

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 Committee on Community Affairs

BILL: SB 770

INTRODUCER: Senator Martin

SUBJECT: Improvements to Real Property

DATE: January 19, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hackett</u>	<u>Ryon</u>	<u>CA</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>FP</u>	_____

I. Summary:

SB 770 substantially amends a program authorized in current law, commonly known as the “Property Assessed Clean Energy” or “PACE” program, which allows property owners to make qualifying improvements to real property and finance the cost through annual non-ad valorem tax assessments. Qualifying improvements are those that enhance energy efficiency, renewable energy, wind resistance, and newly added by the bill wastewater treatment, flood and water damage mitigation, and sustainable building improvements.

The bill enhances certain protections for consumers entering into PACE contracts, and oversight for contractors that install improvements. The bill expands the universe of improvements this financing may be utilized to install. The bill updates the legislative intent of the PACE statute to reflect the expanded scope of the program, and introduces definitions used to clarify the language of the statute.

The bill does not affect state or local revenues.

The bill takes effect July 1, 2024.

II. Present Situation:

PACE in Florida

In 2010, the Legislature authorized local governments¹ to fund property owners making qualifying improvements and to establish a financing agreement for the repayment of such costs through annual non-ad valorem property tax assessments. Although Florida’s law does not use

¹ “Local government” means a county, municipality, a dependent special district as defined in s. 189.012, F.S., or a separate legal entity created pursuant to s. 163.01(7), F.S.

the terms “PACE” or “Property Assessed Clean Energy,” it is generally understood that s. 163.08, F.S., is Florida’s PACE program.²

Through a PACE program, a property owner³ may apply to a local government for funding to enhance energy conservation and efficiency improvements, such as energy-efficient HVAC systems, replacement of windows, electric vehicle charging equipment, and efficient lighting equipment; renewable energy improvements utilizing hydrogen, solar, geothermal, and wind energy; and wind resistance improvements such as wind-resistant shingles, gable-end bracing, storm shutters, and opening protections.⁴

PACE programs in Florida are formed by local governments and operate typically in partnership with several localities pursuant to an interlocal agreement. Additionally, PACE programs in Florida can be operated by a third-party PACE administrator, which is either a for-profit or not-for-profit entity acting on behalf of the local government.⁵ However, it is the local government that enters into a financing agreement directly with the property owner.⁶ In 2012, the Legislature expanded the definition of “local government” to allow a partnership of local governments formed pursuant to the Florida Interlocal Cooperation Act⁷ to enter into a financing agreement wherein the partnership, as a separate legal entity, imposes the PACE assessment.⁸

At least 30 days before entering into the financing agreement, the property owner must provide notice to any mortgage holder or loan servicer of the intent to enter into the agreement, the maximum amount to be financed, and the maximum annual assessment.⁹ The law provides that an acceleration clause for “payment of the mortgage, note, or lien or other unilateral modification solely as a result of entering into a financing agreement ... is not enforceable.” However, the mortgage holder or loan servicer may increase the required monthly escrow by an amount necessary to pay for the qualifying improvement.¹⁰

Qualifying Improvements

The types of projects PACE financing may fund are referred to as “qualifying improvements.” A local government may not offer PACE financing for any project not included in the statutory definition of qualifying improvements. As provided in current law, qualifying improvements include the following:

- Energy conservation and efficiency improvements,¹¹ to include:

² See generally Erin Deady, *Property Assessed Clean Energy: Is There Finally a Clear Path to Success?* Florida Bar Journal Vol. 90, No. 6, June 2016, pg. 114, available at <https://www.floridabar.org/the-florida-bar-journal/property-assessed-clean-energy-is-there-finally-a-clear-path-to-success/> (last visited Jan. 10, 2024).

³ While nationally it is common to separate PACE programs into residential and commercial programs, Florida Statutes do not differentiate based on the nature of the property. See United States Office of State and Community Energy Programs, *Property Assessed Clean Energy Programs*, available at <https://www.energy.gov/scep/slsc/property-assessed-clean-energy-programs> (last visited Jan. 10, 2024).

