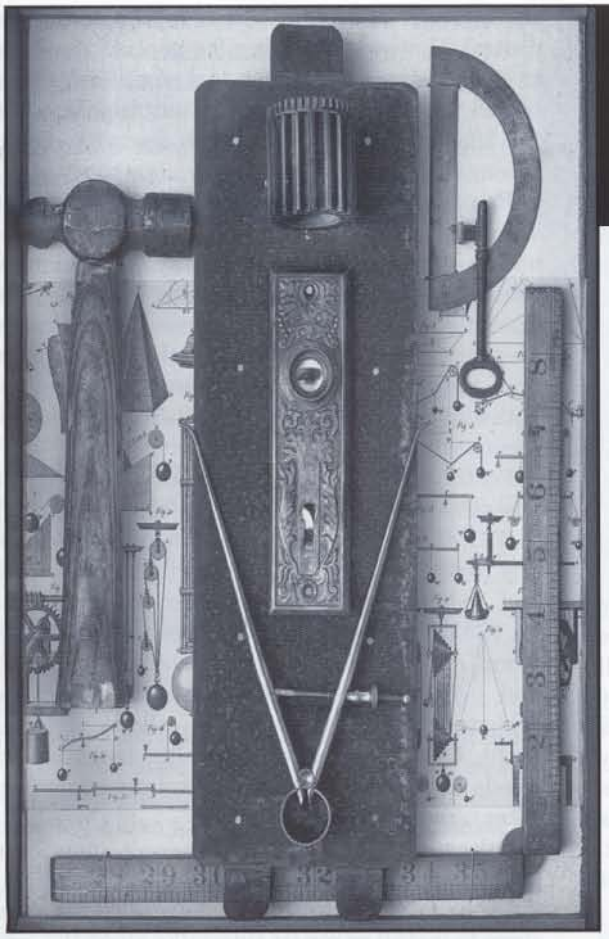


special assessments: a fair way for townships to provide public improvements

At one time or another, township residents will request a legal, useful and appropriate service or public improvement that the township board cannot provide because there is not enough money in the general fund to pay for it. Residents may also request a service or improvement that only affects property owners in a limited area. Politically, it can be difficult to justify spending general fund money to pay for a service or improvement that does not benefit the entire township.

Fortunately, the Legislature recognizes these situations, and authorizes townships, cities, villages and counties to raise money by specially assessing part or all of a project's cost against the real property that will benefit from the service or improvement.

Specially assessing real property to finance the cost of a township service or public improvement is a complex process. However, it is one of the best ways to ensure that property owners who benefit from a special project share in the cost. Special assessments typically have benefits that outweigh the procedural complexities of creating a special assessment district, establishing the assessments and collecting the payments. This article provides an overview of the special assessment process, providing guidelines and tips to help township officials define a district, apportion costs, collect fees and meet detailed statutory requirements. ➤

by Lynda E. Thomsen
Attorney

Special Assessments

What is a special assessment?

The Michigan Supreme Court stated that "The words 'special assessments' refer to pecuniary exactions made by the government for a special purpose or local improvement, apportioned according to the benefits received" (*Wikman* vs. *Novi*, 413 Mich 617; 1982). Special assessments have been used for many years to raise revenue to construct and maintain local improvements such as water and sewer mains, street improvements, and sidewalks. In recent years, townships have also used special assessments to raise funds for services, such as police and fire protection, garbage collection, recycling services and similar ongoing programs.

Special assessments are unique in that they are not taxes or fees charged for services. With few exceptions, taxes must be levied uniformly on all taxable property, and fees for services only apply when a resident chooses to take advantage of a service. In contrast, special assessments can only be imposed on property that receives a special benefit from a township service or improvement. This assessment is imposed before a service is provided, as a means of paying for part or all of the costs for the service or improvement.

It is fair to say that without special assessments, there are some projects that would be almost impossible for townships to undertake. For example, some parts of Michigan have deteriorating private roads. Townships have the statutory authority to specially assess property that will benefit from improving a private road and advance township funds to pay for the road improvement project. The funds are then reimbursed from the special assessment funds collected. Without statutes allowing special assessments, it is questionable whether any township board could spend public money to improve a private road, regardless of how substantial the need for improvement might be.

