The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

BILL:	CS/SB 2322
INTRODUCER:	Community Affairs Committee and Senator Bennett
SUBJECT:	Energy Improvement Districts
DATE:	March 17, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Yeatman	CA	**Fav/CS**
2.			CU	
3.			FT	
4.			WPSC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This Committee Substitute (CS) provides supplemental authority for local governments to finance energy efficiency and renewable energy improvements, and changes or improvements made for the purpose of improving a property's resistance to wind damages; for property owners that wish to participate in this financing program on a voluntary basis.

The CS authorizes local governments to levy a non-ad valorem assessment for such improvements that shall be repaid through an assessment, a municipal or county lien, or other lawful method. The CS also grants local governments the authority to issue debt, payable from revenues received from the improved property and to partner with one or more local governments for the purpose of providing such improvements.

This CS creates section 163.08, of the Florida Statutes.

II. Present Situation:

Property Assessed Clean Energy (PACE) Financing

Property Assessed Clean Energy (PACE) financing allows property owners to borrow money from a newly established "municipal financing district" to purchase renewable energy devices for their home.[1] These newly established districts provide funding to participating homeowners through the issuance of local revenue bonds that are repaid through special assessments that act as lien on the property until the amount is paid off.

This modern policy trend was facilitated by the passage of the American Recovery and Reinvestment Act (ARRA), which repealed a former restriction that limited the use of Investment Tax Credits (ITC) on projects that also provided energy financing.[2] Berkeley, California was the first city to implement PACE financing in November 2008, through The Berkeley First Program by adding the costs for energy efficiency improvements to the homeowner's annual property tax bill paid over a period of twenty years.[3] PACE financing programs begin with state legislation that authorizes the creation of special taxing districts to issue bonds to real estate applicants to purchase energy efficiency devices.[4] As of November 2009, the following 16 states have passed enabling legislation for PACE financing:

- California (AB 811)
- Colorado (HB 08-1350)
- Illinois (SB 583)
- Louisiana (SB 224)
- Maryland (HB 1567)
- Nevada (SB 398)
- New York (AB 8862)
- New Mexico (HB 572)
- North Carolina (SB 97)
- Ohio (BH 1)
- Oklahoma (SB 668)
- Oregon (HB 2181 & HB 2626)
- Texas (HB 1391 & HB 1937)
- Vermont (H 446)
- Virginia (SB 1212)

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[1] Fir Tree Partners *PACE Finance: Innovative Funding to Accelerate the Energy Retrofit of America's Buildings*, Oct. 2009 (Slideshow Introduction to PACE- Washington D.C. Presentation 10-6-09) available online at http://pacenow.org/documents/Basic_Slide_Intro_to_PACE.pdf (last visited March 8, 2010).

[2] Interstate Renewable Energy Council (IREC), *2009 Updates and Trends* at 2 (Presented on Oct. 26, 2009, in Anaheim, CA) (Barnes, Justin, Rusty Haynes, Amy Heinemann, Brian Lips and Amanda Zidek-Vanega; NC Solar Center) available online at http://www.dsireusa.org/documents/PolicyPublications/IREC_Updates_%20Trends_2009.pdf (last visited on March, 8 2010).

[3] BerkeleyFIRST, *Financing Initiative for Renewable and Solar Technology: Program Details*, available online at http://www.berkeleyfirst.renewfund.com/learn-more/program-details (last visited on March 8, 2010). (As a city in a charter county, Berkeley was permitted to develop a PACE financing program independent of state enabling legislation.)

[4] Fir Tree Partners, *See supra* note 1. (Note- pursuant to article VII, section 1(g) of the State Constitution, cities or counties operating under county charters may be permitted to develop PACE programs without enabling state legislation, through locally adopted ordinances).

- Wisconsin (AB 255)[5]

Both Florida and Hawaii currently have the existing statutory authority to launch PACE programs.[6] The primary incentive for PACE programs is to eliminate high up-front cost barriers for property owners to install renewable energy sources while providing an alternative revenue source to finance energy efficiency projects without impacting the state budget.[7]

Counties

Article VIII, section 1 of the State Constitution requires the state of Florida to be divided into political subdivisions known as counties which shall provide state services at the local level. There are two types of counties that are recognized under the Florida Constitution: 1) counties that are not operating under a county charter and 2) counties that are operating under a county charter.[8]

Non-Charter Government- As provided in Article VIII, section 1(f), of the State Constitution:

> Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.[9]

Charter Government- Charter counties were created in 1968 when they were implemented into Article VIII, section 1(g), of the State Constitution, providing that:

> Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.[10]