⁴ Section 163.08(2)(b), F.S.

⁵ Section 163.08(6), F.S.

⁶ Section 163.08(8), F.S.

⁷ Section 163.01(7), F.S.

⁸ Chapter 2012-117, L.O.F.

⁹ Section 163.08(13), F.S.

¹⁰ Section 163.08(15), F.S.

¹¹ Section 163.08(2)(b)1., F.S.

- Air sealing;
- Installation of insulation;
- Installation of energy efficient HVAC systems;
- Building modifications which increase the use of daylight;
- Replacement of windows;
- Installation of energy controls or energy recovery systems;
- Installation of electric vehicle charging equipment; and
- Installation of efficient lighting equipment.
- Renewable energy improvements,¹² which means installation of any system in which the electrical, mechanical, or thermal energy is produced from a method utilizing hydrogen, solar energy, geothermal energy, bioenergy, or wind energy.
- Wind resistance improvements,¹³ to include
 - Improving the strength of the roof deck attachment;
 - Creating a secondary water barrier to prevent water intrusion;
 - Installing wind-resistant shingles;
 - Installing gable-end bracing;
 - Reinforcing roof-to-wall connections;
 - Installing storm shutters; and
 - Installing opening protections.

Wind resistance improvements applied to buildings under new construction do not qualify for PACE financing.¹⁴

Florida PACE Consumer Protections

Current law provides that, before entering into a financing agreement, the local government must reasonably determine that:

- All property taxes and other assessments are current and have been paid for the preceding 3 years;
- There are no involuntary liens including construction liens;
- There are no notices of default or other evidence of property-based debt delinquency recorded and not released in the preceding 3 years; and
- The property owner is current on all mortgage debt on the property.¹⁵

Further, any work requiring a license to make a qualifying improvement must be performed by a properly certified or registered contractor.¹⁶ The total amount of PACE assessments for any property may not exceed 20 percent of the property's market value, unless an energy audit determines that the savings from the qualifying improvement equals or exceeds the repayment amount of the non-ad valorem assessment.¹⁷

¹² Section 163.08(2)(b)2., F.S.

¹³ Section 163.08(2)(b)3., F.S.

¹⁴ Section 163.08(10), F.S.

¹⁵ Section 163.08(9), F.S.

¹⁶ Section 163.08(11), F.S.

¹⁷ Section 163.08(12), F.S.

Consumer Protections for Residential PACE Financing Generally

Concerns have arisen about issues consumers may face regarding residential PACE financing. Because the PACE financing is structured as a tax assessment instead of a loan, PACE programs historically have not been required to provide homeowners with the same disclosures about the financing costs that traditional lenders must provide.

Additionally, the tax liens for PACE financing take priority over other lien-holders, including the property's mortgage holder.¹⁸ Such priority has influenced Fannie Mae and Freddie Mac to refuse the purchase of loans with existing PACE-based tax assessments,¹⁹ and properties encumbered with PACE obligations are not eligible for Federal Housing Administration insured financing.²⁰ However, priority lien position protects local governments, who are authorized to take on debt for the financing they provide.²¹ Advocates also state that the priority lien position enables local governments to offer competitive interest rates, ranging from approximately 6 to 9 percent.²²

Consumer Financial Protection Bureau Steps

In 2018, the United States Congress directed the Consumer Financial Protection Bureau (CFPB) to promulgate regulations regarding PACE financing.²³ The CFPB has issued advance notices of proposed rulemaking in order to apply the Truth in Lending Act's ability-to-repay requirements, currently in place for residential mortgage loans, to PACE financing.²⁴

The existing federal ability-to-repay requirements prohibit creditors from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan according to its terms, and all applicable taxes, insurance, and assessments.²⁵ In making such a determination, the creditor must verify and consider specific factors including the consumer's income, assets, and existing debt obligations.²⁶ The Truth in Lending Act's stated purpose is "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive."²⁷

¹⁸ Debra Gruszecki, INLAND: Realtors Offer Word of Warning About Solar Financing Program," Jan. 19, 2015, The Press-Enterprise, available at <https://www.pe.com/2015/01/19/inland-realtors-offer-word-of-warning-about-solar-financing-program/> (last visited Jan. 10, 2024).

¹⁹ FHFA, *Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens* (Dec. 22, 2014), available at <https://safeguardproperties.com/statement-of-the-federal-housing-finance-agency-on-certain-super-priority-liens/> (last visited Jan. 10, 2024).

²⁰ "ML 2017-18: Property Assessed Clean Energy (PACE)," December 7, 2017, U.S. Department of Housing and Urban Development, available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/17-18ml.pdf> (last accessed Jan. 10, 2024).

²¹ Section 163.08(7), F.S.

²² *AboutPACE*, Florida PACE Funding Agency, available at <https://floridapace.gov/about-pace/> (last visited Jan. 10, 2024).

²³ Section 307, Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law No 115-174 (May 24, 2018).

²⁴ Advance Notice of Proposed Rulemaking on Residential Property Assessed Clean Energy Financing, Docket No. CFPB-2019-0011, available at https://files.consumerfinance.gov/f/documents/cfpb_anpr_residential-property-assessed-clean-energy-financing.pdf (last visited Jan. 10, 2024).

²⁵ *Id.*, citing TILA section 129C(a), 15 U.S.C. 1639c(a).

²⁶ *Id.*

²⁷ 7 TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

The CFPB's regulations on residential PACE financing are still in development and have not been finalized at this time.

California's Consumer Protection Measures

California, one of the three states currently offering residential PACE financing,²⁸ has taken measures to protect consumers independent of federal regulation. In 2016, California's law changed to require PACE programs to provide mortgage-level disclosures and to conduct live recorded calls with homeowners to confirm financing terms and obligations.²⁹

In 2017, California legislation required that PACE program administrators be licensed by the California Department of Financial Protection and Innovation, provided oversight for contractors and third party solicitors, and authorized the same department to bring enforcement actions against PACE administrators and contractors. The law also required that a PACE administrator thoroughly determine the property owner's ability to repay the loan before approving a financing contract.³⁰ In 2021 California took further action specifically to protect senior citizens being solicited at home, criminalizing transactions that are part of a pattern in violation of specific PACE consumer protections.³¹

III. Effect of Proposed Changes:

The bill substantially amends Florida's PACE program in s. 163.08, F.S. It defines key terms, expands the types of qualifying improvements, imposes new consumer protections, extends participation in the program to lessees of government property, and enacts new PACE contractor oversight and accountability provisions.

Definitions

The bill defines the following terms:

- "Commercial property" means real property not defined as residential, including multifamily residential, commercial, industrial, agricultural, nonprofit-owned, long-term care facilities, and government commercial property.
- "Facility" means a portion of a building, structure, or site improvement, element, or pedestrian or vehicular route on a site.
- "Government commercial property" means property owned by a local government and leased to a nongovernmental lessee for commercial usage.
- "Program administrator" means an entity, including, but not limited to, for-profit or-not-for-profit entities, with whom a local government contracts to administer a PACE program.
- "Qualifying improvement contractor" means an independent contractor enrolled in a program to install or otherwise work on qualifying improvements on residential property.

²⁸ California, Florida, and Missouri are the only three states offering PACE financing on residential property.

²⁹ James Reed, "Consumer Protections for PACE Now Written into State Law," Orange County Register, October 7, 2016, available at <https://www.ocregister.com/2016/10/07/consumer-protections-for-pace-now-written-into-state-law/> (last visited Jan. 10, 2024).

³⁰ Assembly Bill 1284 (Dababneh, Chap 475, Stats. 2017) – California Financing Law: Property Assessed Clean Energy program: program administrators.

³¹ Assembly Bill 790 (Quirk-Silva, Chap 589, Stats. 2021) – Consumer Legal Remedies Act.

- “Qualifying improvement program” is a program established by a local government or local governments to finance PACE improvements.
- “Residential real property” means a residential property of four or fewer dwelling units which is or will be improved by a qualifying improvement.

Expansion of Qualified Improvements

The bill amends the definition of “qualifying improvements” to expand the universe of the types of projects a local government’s PACE program may finance. Significantly, the bill adds the following three new categories of qualifying improvements:

- Wastewater treatment improvements.
- Flood and water damage mitigation.
- Resiliency improvements.

The “wastewater treatment improvement” category includes the replacement or improvement of an onsite sewage treatment and disposal system with an advanced system of the same type, or replacement with a central sewage system. The term includes repairs or modifications made to an onsite sewage treatment and disposal system regulated by the Department of Health under ss. 381.0065 and 381.00651, F.S. This expansion applies only to residential properties.

The “flood and water damage mitigation” category, applying only to residential properties, includes projects and installations:

- Raising a structure above the base flood elevation to reduce flood damage;
- Building or repairing a flood diversion apparatus;
- Utilizing flood damage resistant building materials;
- Using electrical, mechanical, plumbing, or other system improvements to reduce flood damage; and
- Qualifying for reductions in flood insurance premiums.

For commercial property, the bill additionally includes “resiliency improvements,” which includes:

- Improving the strength of a roof deck attachment;
- Secondary water barriers;
- Wind-resistant shingles;
- Gable-end bracing;
- Roof-to-wall connection reinforcement;
- Storm shutters;
- Opening protections;
- Stormwater and flood resistance measures including shoreline improvements; and
- Improvements necessary to achieve a sustainable building rating or compliance with a national model resiliency standard.

The bill also provides that a PACE contract can cover any qualifying improvements on buildings under new construction, and that PACE financing may be used for refinancing existing loans on qualifying improvements.

Ordinances Governing PACE Programs

The bill provides that, **subject** to a local government ordinance or resolution authorizing a local government to offer a qualifying improvement program for residential or commercial property in that county or municipality, a residential or commercial property owner located in that county or municipality may apply to the appropriate qualifying improvement program for PACE financing. This change may clarify that special districts may only administer PACE loans in counties and municipalities that have affirmatively authorized such programs.

The bill also provides that a local government must include in a contract with program administrators the right to perform annual reviews of the program administrator's compliance with laws and regulations governing PACE programs for residential properties, and must place a program administrator in a probationary program following substantial noncompliance. The nature of such probationary program is not provided by law.

Consumer Protection Measures

To account for recent consumer protection concerns regarding PACE financing nationwide, the bill provides regulations aimed at mitigating these concerns and ensuring consumers are well-informed of their obligations before entering into a PACE financing agreement.

Specifically, the bill provides that, a financing agreement for residential property may not be approved unless determinations have been made that:

- All property taxes and other assessments are current and have not been delinquent for the preceding 3 years or the owner's period of ownership, if less than 3 years;
- There are no involuntary liens, including construction liens on the property;
- There are no notices of default or other evidence of property-based debt delinquency recorded in the preceding 3 years;
- The property owner is current on all mortgage debt on the property;
- The property is within the geographical boundary of the applicable qualifying improvement program;
- The term of the financing agreement does not exceed the useful life of the qualifying improvement, or for multiple improvements does not exceed the lesser of 30 years or the weighted average estimated useful life of improvements;
- The property is not subject to an existing home equity conversion mortgage or reverse mortgage product, or is not currently a residential property gifted to a homeowner by a nonprofit entity;
- The property owner is not currently in bankruptcy;
- For solar energy improvements, the property owner has obtained estimates from at least two unaffiliated, competitive entities; and
- The owner has been asked if they have obtained or sought to obtain additional qualifying improvements on the same property which have not been recorded.