Street lights are another expensive amenity that many township residents take for granted. Where residents want and need street lights, it is reasonable and appropriate for township boards to create a special assessment district and pass on the cost to the people who benefit from them.

Enabling legislation details special assessment procedures

Special assessment statutes are a form of permissive legislation that allow local governments to levy special assessments. If a township levies a special assessment, it must adhere to the provisions of the specific statute authorizing the special assessment. Townships can only levy special assessments for purposes specifically authorized by statute. For instance, Public Act 188 of 1954 permits special assessments to fund aquatic weed control. However, spraying for general weed control and gypsy moths are not specifically mentioned in that statute. Some municipalities use PA 188 to finance gypsy moth spraying on the theory that it constitutes tree maintenance.

Procedural requirements vary from statute to statute, and failure to follow the statutory requirements may make a special assessment voidable, if challenged by the Michigan Tax Tribunal. For example, when a special assessment district is created for police or fire protection, there is a referendum right where property owners must be given notice. This is not required by other special assessment statutes.

Fortunately, the most frequently used special assessment statute, PA 188 as amended, (MCL 41.721, *et seq*), permits a township board to correct any procedural errors by going back to the error and redoing the procedure from that point on. PA 188 authorizes special assessment districts for storm and sanitary sewers, water mains, public and private roads, public parks, elevated foot bridges, garbage and rubbish collection, bicycle paths, lighting systems, sidewalks, trees, aquatic weeds and plants, erosion control structures and dikes, among others.

Other permissible special assessments are authorized by the following:

- PA 67 of 1921 (MCL 41.288) authorizes townships to install or repair sidewalks along the sides of highways and install elevated structures for foot travel over highways in the township.
- PA 81 of 1989 (MCLs 41.801-41.810) authorizes townships, individually or jointly with other townships, cities or villages, to purchase, house or operate police or fire equipment.
- PA 246 of 1931 authorizes townships and/or road commissions to construct and maintain sidewalks, bridges and streetlights in unincorporated areas. Care should be taken in specially assessing under this act, because only minimal procedural information is provided. Where possible, use the procedures of PA 188 for this sort of improvement or consult your county road commission to see whether it will handle the process under its statutory authority.
- PA 116 of 1923, as amended, (MCL 41.411, *et seq*) authorizes townships or incorporated villages to establish special assessment districts for bridges over waterways, street improvements, dust control, storm sewers, destroying weeds, street markers and lighting, contracting for public transportation and police protection, establishing and maintaining garbage and mixed refuse collection or disposal systems, sewers, sidewalks, waterworks, fire apparatus and equipment, housing for fire apparatus or equipment, water mains, tree trimming and spraying, sail and beach erosion control, sea walls, breakwaters, retaining walls, and swimmer's itch control. This statute is unique in requiring a petition to be signed by record own-

ers of not less than 51 percent of the land in the special assessment district before it can be used as the statutory basis for a special assessment.

All special assessments must adhere to the following statutes' requirements:

- PA 162 of 1962 (MCL 211.741, *et seq)* requires notice to be provided to all property owners and parties with a claim in property to be assessed whose names appear on the last ad valorem tax roll that has been reviewed by the local board of review and supplemented by name and address changes. The notice must be sent by first-class mail prior to each hearing.
- PA 267 of 1976 (MCL 15.261, *et seq*) requires townships to comply with the Open Meetings Act's notice and meeting requirements throughout the special assessment process.
- PA 64 of 1988 (MCL 211.744) requires local governments to notify property owners of their right to protest and appeal a special assessment.
- PA 65 of 1988 (MCL 205.735) specifies that property owners must first protest a special assessment at the public hearing held to confirm the roll before appealing to the Michigan Tax Tribunal.

