elections, the invisibility of special district affairs to the public and the media make these elections relatively meaningless in most cases.

These characteristics of MFSD governance and politics may trouble those who value cities, but the same characteristics are exactly why MFSDs are so popular with developers. It is easy to understand why developers would want to have their own governments, but it is harder to understand why state legislatures give them such a gift. Further research may help us understand why state legislatures feel it necessary to do this. All these entities—cities, counties, and special districts-- are creatures of the state legislature and state constitutions. We need to understand why some legislatures see so much value in government by special district instead of by municipality. We need to ask whether state and local government have arrived at a place where it is necessary to give developers their own local governments in order to build infrastructure. And if we are going to create what are, for all practical purposes, city governments in which people cannot vote to choose their own community leadership, then we need to ask whether it is possible to have cities without citizens.

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