Although a non-charter county can be established through general law, a county charter can only be adopted, amended, or repealed through a special election by the vote of the electors in that county. Unless otherwise provided in a county charter or special law, the electors of each county must elect the following constitutional officers for a four-year term: a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of circuit court.[11]

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[5] Fir Tree Partners, *See supra* note 1.
[6] *Id.*
[7] Interstate Renewable Energy Council (IREC), *See supra* note 2.
[8] Art. VIII, s. 1(f)-(g), of the Florida Constitution.
[9] Art. VIII, s. 1(f), of the Florida Constitution
[10] Art. VIII, s. 1(g), of the Florida Constitution
[11] Art. VIII, s. 1(d), of the Florida Constitution

Municipalities

Article VIII, section 2, of the State Constitution authorizes the Legislature to establish or abolish municipal governments pursuant to general or special law. A municipality is a local government entity located within a county that is created to perform additional functions and services for the particular benefit of the population within the municipality. The Municipal Home Rule Powers Act, granted in Art. VIII, section 2(b), of the State Constitution, states that a municipality may provide any governmental, corporate, or proprietary powers necessary so long as: 1) it is for a municipal purpose, and 2) it is not otherwise prohibited by general or special law.[12] The Florida Supreme Court considers any activity that is "essential to the health, morals, protection and welfare of the municipality" to be a valid municipal purpose.[13] While municipalities and charter counties have constitutional home rule power, non-charter counties only have home rule powers as provided by law.

Chapter 125, Florida Statutes

The legislative enactment of s. 125.01, F.S., provided unchartered counties with the authority to exercise home rule powers that are not inconsistent with general or special law.[14] These statutory powers and duties include but are not limited to, the power to:

- Provide fire protection, ambulance services, parks and recreation, waste and sewage collection and disposal, and water and alternative water supplies;
- Enter into agreements with other governmental agencies within or outside the boundaries of the county for joint performance, or performance by one unit in behalf of the other, of any of either agency's authorized functions;
- Levy and collect taxes, fees and special assessments for certain county and municipal services, borrow and expend money, and issue bonds, revenue certificates and other obligations of indebtedness, according to general law; and
- Adopt ordinances and resolutions along with fines and penalties for the violation of such ordinances. [15]

Counties may also establish and subsequently merge or abolish dependent special districts that include both incorporated and unincorporated areas, subject to the approval of the governing body of the affected incorporated area and to the extent, not inconsistent with general or special law.[16] The municipal services and facilities within may then be provided through funds derived from services charges, special assessments or taxes within the district.[17]

Special Districts

Special Districts are governed by the Uniform Special District Accountability Act of 1989 under ch. 189, F.S. A special district is a confined local government unit established for a special purpose that can be created by general law, special act, local ordinance, or by rule of the

[12] *City of Boca Raton v. Gidman*, 440 So.2d 1277 (Fla. 1983) (providing money for a daycare is a valid municipal purpose that was not precluded by the city charter).
[13] *State v. City of Jacksonville*, 50 So.2d 532,535 (Fla. 1951) (stating that "municipal purpose" is broadly interpreted to include the maintenance and operation of a radio broadcasting system by the city).
[14] Section 125.01(2)(b), F.S.
[15] Sections 125.01(1)(d)(e)(k)(p)(r) and (t), F.S.
[16] Sections 125.01(5)(a), F.S.
[17] *Id.*

Governor or the Cabinet.[18] There are two types of special districts: independent districts and dependent districts. Dependent special districts are created at the prerogative of individual counties and municipalities and meet at least one of the following criteria:

- The membership of its governing body is identical to the governing body of a single county or municipality.
- All members of its governing body are appointed by the governing body of a single county or municipality.
- During their unexpired terms, members of the special district's governing body are subject to removal at will by the governing body of a single county or municipality.
- The district has a budget that requires approval through an affirmative vote or can be vetoed by the governing body of a single county or municipality.[19]

Independent special districts can only be created through legislative authorization and may encompass more than one county.[20] The policy behind independent special districts is to provide an "alternative method to manage, own, operate, construct and finance basic capital infrastructure, facilities and services".[21] Pursuant to s. 189.404(3), F.S., and with the exception of community development districts, general laws or special acts that create or authorize the creation of an independent special district must provide the following information in their charters:

- The purpose of the special district;
- The powers, functions and duties of the special district relating to ad valorem taxes, bonds and other revenue-raising abilities, budget preparation and approval, liens and lien foreclosures, and the use of tax deeds and certificates for non-ad valorem assessments and contractual agreements;
- The methods for establishing the district and amending the charter;
- The membership, organization, compensation, and administrative duties of the governing board and its members;
- The applicable financial disclosure, noticing and reporting requirements;
- The procedures and requirements for issuing bonds, if applicable;
- The election procedures and requirements;
- The methods for financing the district;
- The authorized millage rate and method(s) for collecting non-ad valorem assessments, fees, or service charges;
- The planning requirements; and
- The district boundaries.[22]

