HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HM 7153 PCB FAS 11-02 Qualifying Improvements to Real Property
SPONSOR(S): Federal Affairs Subcommittee, Plakon
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Federal Affairs Subcommittee	10 Y, 2 N	Cyphers	Cyphers
1) State Affairs Committee	17 Y, 0 N	Cyphers	Hamby

SUMMARY ANALYSIS

During the 2010 Legislative Session, the Legislature passed CS/HB 7179, which created s. 163.08, F.S. The new law (Chapter 2010-139, Laws of Florida) provides the expressed authority to local governments regarding qualified improvements to real property.

The statute provides that if a local government passes an ordinance or adopts a resolution to create a program to provide up-front financing for energy conservation and efficiency, renewable energy, or wind resistance improvements, a property owner within the jurisdiction of that local government may apply to the local government for funding to finance a qualifying improvement and voluntarily enter into a financing agreement with the local government. Finance agreements under this framework include the repayment of the financed amount as a non-ad valorem assessment placed on the property owner's property tax bill.

On July 6, 2010, the Federal Housing Finance Agency (FHFA) acted to halt the local option finance programs contemplated in s. 163.08, F.S. This action on the part FHFA constitutes federal interference regarding the right of local governments to place assessments on real property.

If enacted, this memorial would request that Congress act to affirm the authority of local governments to implement energy conservation and efficiency, renewable energy, and wind resistance improvements programs as authorized under Chapter 2010-139, Laws of Florida.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Over the last several years, the Florida Legislature has placed an increased emphasis on promoting renewable energy, energy conservation, enhanced energy efficiency, and windstorm resistance in Florida. The Property Assessed Clean Energy (PACE) Program is a model that has gained national popularity in recent years as an innovative way for local governments to encourage property owners to reduce energy consumption and increase energy efficiency.

The PACE model allows individual residential, commercial, or industrial property owners to contract directly with qualified contractors for energy efficiency and renewable energy projects, and local governments provide the upfront funding for the project through proceeds of a revenue bond issuance. The bonds proceeds used to finance the projects are then repaid over a number of years through an assessment on participating property owners' property by means of the owners' tax bills. As of 2010, though, there were no provisions in the Florida Statutes which expressly provided for such a program.

Florida Legislation

During the 2010 Legislative Session, the Legislature passed CS/HB 7179, which created s. 163.08, F.S. The new law (Chapter 2010-139, Laws of Florida) provides the expressed authority to local governments (counties and municipalities) regarding qualified improvements to real property. The statute provides that if a local government passes an ordinance or adopts a resolution to create a program to provide up-front financing for energy conservation and efficiency, renewable energy, or wind resistance improvements, a property owner within the jurisdiction of that local government may apply to the local government for funding to finance a qualifying improvement and voluntarily enter into a financing agreement with the local government.

If utilizing a non-ad valorem assessment to finance the qualifying improvement, the local government must follow the uniform method for the levy, collection, and enforcement of non-ad valorem assessments, enumerated in s. 197.3632, F.S. This section requires a resolution by the local government, public hearings, published notices in the newspaper, and individual mail notices to property owners informing them of the assessment and their right to attend a public hearing. Under current law, the special assessment process must be initiated prior to January 1 of each year.

The bill also authorizes local governments to: partner with one or more local governments for the purpose of providing and financing qualifying improvements; levy a non-ad valorem assessment to fund a qualifying improvement; incur debt to provide financing for qualifying improvements; and collect costs incurred from financing qualifying improvements through a non-ad valorem assessment. The bill provides that no provision in any agreement between a local government and an energy, power, or utility provider shall limit or prohibit any local government from exercising its authority under the section and that the section is additional and supplemental to county and municipal home rule authority.

The agreements can be for any number of years, but since the intent of the program is to spread the full cost of improvements over a period of time to allow utility or insurance cost savings to the property owner to cover the costs of the improvements, a payback period of up to 20 years or more would not be uncommon for more expensive improvements. Regardless of the amount of financing or length of repayment period, the decision to enter into any agreement is strictly voluntary for local governments as well as property owners.

Qualifying Improvements

All qualifying improvements must be affixed to a building or facility that is part of the property and, if the work requires a license, must be performed by a properly certified or registered contractor. Qualifying improvements include energy conservation and efficiency improvements, renewable energy improvements, and wind resistance improvements. However, the program does not cover wind resistance improvements in buildings or facilities under new construction.