Similarly, a financing agreement for commercial property may not be approved unless determinations have been made that:

- All property taxes and other assessments levied on the same bill as the property taxes are current;
- There are no involuntary liens greater than \$10,000, including construction liens, on the property;
- No notices of default or other evidence of property-based debt delinquency have been recorded and not released during the preceding 3 years or the property owner's period of ownership if less than 3 years; and
- The property owner is current on all mortgage debt on the property.

A qualifying improvement contract on residential property further requires that the local government or program administrator determine that the property owner has the ability to pay the PACE assessments. This requires that the estimated annual payment amount for all qualified improvement financing agreements on the property does not exceed 10 percent of the property owner's annual household income. The bill provides what documents and evidence this determination must be based upon.

Before or concurrent with entering into a residential PACE financing agreement, the PACE administrator must provide a financing estimate and disclosure to the property owner that includes:

- The total amount estimated to be funded including program fees and capitalized interest;
- The estimated annual PACE assessment;
- The term of the PACE assessment;
- The interest charged and estimated annual percentage rate;
- A description of the qualifying improvement;
- A disclosure that if the property owner sells or refinances the property, the property owner may be required to pay off the full amount owed under each PACE financing agreement;
- A disclosure that the PACE assessment will be collected alongside other property taxes, and will result in a lien on the property during the term of the agreement; and
- A disclosure that failure to pay the PACE assessment may result in penalties and fees, along with the issuance of a tax certificate that could result in the property owner losing the real property;
- A disclosure that the owner has 5 days to cancel the financing agreement;
- A disclosure that any potential utility or insurance savings are not guaranteed and will not reduce the annual or total assessments due;
- A disclosure that a local government, program administrator, or contractor does not provide tax advice, and that professional tax advice should be sought for questions regarding tax impacts; and
- A disclosure that the property owner cannot be assessed a prepayment penalty.

The program administrator must also conduct a recorded telephone call with the property owner to confirm the following:

- That the property owner has access to the contract and financing estimates and disclosures;
- The qualifying improvement that is being financed;

- The total estimated annual costs, including fees;
- The total estimated average monthly equivalent amount required to pay such annual costs;
- The estimated date the property owner's first tax payment including the PACE assessment will come due;
- The term of the PACE financing agreement;
- That payments will cause the owner's annual tax bill to increase, that payments will be made through additional annual assessments, and that such payments will be made either directly to the county tax collector's office or through the owner's mortgage escrow account;
- That the owner has disclosed whether the property has received or is seeking additional PACE assessments and has disclosed all other PACE assessments or special taxes about to be placed on the property;
- That the property will be subject to a lien during the term of the PACE financing agreement which may require the contract to be paid in full before selling or refinancing the property;
- That any potential utility or insurance savings are not guaranteed and will not reduce the PACE or total assessment amount; and
- That the program administrator does not provide tax advice and that the owner should seek professional tax advice with questions regarding tax credits, deductibility, or other impacts of the qualifying improvement or PACE financing agreement.

A property owner may cancel the PACE financing agreement within five business days after signing the contract, without financial penalty. The local government must provide at the time of contracting a cancellation form. The bill provides direction for instances where a an agreement is canceled within 5 days, but after a contractor has either initiated work or delivered chattel or fixtures to a residential property under the contract.

When a change order or proposed change order on a project significantly increased the cost of the original project or significantly expands the scope of the original project, a local government or program administrator must notify the property owner and confirm the change, including an updated disclosure form.

The bill provides that a financing agreement may be executed for qualifying improvements in the construction of a commercial property before a certificate or occupancy is issued, and that in such cases progress payments are permitted provided that the property owner subsequently provides written verification confirming that qualifying improvements, once final, are completed and operating as intended.

The bill provides that before entering into a PACE agreement for commercial properties, the local government or program administrator must receive the written consent of current mortgage holders or loan servicers encumbering the property.

Maximum Assessments on Property

Current law provides that the total amount of any non-ad valorem assessments for a property may not exceed 20 percent of the just value of the property, as determined by the property appraiser. The bill amends this requirement to read that total assessments may not exceed 20 percent of the fair market value as determined by a reputable third party.

The bill also newly provides that the combined mortgage-related debt and total amount of non-ad valorem assessments may not exceed 97 percent of the fair market value of the property.

Judicial Remedies for Failure to Establish Ability to Pay

The bill provides that, in the event that a court or tribunal determines by clear and convincing evidence that the program administrator's determination of the property owner's ability to pay was not objectively reasonable based on the information provided by the property owner, the yearly assessment payment shall be reduced in the amount which is within the property owner's ability to pay. This provision does not require or authorize the administrator to reduce the total amount owed on the assessment.

This provision requires reduction of the monthly payments to meet the buyer's ability to pay, which without reducing the total amount due will extend the term of the assessment. Notwithstanding, the term of a PACE financing agreement may not exceed the lesser of 30 years or the useful life of the improvement.

PACE Contractor Oversight

The bill provides that for residential real property, a program administrator may not enroll a contractor unless the administrator makes a reasonable effort to review the contractor's professional standing. This includes reviewing the appropriate licensure, permits, and registrations required for its business operations. Additionally, the administrator must obtain the contractor's written agreement that the contractor will act in accordance with all applicable laws to include advertising and marketing laws and regulations.

Further, the bill requires a program administrator to maintain a process to enroll new contractors that includes reasonable review of each contractor's relevant work or project history, financial and reputational background, criminal background, and status on Better Business Bureau or other online platform tracking contractor reviews. A program administrator may rely on a background check conducted by the Florida Department of Business and Professional Regulation Construction Industry Licensing Board to comply with the criminal background check.

Before disbursing funds to a contractor for a qualifying improvement on residential real property, a program administrator must confirm that the applicable work or service has been completed. This is accomplished through either written or telephonic certification with the property owner, or through a third-party site inspection.

A contractor should not present a different price for a qualifying improvement on residential real property financed by a PACE financing agreement than the contractor would otherwise present were the improvement not financed by PACE.

A program administrator may not provide a contractor with any payment, fee, or kickback in exchange for referring business relating to a specific assessment financing agreement.

A program administrator must develop and implement policies and procedures for responding, tracking, and resolving questions and complaints. It must also have a process for monitoring

contractors with regard to performance and compliance with program policies, and implement policies for suspending, terminating, and reinstating contractors based on violations of program policies or unscrupulous behavior. Further, a program administrator must submit a report annually showing the number of property owner complaints and what category the complaints fall into. The program administrator must conduct regular reviews of contractors to confirm ongoing compliance with oversight regulations.

The bill imposes certain marketing and communications guidelines for program administrators and contractors to follow. Under these provisions, program administrators and contractors may not suggest that PACE financing is a government assistance program, that qualifying improvements are free or that PACE is a free program, or that utilizing PACE financing does not require the homeowner to repay the financial obligation. A program administrator or contractor may not make representations as to the tax deductibility of a PACE financing agreement on residential real property. They may only encourage a property owner to seek the advice of a tax professional.

Protections applying specifically to residential real property do not apply if the program administrator determines that the residential real property is owned by a business entity that owns more than four such properties, and the business entity's ownership does not reside on the property.

Finally, the bill provides that a local government or program administrator offering a qualifying improvement program for residential property may finance qualifying improvements on commercial properties if the estimated amount of financing on such properties does not exceed \$750,000.

The bill takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. This bill does not require counties or municipalities to spend funds, limit their authority to raise revenue, or reduce the percentage of a state tax shared with them as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

The bill does not create or raise state taxes or fees. Therefore, the requirements of Article VII, s. 19 of the Florida Constitution do not apply.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill does not affect state or local revenue.

B. Private Sector Impact:

Property owners who live within a jurisdiction that offers PACE financing will see the benefit of increased consumer protections.

C. Government Sector Impact:

PACE programs are designed to be budget-neutral for local governments. As such, no government sector impact is expected for this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 163.08 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.