The Department of Community Affairs maintains and updates an official list of all the special districts within the state of Florida on October 1 of each year. Additionally, the department's Special District Information Program (SDIP), provides detailed information on the individual functions and status of each special district. To date, there are 1,622 special districts in the state

[18] Section 189.403, F.S.
[19] Section 189.403 (2), F.S.
[20] *See* s. 189.403 (3), F.S.
[21] Section 189.402 (4), F.S.
[22] Section 189.404(3)(a) – (o), F.S.

of Florida: 1007 independent districts and 615 dependent districts. Of the total number, 69 districts are multicounty districts and 1,553 are single county districts, and include various types of special districts which include but are not limited to: community development districts (576), community re-development districts (201), drainage and water control districts (94), fire control and rescue districts (67), mosquito control districts (18), neighborhood improvement districts (33), and soil and water conservation districts (63).[23]

Special Assessments

Special assessments are a revenue source that may be used by local governments to fund certain services and maintain capital facilities. Unlike taxes, these assessments are directly linked to a particular service or benefit. Examples of special assessments include fees for garbage disposal, sewer improvements, fire protection, and rescue services.[24] Counties and municipalities have the authority to levy special assessments based on their home rule powers. Special districts derive their authority to levy these assessments through general law or special act.

As established in Florida case law, an assessment must meet two requirements in order to be classified as a valid special assessment:

1) The assessment must directly benefit the property, and
2) The assessment must be apportioned fairly and reasonably amongst the beneficiaries of the service.[25]

These special assessments are generally collected on the annual ad valorem tax bills; characterized as a "non-ad valorem assessment" under the statutory procedures in ch. 197, F.S. [26] Section 197.3632(1)(d), F.S., defines a non-ad valorem assessment as "those assessments that are not based upon millage and which can become a lien against a homestead as permitted in s. 4, Art. X, of the State Constitution".[27]

III. Effect of Proposed Changes:

Section 1 of this CS creates s. 160.08, F.S., to provide local governments with supplemental authority to finance energy efficiency, renewable energy and wind resistance improvements to real property for participating property owners, which may be repaid through a local government levied non-ad valorem assessment, municipal or county lien, or other lawful method. Subsection (1) of s. 163.80, F.S., provides legislative intent confirming the policies created in the State Comprehensive Plan to promote energy conservation, energy security and reduce greenhouse gasses by continuing to provide a schedule for increases in energy performance of

[23] Florida Department of Community Affairs, *Official List of Special Districts Online*, available at http://www.floridaspecialdistricts.org/OfficialList/index.cfm (last visited on March 8, 2010).
[24] *See Harris v. Wilson*, 693 So. 2d 945 (Fla. 1997); *City of Hallandale v. Meekins*, 237 So. 2d 578 (Fla. 2d DCA 1977); *South Trail Fire Control Dist., Sarasota County v. State*, 273 So. 2d 380 (Fla. 1973); and *Sarasota County v. Sarasota Church of Christ*, 641 So. 2d 900 (Fla. 2d DCA 1994).
[25] *City of Boca Raton v. State*, 595 So. 2d 25, 29 (Fla. 1992).
[26] *Primer on Home Rule & Local Government Revenue Sources* at 35 (June 2008).
[27] Section 4(a), Art. X, of the State Constitution, provides, in pertinent part that "[t]here shall be exempt from forced sale under process of any court, and no judgment, decree, or execution shall be a lien thereon, except for the payment of taxes and assessments thereon …"

buildings. [28] Declaring a state importance in making renewable energy, energy efficiency, and wind resistance improvements more affordable and enabling property owners, on a voluntary basis, to finance such improvements with local government assistance. Finding the provisions in this act to be reasonable and necessary to achieve a compelling state interest for the prosperity and welfare of the state, and its property owners and inhabitants.

Subsection (2) provides definitions for the following terms: "local government", "qualifying improvement", "energy conservation and efficiency improvement", "renewable energy improvement", and "wind resistance improvement".

Subsection (3) authorizes local governments to levy a non-ad valorem assessment to fund a qualifying improvement.

Subsection (4) directs property owners that voluntarily choose to participate in a local financing program to apply to the local government by entering into a financing agreement with the local government. Also providing that these funds may be repaid through a government levied non-ad valorem assessment under s. 197.3632, F.S., utility surcharge, municipal or county lien, or pursuant to any other lawful method.

Subsection (5) authorizes a local government to partner with one or more local governments for the purpose of providing and financing qualifying improvements.

Subsection (6) states that a qualifying improvement program may be administered by either a for-profit or not-for-profit entity, on behalf and at the discretion of, the local government.

Subsection (7) provides that the local government may incur debt for providing such improvements; payable from revenues received from the improved property or other authorized revenue sources.

Subsection (8) prohibits the local government from entering into a financing agreement with anyone other than the record owner of the affected property.

Subsection (9) requires the local government to "reasonably determine" the following information prior to entering into a financing agreement:

- All property taxes and any other assessments levied on the property tax bill are paid and have not been delinquent for the past three years, or the property owner's period of ownership, whichever is less;
- There are no involuntary liens on the property;
- No notices of default or other evidence of property-based debt delinquency have been recorded during the past three years, or the property owner's period of ownership, whichever is less; and
- The property owner is current on all mortgage debt on the property.

Subsection (10) requires a qualifying improvement to be affixed to an existing building or facility that is part of the property.

[28] Chapter 187, F.S.

Subsection (11) provides that any work requiring a license shall be performed by a properly certified or registered contractor pursuant to parts I and II, of ch. 489, F.S.

Subsection (12) states that the total amount of any non-ad valorem assessment, or municipal or county lien for a property cannot exceed 20 percent of the just value of the property without the consent of the mortgage holder or loan servicer. The provisions of this subsection do not apply if an energy conservation and efficiency or renewable energy qualifying improvement has been supported by an energy audit stating that the annual energy savings from the improvement equals or exceeds the annual repayment amount. Authorizing local governments to adopt alternative parameters to conform to its local needs and conditions.

Subsection (13) requires participating property owners to provide at least 30 days notice before entering into any financing agreement, to any mortgage holder or loan servicer stating: his or her intent to enter into the agreement, the maximum amount to be financed, and the maximum annual assessment that will be required to repay the amount. Providing that certain payment acceleration provisions in an agreement between the mortgagee/lien holder and the property owner, which are solely the result of entering into a financing agreement shall not be enforceable. This provision does not limit a loan servicer's authority to increase the required monthly escrow in the amount necessary to pay the annual qualifying improvement assessments.

Subsection (14) provides that no provision in any agreement between a local government and an energy, power, or utility provider shall limit or prohibit the local government from exercising its authority under this section.

Subsection (15) clarifies that this section shall be construed as an additional and supplemental authority to county and municipal home-rule authority.

Section 2 states that this act shall take effect July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, section 10, of the State Constitution, prohibits the enactment of any law that impairs contract obligations.[29] Section 163.08(13), of this CS **(lines 226-232)** provides that:

> "No provision in any agreement between a mortgagee or other lienholder and a property owner or otherwise now or hereafter binding upon a property owner, which allows for acceleration of payment of the mortgage, note or lien or other unilateral modification solely as a result of entering into a financing agreement as provided for in this section shall be or construed as enforceable."

This provision may impair certain contractual obligations, which would violate Article 1, s.10, of the State Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

Property owners that voluntarily choose to participate in an established local government financing program will be subject to non-ad valorem assessments, utility surcharge, or municipal or county liens. Property owners that choose not to receive local government financing will not be obligated to pay these assessments.

B. Private Sector Impact:

This CS may encourage owners and builders of residential and commercial property to install energy efficiency, renewable energy, and/or wind resistance improvement devices, since it will eliminate the high up-front installment costs. The installation of renewable energy and energy efficiency devices on residential and commercial properties will reduce greenhouse gasses and lower fossil fuel use. Property owners that install wind-resistance devices will reduce wind damage and may also be eligible for wind-storm mitigation discounts and premiums as provided in s. 627.06501, F.S.

This CS also has the potential to create new jobs in the local sector and would be beneficial to the insurance, solar energy and construction industries.

C. Government Sector Impact:

This CS directs local governments to adopt a model financing program but does not mandate any specific structures or procedures for such program. Therefore, the level of funding is left to the discretion of the local government.

VI. Technical Deficiencies:

None.

[29] Art. I, s.10, of the Florida Constitution.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 17, 2010:

- This Committee Substitute (CS) creates s. 163.08, F.S., to provide supplemental authority for local governments to finance energy efficiency and renewable energy improvements, and changes or improvements made for the purpose of improving a property's resistance to wind damages; for property owners that wish to participate in this financing program on a voluntary basis.
- The CS authorizes local governments to levy a non-ad valorem assessment for such improvements, repayable through an assessment, a municipal or county lien, or other lawful method.
- The CS grants local governments the authority to issue debt, payable from revenues received from the improved property and to partner with one or more local governments for the purpose of providing such improvements.
- The CS requires qualified improvements to be affixed to an existing building or facility that is part of the property and be made by a certified or registered contractor.
- The CS deletes provisions related to the establishment of district boards.

B. Amendments:

None.