Allowances for Local Governments

The bill authorizes a local government to do the following when implementing a qualifying improvement financing program:

- Partner with one or more local governments for the purpose of providing and financing qualifying improvements.
- Allow a qualifying improvement program to be administered by a for-profit entity or a not-for-profit organization on behalf of and at the discretion of the local government.
- Levy a non-ad valorem assessment to fund a qualifying improvement.
- Incur debt (bonds or loans) to provide financing for qualifying improvements, payable from revenues received from the improved property or any other available lawful revenue source.
- Collect costs incurred from financing qualifying improvements through a non-ad valorem assessment on the benefitted property.

Responsibilities of Local Governments

Prior to entering into a financing agreement, a local government is required to “reasonably determine” that:

- 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.

Responsibilities of Property Owner and Mortgage Holder

The statute provides that, at least 30 days before entering into the financing agreement, the property owner must provide notice to the mortgage holder or loan servicer of the 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. Though the statute does not allow the mortgage holder to accelerate payments based on the homeowner’s participation in a program, it does recognize the mortgage holder or loan servicer’s ability to increase the required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment. If the property is sold prior to the end of the repayment period, the new owner takes over the remaining special assessment payments as part of the property’s annual tax bill.

Without the consent of the mortgage holder or loan servicer, 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, as determined by the county property appraiser. However, if the energy conservation, efficiency, or a renewable energy qualifying improvement is supported by an energy audit, the amount financed is not limited to 20 percent if the audit demonstrates that the annual energy savings from the qualified improvement equals or exceeds the annual repayment amount of the assessment or lien.

Each contract for the initial sale of a parcel (newly-constructed property) which is subject to a non-ad valorem assessment imposed pursuant to this act, must include the following statement: "THE . . . (name of local government) . . . HAS IMPOSED A NON-ADVALOREM ASSESSMENT ON THIS PROPERTY. THIS ASSESSMENT IS IN ADDITION TO OTHER LOCAL GOVERNMENTAL ASSESSMENTS AND ALL OTHER ASSESSMENTS PROVIDED FOR BY LAW.

Non-Ad Valorem Assessments

Chapter 197, F.S., governs tax collections, sales and liens. "Non-ad valorem assessment" is defined in s. 197.3632, F.S., as "only 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." Section 4(a), Art. X of the State Constitution provides, in part that, "There 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…."

Section 197.3632(3)(a), F.S., requires local governments electing to use the uniform method of collecting assessments for the first time to adopt a resolution at a public hearing prior to January 1, or March 1 if the property appraiser and tax collector agree. The resolution must state the need for the levy and include a legal description of the property subject to the levy. In addition, the local government must publish notice of its intent to use the uniform method for collecting such assessment.

States with Local Option Financing

Twenty five states have authorized PACE or PACE-like local option financing programs for renewal energy, energy efficiency, and/or windstorm mitigation since 2008. Those states include: California, Colorado, Florida, Georgia, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Texas, Vermont, Virginia, and Wisconsin.[1]

FHFA Action and Response

The Federal Housing Finance Agency (FHFA) was created on July 30, 2008, when President George W. Bush signed into law the Housing and Economic Recovery Act of 2008. The Agency was created to oversee components of the secondary mortgage markets in the United States, including Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.[2] The law combined the staffs of the Office of Federal Housing Enterprise Oversight (OFHEO), the Federal Housing Finance Board (FHFB), and the Government Sponsored Enterprises (GSE) mission office at the Department of Housing and Urban Development (HUD). As of June 2008, the combined debt and obligations of these GSEs totaled $6.6 trillion, exceeding the total publicly held debt of the United States by $1.3 trillion. The GSEs also purchased or guaranteed 84% of new mortgages in the United States.[3]

[1] http://www.dsireusa.org/
[2] Fannie Mae and Freddie Mac own and/or securitize approximately 70 percent of all residential loans in the United States.
[3] http://www.fhfa.gov/Default.aspx

As the regulatory agency over Fannie Mae and Freddie Mac, the FHFA released a letter calling for a pause to what it referred to as the proliferation of PACE and PACE-like programs. The principal reason given for halting the development and implementation of the programs is that most of them place the repayment of improvements financed through local programs ahead of the mortgage (first lien position). FHFA claims that the priority position of these liens, in part, "…represent a key alteration of traditional mortgage lending practice. The present significant risk to lenders and secondary market entities, may alter valuations for mortgage-backed securities and are not essential for successful programs to spur energy conservation."