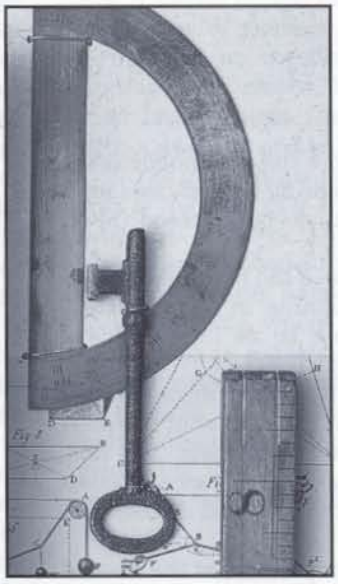
How do townships begin the process?

If residents express interest in a project or improvement, one of the best ways to measure the interest level is to suggest that the supporters circulate an informal petition. When the petition is filed with the township clerk, the board can review it and gauge the amount of support for the project.

Under current statutes, petitions are almost never required to start the special assessment process, but they can become necessary if written objections are filed by a number of property owners. PA 188 states that if the owners of more than 20 percent of the land in a proposed special assessment district file written objections with the township clerk at or before the first public hearing, the township board cannot proceed until petitions supporting the project—signed by the owners of more than 50 percent of the property in the proposed district—have been filed.

PA 142 of 1998, effective March 22, 1999, established a standard petition form Michigan citizens must use to propose a constitutional amendment, initiate legislation or nominate a person for office. However, these new petition form requirements do not apply to special assessments, since a signer of a special assessment petition must be a property owner in the district—not necessarily an elector.

Special assessment statutes do not require a specific form for special assessment petitions, but the petitions must contain the signature of every record owner of a parcel for that particular parcel to be counted. A "record owner" is a person or other legal entity who has the most recent fee title or land contract buyer's interest as shown by the register of deed's records. Townships may contact the MTA for a sample special assessment petition form.



> "Townships can only levy special assessments for purposes specifically authorized by statute."

The board should work with the township's attorney and engineer to determine if a petition satisfies the statutory requirements. If this becomes a serious issue, that typically indicates project support is marginal.

Once officials agree there is significant support for a project, the board should consider holding an informational meeting before beginning the formal special assessment procedure. Special assessment projects can be very expensive and complex, and the meeting can help residents understand the project plans and costs.

The special assessment process has many steps

Once a township board decides to proceed with a special assessment, certain steps must be meticulously followed. The following procedures apply to special assessments authorized under PA 188, which is the special assessment statute most generally applicable in townships. The procedural requirements of other statutes vary slightly and should be carefully reviewed and followed.

The required steps to establish a special assessment district under PA 188 are:

1. Prepare plans showing the improvement, its location and cost estimates. Include all reasonable administrative, construction and legal costs the township could incur during the special assessment levy and/or for as long as any special assessment bonds are outstanding. Typically, the township engineer prepares the tentative description of the proposed district and an estimate of the plan's construction costs.

2. File the plans and cost estimates with the township clerk, and adopt a resolution setting the time and date of the first public hearing and directing the clerk to provide the notices required by law. ➤

3. At least 10 days before the first public hearing, send a notice of the hearing by first-class mail to each owner of property to be assessed (MCL 211.741(1)).

4. Publish twice a notice of the first public hearing in a newspaper circulating in the township. The first publication must be at least 10 days before the hearing (MCL 41.724a).

5. Hold the first public hearing to discuss creating the special assessment district, what the project will entail and the estimated costs. The first public hearing allows interested persons to state objections to the project, the proposed district and the cost estimates.

6. If the board decides to proceed, at the close of the hearing, adopt a resolution to create the special assessment district and direct the township supervisor to prepare a special assessment roll.

7. The supervisor should prepare the special assessment roll and file it with the clerk. The township board adopts a resolution setting the time, date and place of the second public hearing and directing the clerk to provide the required notices.

8. At least 10 days before the second public hearing, send a notice of the hearing by first-class mail to each owner of property to be assessed (MCL 211.741(1)).

9. Publish twice a notice of the second public hearing in a newspaper circulating in the township. The first publication must be at least 10 days before the hearing.

10. Hold the second public hearing to consider the special assessment roll. The primary purpose of the second hearing is to allow the township board to hear objections to the assessments to be levied and correct any errors on the roll.

11. At the close of the public hearing, the township board confirms by resolution the special assessment roll as submitted or with modifications and specifies the payment details.

These 11 steps are relatively straightforward, and the process to establish a special assessment frequently goes smoothly. To help ensure success and compliance with the law, follow these additional guidelines:

▼ Keep a record of everyone who attends the public hearings, and make sure that the minutes of the hearings reflect all comments made by everyone in attendance.

▼ Make an affidavit of mailing for the notices sent to everyone in the special assessment district, and keep it along with proof that the hearing notices were published as required by statute.

▼ Make sure the hearing notices include the following points: 1) date, time, and location of hearing, 2) notice that the plans, cost estimates, petitions and special assessment roll are on file at the clerk's office and available for public examination, and 3) a statement that property owners and parties with an interest in property to be assessed or an agent for the party must appear and protest at the hearing to be eligible to appeal the amount of the special assessment to the Michigan Tax Tribunal, as well as details about the appeal process as required in MCL 211.74.

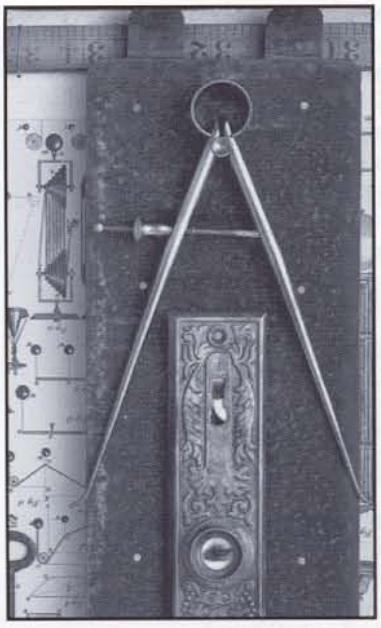
▼ Ask the township engineer and attorney to attend the hearings, if possible. They can help answer questions about special assessment districts in general and the township's specific project.

▼ Be aware that the township board can make the special assessment district smaller or reduce the total amount of a special assessment after the process begins without holding another public hearing. However, to increase the district's area or the total amount of the special assessment roll requires the board to send notice to all residents affected by the assessment and schedule, notice and hold another public hearing.

▼ Keep in mind that special assessments are not subject to citizen vote or the vote of residents at the public hearing. The township board decides to establish a special assessment district after considering all the comments and written objections or support received. One exception is a special assessment for police or fire protection which is subject to a possible referendum at project inception.

▼ Once the special assessment hearing is closed, additional comments or objections are not considered.

▼ The special assessment roll is considered final when it is confirmed



"The first public hearing allows interested persons to state objections to the project, the proposed district and the cost estimates."

by township board resolution. It can only be changed by appeal within 30 days to the Michigan Tax Tribunal. The only other way to make changes to the roll after it has been confirmed is to hold another public hearing preceded by notices. The one statutory exception to this is for a parcel that is divided after a special assessment is imposed. The special assessment can be divided by the township board, with notices sent to the owners of the affected parcels.

How should the special assessment district be defined?

In some areas, defining the boundaries of a district can be very simple. For instance, if fire protection is provided by contract to a specified township area, all property receiving the service would be included in the special assessment district. However, where street lighting is provided, the township board has to decide the size of the district benefitting specially from the lights. It is best to start with a large district for the first public hearing. If it appears that the size should be reduced, the township board can do that after the hearing. If the district size must be increased after the first public hearing, notice must be provided to the additional property owners, and another public hearing must be held.

Project costs must be apportioned fairly

Unlike a property tax, the amount of a special assessment is *not* based on a uniform rate, such as a millage, applied to the value of all the parcels. Instead, the benefit of the project or improvement to each parcel is analyzed by the township board, and the amount paid by each parcel owner is set at a level proportionate to the benefit that parcel receives.

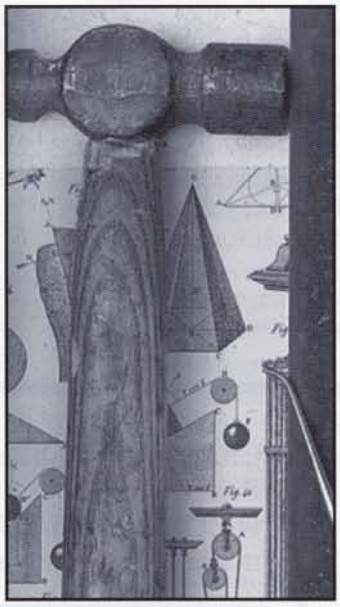
In a perfect world, every special assessment would spread the entire cost of an improvement against the real property that benefits from the improvement, in an amount that accurately equates to the value of the benefit received. We know this is not a perfect world, and fortunately, the Michigan Tax Tribunal and the appellate courts agree. Establishing a special assessment district and imposing a special assessment upon real property are legislative determinations of the township board, and as such, they are presumed valid. A strict, dollar-for-dollar equality between the value of the benefit to a parcel from an improvement and the amount of the special assessment imposed upon that parcel is not required by law. The assessment must only be reasonably proportionate to the benefit.

Townships should keep three important facts in mind when apportioning special assessment costs:

1. *Property exempt from taxation is frequently not exempt from special assessments.* For example, property used for a charitable purpose may be tax exempt, but property owners may still have to pay special assessments.

2. *A special benefit may not be directly related to parcel size or frontage.* For example, a 160-acre farm with no dwelling and a half-mile road frontage may receive less special benefit from a road improvement than a one-acre, platted lot with a dwelling and only 165 feet of frontage.

3. *The law permits the township to recover all or part of the costs of a project by specially assessing benefitted property.* This can be important if the current special benefit is less than the total cost of a project, which happens often with sewer and water projects where future development may lead to future connections inside and outside the special assessment district. In these cases, it may be possible for a township to specially assess for part of the costs and proceed with the project by advancing other costs from the general fund, a township improvement revolving fund or by issuing bonds.



> "The benefit of the project or improvement to each parcel is analyzed by the township board."

If project costs exceed estimates, the law permits a township board to reassess the additional expenses, send proper notices and hold another public hearing. It is much easier to reduce the estimates than to increase them, so it is a good idea to conservatively set high cost estimates before the first public hearing.

Townships may retain surpluses of less than 5 percent of the original roll. If there is more than a 5 percent surplus after all project costs are paid, property owners must receive a refund. Before making a refund, the project and all project costs should be reviewed very carefully. Keep in mind that there may be future expenses related to the project, so, in some situations, a fund balance should be retained to pay for them. Many townships advance funds for special assessment projects and sometimes overlook the fact that they are entitled to be reimbursed for all the money paid in advance. It is crucial that careful records ➤

be kept of all expenditures, and that they be reimbursed with a maximum of 5 percent interest. In addition to the minutes and resolutions kept by the clerk, a separate file should include a copy of each document relating to the special assessment.

How should the special assessment be billed and paid?

Except for police and fire special assessments, special assessments can be billed separately from the township's tax bill, although most townships choose to bill special assessments with property taxes for convenience. Billing and collecting special assessments are statutory duties of the township treasurer.

When the amount of a special assessment is large, it is generally divided into installments, payable over a term of years. The term can vary from project to project. For example, in a road improvement project where the township advances funds from the general fund, it may be appropriate to allow for a small number of installments, such as one per year for five years. However, expensive sewer projects financed by bonds payable over 20 years would typically be paid with one annual installment for 20 years.

When a special assessment is payable in installments, the law requires the township to charge interest on the unpaid balance (MCL 41.727). The interest can be up to 8 percent per year, or 1 percent more than the interest rate on bonds sold to finance a project. Sometimes property owners complain about being charged interest on special assessments. Township officials may need to review the benefits received and explain that by law, they have no option to decline to charge interest.

Special assessments provide a valuable option for financing public improvements

Special assessments provide an opportunity for townships to finance projects and improvements that might otherwise be impossible to provide. The process involves many details and a lot of public input—which is the way it should be, since a special assessment impacts the public for a long time. While there is a great deal of work involved to establish a district and impose a special assessment to pay for a service or improvement, there is also a wonderful feeling of satisfaction when a project is successfully accomplished. For more technical information on special assessments, the MTA has a 70-page manual available to members at a cost of $20 per copy. To order, call MTA Education Aide Michele Schimberg at (517) 321-6467, ext. 227.❖

Lynda E. Thomsen is an attorney who practices law in Kalamazoo. She has practiced municipal law for 21 years and, as part of the firm of Bauckham, Sparks, Rolfe & Thomsen, P.C., she represented townships, authorities and other governmental agencies. Thomsen received her J.D. from the University of Iowa law school and was admitted to the Michigan Bar in 1983. She is a member of the State Bar of Michigan and the Women Lawyers Association of Michigan.

FB

14 Years Serving Michigan Townships

We've all got Priorities! Put us at the top of your list...

FundBalance™
2805 S. Industrial,
Ann Arbor, MI 48104

Changes force everyone to redefine what's important. Rapid changes in hardware and operating systems as well as year 2000 compliance issues keep software makers and customers on their toes.

Two things haven't changed:

1. ***Our customers are still our #1 priority.*** We listen to your suggestions when developing our programs and all of our software is backed by the same reliable and affordable support you have come to expect.

2. ***FundBalance is still Michigan's #1 fund accounting solution.*** We produce a full range of Financials, Utility Billing, Voter Registration and Cemetery Management in DOS as well as our new 32-bit line for Windows95/NT and Novell. FB Plus and 32 software will keep you in compliance for the year 2000 and beyond...

Call Today! 1-800-457-FUND

No two special assessments are alike

If a township has never imposed a special assessment, it can be overwhelming to absorb all the details of the statutory procedures. While nothing can substitute for assistance from someone with special assessment experience, the following guidelines and tips will help township officials handle many of the special issues that occur with the different types of special assessments.

Roads

Improving public and private roads can be very expensive. County road commissions can specially assess benefitted property for the costs of road improvements. Before a township undertakes a road special assessment, it's best to contact the road commission to see if they will handle the matter. Road special assessments are frequently imposed on a "front foot" basis, meaning the cost of the project is divided by the total amount of road frontage, and each parcel is specially assessed the price per front foot times the width of its frontage.

There are also situations where the road being improved is a through street, and part—but not all—of the cost constitutes a "special benefit" to the parcels that have frontage along the road. In these instances, the township may only be able to specially assess part of the project cost against those parcels, with the balance of the cost payable from the general fund.

Street Lighting

Some townships establish a new street lighting special assessment district whenever one is requested. Other townships opt to create one township-wide special assessment district for street lighting, and only impose special assessment fees for street lights on parcels located within a specific distance of each light. When a new light is planned, the board sends written notice to the land owners who will be specially assessed for the first time.

If a township already has many street lighting special assessment districts, the board may want to consider consolidating them into one township-wide district. Officials should be aware that the cost to mail a written assessment notice to every owner of record of real property in the township may outweigh the benefit of consolidating existing street lighting special assessment districts.

The service of providing street lights goes on for years, and the township board should annually reassess the property in the district for the upcoming year's expense. If a surplus accumulates, the amount of the upcoming year's assessment can be reduced. Special assessments for controlling weeds in lakes, chloriding roads, and providing fire and police operations should also be reassessed annually.

Sewer and Water

Sewer and water special assessments tend to be the most complicated. In addition to special assessments, there will invariably be an ordinance requiring fees and charges for services and connection to the system. It is imperative that any township seeking to create a special assessment district for sewer or water work with an attorney and engineer who are experienced in this area. The cost of the project to serve a particular area will be much higher than is typical elsewhere in the township if the system requires deep lines or expensive road restoration or if only a few customers ➤

are available to pay for the project. If so, the township board may decide not to approve a particular project because it is not feasible under current conditions.

When a special assessment for water or sewer is imposed, it is common to base the amount of the special assessment on a combination of factors, such as the parcel size plus the current use. Water or sewer special assessments are typically for large sums of money, payable in installments over many years. This sort of special assessment can be deferred in whole or part, if the township adopts an ordinance provision for deferments. Also, MCL 211.763, *et seq,* provides for state deferment in limited situations for elderly, handicapped and low-income property owners. When a state deferment is granted, the state pays the special assessment in full, and takes a lien against the property for the amount paid, plus interest until the state is reimbursed.

Lake Levels and Weed Control

Special assessments for lake levels and weed control are typically imposed only on the parcels having lake frontage or lake access rights. Some types of water treatments are experimental, and the township board may choose to set up the district for many years, but only specially assess the costs of weed control for a two- or three-year period. If the process is successful, a hearing can be held in future years to establish new special assessments annually or for a longer term.

Police and Fire

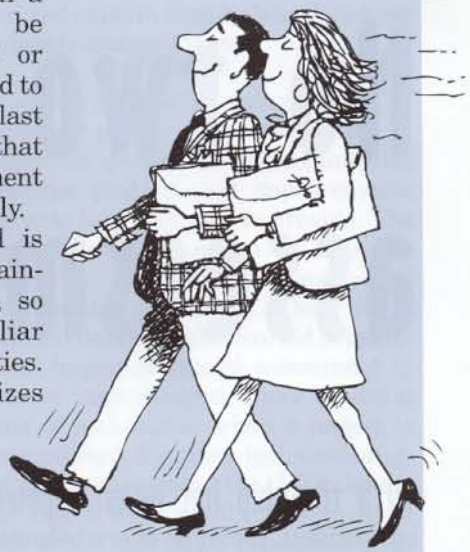
The statute for police and fire special assessments differs from the typical special assessment statute because it permits a referendum by landowner petition or at the initiative of the township board. Special assessments for police and fire are on a millage basis and must be billed on the tax bill. Public Act 81 of 1989, as amended, requires the special assessment to be levied on taxable value, just as property taxes are. Some townships find special assessments for police and fire are very appealing to residents. However, the special assessment is levied on real property only, not on taxable personal property, and some tax exempt property is subject to special assessment. If a township imposes a police and fire special assessment, it will be necessary to establish a value for some property that would otherwise not receive a tax bill, such as property exempt from taxes because it is used for a charitable purpose. ❖

—by Lynda Thomsen

Who does what?

The procedure to establish a special assessment can be complicated, and errors or omissions may require the board to redo the proceedings from the last correct step. It is important that each step in the special assessment procedure be completed correctly.

The entire township board is involved in establishing and maintaining a special assessment, so each official must be familiar with his or her responsibilities. The following list summarizes each official's statutory and recommended duties in the special assessment process.



Township board

- Determines which statute authorizes the special assessment
- Gathers cost projections and plans
- Sets all public hearing dates
- Authorizes the project by resolution
- Confirms the special assessment roll
- Certifies the levy

Supervisor/Assessor

- Verifies the petition and signatures (generally)
- Moderates the public hearing (generally)
- Prepares the special assessment roll, attaches warrant and files with clerk
- Defends an appeal before the Michigan Tax Tribunal

Clerk

- Makes plans and cost estimates available for public viewing
- Publishes the public hearing notices in the newspaper
- Sends the hearing notices by first class mail to all property owners in the proposed district
- Records the minutes for all related meetings, including public comment at hearings
- Endorses the special assessment roll, following township board confirmation
- Delivers confirmed special assessment roll, with his or her attached certificate, to township treasurer
- Records all expenses attributed to the district
- Files all documents related to the district

Treasurer

- Mails the special assessment bills
- Collects the special assessment and interest
- Deposits all special assessment payments
- On September 1 of each year, reports to the township board any past due special assessment installments

—by Evelyn David
MTA Membership Information Officer