There were three differing responses to the directive given by FHFA. First, some local governments, like Sonoma County, California, have adjusted their programs to remove the lien priority over the property owner's mortgage. The consequences of doing that, however, are that they are now forced to fund their program out of the county's general fund since bond markets have required a first lien or another source of revenue to back the bonds. This exposes the county to higher financial risk as well as the possibility of placing the county's credit rating at risk.[4]

Another strategy employed in response to the FHFA directive has been litigation. On July 14, 2010, the Attorney General of California brought suit against FHFA asserting that the Agency overstepped their authority by improperly ignoring the states' right to define what is in the public interest. The suit also alleges that FHFA failed to engage in the official rulemaking process prior to releasing its July 6, 2010, prohibition. In October, 2010, Leon County, Florida filed a lawsuit against FHFA as well, claiming the county's right to collect assessments for their PACE-like LEAP program under the Florida Constitution (Articles VII and X).

The third strategy in response to the actions of FHFA has been legislative in nature. During the 111th Congress, legislation was filed in the House of Representatives (HR 5766 July 15, 2010 by Rep. Thompson[5]) and Senate (S 3642 July 22, 2010 by Sen. Boxer[6]) directing FHFA to accept PACE underwriting standards as found in, "Guidelines for Pilot PACE Financing Programs," issued on May 7, 2010, by the Department of Energy.[7] The PACE Assessment Protection Act of 2010 was never heard in a committee of either body, but there is some expectation among proponents that similar legislation will be reintroduced in the 112th Congress.

Effect of Proposed Changes

If enacted, this memorial would request that Congress act to affirm the authority of local governments to implement energy conservation and efficiency, renewable energy, and wind resistance improvements programs as authorized under Chapter 2010-139, Laws of Florida.

The legislation also includes whereas clauses in order to support the memorial. The whereas clauses include:

WHEREAS, utility bills represent a major expense for home and business owners, and

WHEREAS, hurricanes and other wind storm events pose significant threats to Florida citizens and property, and

WHEREAS, energy conservation and efficiency and reduced reliance on fossil fuel energy generation enhance the welfare of the public by reducing energy bills and diversifying energy production, and

[4] National Renewable Energy Laboratory: Energy Analysis – Fact Sheet Series on Financing of Renewables and Efficiency

[5] http://www.govtrack.us/congress/bill.xpd?bill=h111-5766

[6] http://www.govtrack.us/congress/bill.xpd?bill=s111-3642

[7] http://www1.eere.energy.gov/wip/pace.html

WHEREAS, wind storm protection reduces damage to the improved property and property in the vicinity of the improved property from hurricanes and other wind events, and

WHEREAS, the upfront costs of such improvements and the time required for resulting cost savings to cover the costs of the improvements prevent property owners from making otherwise cost-effective energy and wind resistance improvements, and

WHEREAS, state and local governments have embraced programs that allow local governments to facilitate the financing of energy conservation and efficiency, renewable energy and, in Florida, wind resistance improvements because of the potential to cut energy bills, increase homeowners' cash flow for mortgage payments and other bills or investments, reduce mortgage default risk, and potentially reduce property insurance by reducing property damage risk, by encouraging investment in energy conservation and efficiency, renewable energy, and wind resistance property improvements, and

WHEREAS, unemployment in Florida is at record levels, in the construction sector in particular, and the State of Florida anticipates the implementation of such programs would create employment opportunities for thousands of Florida citizens, and

WHEREAS, the State of Florida has determined that the reduced reliance on fossil fuels for electrical generation and the increased wind resistance of Florida properties to wind storm events are of benefit to the citizens of the State of Florida, and

WHEREAS, in Chapter 2010-139, Laws of Florida, now codified in s. 163.08, Florida Statutes, the State of Florida authorized local governments to create programs to promote such deployment of energy conservation and efficiency, renewable energy, and wind resistance measures at residential and commercial properties, and

WHEREAS, such financing programs are an innovative local government solution to assist property owners in financing energy conservation and efficiency, renewable energy, and wind resistance improvements to their homes and businesses on a voluntary basis, and

WHEREAS, twenty-two other states have passed laws enabling local governments to develop such programs, and

WHEREAS, despite such programs' potential to decrease the burden of household expenses for Floridians who participate, the Federal Housing Finance Agency (FHFA) and the Office of the Comptroller of the Currency on July 6, 2010, issued statements that immediately stalled implementation of such programs in Florida and froze the progress of most existing similar programs nationwide, and

WHEREAS, the FHFA actions have resulted in lawsuits around the nation, and Congressional action would rapidly and efficiently resolve those disputes…

B. SECTION DIRECTORY:

Not Applicable

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None

2. Expenditures:

   None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None

2. Expenditures:

   None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not Applicable

2. Other:

   None

B. RULE-MAKING AUTHORITY:

Not Applicable

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES