



# Addressing Climate Change Locally: North Carolina Local Government Financing Programs for Private Energy Efficiency Projects

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## Introduction

Local governments across the country are becoming increasingly involved in promoting, facilitating, and even funding private sector efforts to reduce greenhouse gas emissions in response to climate change. To date, local efforts have focused primarily on providing incentives to developers and builders (to encourage sustainable building practices) or to local government electric utility consumers (to reduce energy consumption).

Local governments in several states have adopted green building incentive and rebate programs for construction projects. In North Carolina, for example, counties and municipalities are authorized to provide reductions or partial rebates on building permit fees for buildings that meet guidelines established by the Leadership in Energy and Environmental Design (LEED) program,<sup>1</sup> the Green Globes<sup>2</sup> program, or another recognized certification program.<sup>3</sup>

1. Developed by the U.S. Green Building Council, LEED is an internationally recognized green building certification system. It provides third-party verification that a building or community was designed and built using strategies aimed at improving performance across certain metrics, such as energy savings, water efficiency, and CO<sup>2</sup> emissions reductions. For more information on the LEED measures and requirements for LEED certification, see [www.usgbc.org/DisplayPage.aspx?CMSPageID=1988](http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1988) (last visited Nov. 13, 2009).

2. Owned and operated by the Green Building Initiative (GBI), the Green Globes program is a building environmental design and management tool. It delivers an online assessment protocol, a rating system, and guidance for green building design, operation, and management. For more information on the Green Globes program, see [www.greenglobes.com/](http://www.greenglobes.com/) (last visited Nov. 13, 2009).

3. N.C. GEN. STAT. (hereinafter G.S.) § 153A-340; G.S. 160A-381.

Counties and municipalities also are authorized to provide density bonuses, make adjustments to otherwise applicable development requirements, or provide other incentives to developers or builders who build or reconstruct developments in ways that significantly reduce energy consumption.<sup>4</sup> Other North Carolina local governments that provide electric utility services—known as *electri-cities*—have adopted various rebate and loan programs under their broad authority to adopt “adequate and reasonable rules to protect and regulate a public enterprise”<sup>5</sup> and their authority to fix and enforce electric utility rates.<sup>6</sup> These programs are targeted at helping customers make energy efficiency improvements that will reduce electricity demands on the electri-cities’ systems.<sup>7</sup>

A relatively new initiative, however, is the provision by local governments of some form of direct funding for energy efficiency improvements (EEI) and distributed generation renewable energy sources (DGRES) projects on private property, even if the governments do not own or operate electric utilities. EEIs generally involve retrofits to existing structures that reduce energy demand; for example, weather-stripping, storm windows, and increased insulation. DGRES create energy from renewable sources, often in a decentralized manner, which reduces the demand on existing energy supplies and decreases the remittance of certain pollutants. Common DGRES include solar photovoltaic and geothermal energy systems. To date, local governments in a few states have instituted loan programs to assist private sector entities with energy conservation efforts, including the implementation of EEIs and DGRES.<sup>8</sup> The purported benefits of these programs for residential and commercial property owners include easier access to capital at lower borrowing costs (including no or low up-front costs) and with longer repayment periods, and energy efficiency savings that exceed the yearly loan repayment costs.<sup>9</sup> Also, under some programs, the repayment obligation transfers when the benefited property is sold, allowing property owners to invest in improvements that will pay back over a longer period of time than the owner intends to retain the property. The purported benefits for local governments include facilitation of efforts to address local air pollution problems and climate change at a low

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4. G.S. 160A-383.4. The local unit is free to determine its own eligibility criteria based on generally recognized standards, including LEED or other national or regional certification programs. *Id.* Note that this statutory provision originally applied only to select local governments. S.L. 2009-95 (S 52) extended its application to all counties and municipalities.

5. G.S. 160A-312 (municipalities); G.S. 153A-275 (counties).

6. G.S. 160A-314 (municipalities); G.S. 153A-277 (counties).

7. See [www.dsireusa.org/incentives/index.cfm?re=1&ee=1&spv=0&st=0&srp=1&state=NC](http://www.dsireusa.org/incentives/index.cfm?re=1&ee=1&spv=0&st=0&srp=1&state=NC) (last visited Nov. 13, 2009) for a list and brief description of several rebate and loan programs offered by various North Carolina electri-cities.

8. For a description of programs in California, Colorado, and New York, see RENEWABLE AND APPROPRIATE ENERGY LABORATORY, UC BERKELEY, GUIDE TO ENERGY EFFICIENCY & RENEWABLE ENERGY FINANCIAL DISTRICTS FOR LOCAL GOVERNMENTS (Sept. 2009), available at [www.ci.berkeley.ca.us/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Energy\\_and\\_Sustainable\\_Development/Guide%20to%20Renewable%20Energy%20Financing%20Districts2009.pdf](http://www.ci.berkeley.ca.us/uploadedFiles/Planning_and_Development/Level_3_-_Energy_and_Sustainable_Development/Guide%20to%20Renewable%20Energy%20Financing%20Districts2009.pdf) (last visited Feb. 1, 2010).

9. There also may be certain state and federal tax benefits to property owners. For example, the interest portion of loan repayments may be tax deductible, similar to mortgages. And property owners may be eligible for investment tax credits for certain projects. For information about potential federal income tax benefits, see [www.dsireusa.org/incentives/index.cfm?State=US&ee=1&re=1](http://www.dsireusa.org/incentives/index.cfm?State=US&ee=1&re=1) (last visited Nov. 24, 2009). For information about potential state income and property tax benefits in North Carolina, see [www.dsireusa.org/incentives/index.cfm?re=1&ee=1&spv=0&st=0&srp=1&state=NC](http://www.dsireusa.org/incentives/index.cfm?re=1&ee=1&spv=0&st=0&srp=1&state=NC) (last visited Nov. 24, 2009).

cost to the government and stimulation of the local economy through so-called green jobs. In fact, these types of local initiatives currently are being touted by federal government policymakers and Obama administration officials as a major component of the federal effort to stimulate the economy, encourage environmental conservation, and reduce our nation's dependence on foreign oil by laying the groundwork for a "self-sustaining home energy efficiency retrofit industry."<sup>10</sup>

During the 2009 legislative session, the General Assembly added North Carolina local governments to the list of national local governments that are authorized to establish programs to finance certain renewable energy and energy efficiency projects on private property (energy financing programs). The energy financing programs authorized by the North Carolina legislation differ in many respects from those authorized in other states. Furthermore, the legislation is not without complications, leaving many local governments wondering if and how such programs may be structured to benefit their communities. This bulletin explains the current legal framework for local government energy finance programs in North Carolina. The bulletin first discusses the types of energy projects that may be funded under an energy financing program. It then details the basic contours of the authority (including procedural requirements and program limitations) for establishing two types of energy financing mechanisms: revolving loan fund programs and special assessment programs. Finally, it highlights the potential legal hurdles (both statutory and constitutional) to establishing the energy financing programs in this state.

### Authorized Energy Projects

North Carolina local governments are authorized to adopt energy financing programs to "finance the purchase and installation of *distributed generation renewable energy sources* or *energy efficiency improvements* that are permanently affixed to residential, commercial, or other real property."<sup>11</sup> Under current North Carolina law, there are potentially two different authorized mechanisms to fund the energy projects—revolving loan fund programs and special assessments programs. Before discussing the authority for, and the requirements and limitations of, these financing programs, this bulletin examines the types of energy projects that may be funded—defining, to the extent possible, DGRES and EEI.

### Distributed Generation Renewable Energy Sources

DGRES are technologies that involve the harnessing of sources of energy that occur naturally and repeatedly in the environment to accomplish a decentralized generation of electricity, often by using small-scale power generation mechanisms to supplant or supplement the traditional electric power system. Renewable energy sources, unlike fossil fuels, consist of a constantly replenishing flow of energy rather than an existing stock that is diminished by its use. They are statutorily defined by reference to Section 62-133.8 of the North Carolina General Statutes (hereinafter G.S.), which provides that a *renewable energy resource* is "a solar electric, solar thermal, wind, hydropower, geothermal, or ocean current or wave energy resource; a biomass resource, including agricultural waste, animal waste, wood waste, spent pulping liquors, combustible residues, combustible liquids, combustible gases, energy crops, or landfill methane; waste heat

10. MIDDLE CLASS TASK FORCE, COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, RECOVERY THROUGH RETROFIT (Oct. 2009), [http://pacenow.org/documents/Recovery\\_Through\\_Retrofit\\_Final\\_Report.pdf](http://pacenow.org/documents/Recovery_Through_Retrofit_Final_Report.pdf) (last visited Dec. 1, 2009).

11. S.L. 2009-522 (H 1389) (emphasis added).

derived from a renewable energy resource and used to produce electricity or useful, measurable thermal energy at a retail electric customer's facility; or hydrogen derived from a renewable energy resource."<sup>12</sup>

Thus a local government may fund any projects that are permanently affixed to real property and that utilize one or more of the renewable energy resources listed above to generate electricity. Such projects include, but are not necessarily limited to, the installation of solar photovoltaics,<sup>13</sup> solar hot water systems, biomass pellet stoves, and certain high efficiency (non-gas) fireplaces.

### Energy Efficiency Improvements

What constitutes an EEI is not statutorily defined. Thus a local government's governing board has broad discretion to determine what types of projects to fund under its energy financing program. Projects could include sealing leaks in walls, floors, attics, ducts, and windows; improving ventilation by installing attic or whole house fans; upgrading lighting; adding or improving insulation; installing more efficient heating and cooling systems; or installing reflective roofs. This is not an exclusive list, though.<sup>14</sup>

### Selecting Energy Projects for Inclusion in an Energy Financing Program

What specific DGRES and EEI projects (collectively, energy projects) a local unit includes in its energy financing program will depend both on the unit's program goals and its administrative capacity. In some cases, it also will depend on the source of funding for the financing program. As discussed below, a unit is advised to set concrete project goals and objectives with respect to required energy savings and reduced carbon emissions for approved projects.<sup>15</sup> For example, a unit may wish to adopt specified energy efficiency criteria (such as minimum efficiency and certification requirements) similar to those required to qualify for certain federal energy efficiency tax credits under the American Recovery and Reinvestment Act of 2009 (ARRA).<sup>16</sup> (An added bonus is that property owners who avail themselves of the local government's program also may qualify for the federal tax credits.)<sup>17</sup> A local government also should select projects for inclusion in its energy financing program that will be relatively easy to monitor for compliance with the unit's goals and objectives.

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12. G.S. 160A-459.1(c) (municipalities); G.S. 153A-455(c) (counties). A renewable energy source does not include a peat, fossil fuel, or nuclear energy resource.

13. Solar photovoltaic systems use solar panels made of silicon to convert sunlight into electricity.

14. For a detailed list of potential residential energy efficiency improvement projects see the Boulder County, Colorado, Climate Smart Loan Program, [www.bouldercounty.org/bocc/cslp/measures.pdf](http://www.bouldercounty.org/bocc/cslp/measures.pdf) (last visited Nov. 16, 2009). (Note that the legal authority for, and contours of, Boulder County's program differ significantly from that of North Carolina local governments, but all of the listed energy efficiency improvement projects in the Boulder County program also are authorized under North Carolina law.)

15. Establishing concrete carbon emission reduction targets likely is necessary in order to satisfy the North Carolina Constitution's public purpose requirement.

16. Pub. L. No. 111-5 (2009). A list of the project specifications to qualify for the federal tax credit is available at [www.energystar.gov/index.cfm?c=tax\\_credits.tx\\_index#c1](http://www.energystar.gov/index.cfm?c=tax_credits.tx_index#c1) (last visited Oct. 30, 2009).

17. For a list of federal incentives, including tax breaks, see [www.dsireusa.org/incentives/index.cfm?state=us&re=1&EE=1](http://www.dsireusa.org/incentives/index.cfm?state=us&re=1&EE=1) (last visited Jan. 9, 2010). Note that there is some question about whether a property owner may qualify for federal tax breaks if American Recovery and Reinvestment Act of 2009 (ARRA) funds are used to fund the DGRES and EEI projects. A unit should consult with a tax professional to determine eligibility requirements before marketing its energy financing program.

## Authorized Financing Mechanisms

How, though, can a North Carolina local government actually fund energy projects that are permanently affixed to private property? As stated above, there are potentially two authorized financing mechanisms. A local government may establish a revolving loan fund program whereby the local government lends money to a qualifying property owner, upon terms that are set by the unit, to fund the installation of a specified energy project on real property. At least arguably, a local government also may install a DGRES or EEI project (or may contract for its installation) on real property and impose a special assessment on the real property to recoup the costs of the project. Each financing mechanism is discussed in turn. (See Appendix A for a chart comparing the two financing programs.)

### Revolving Loan Fund Programs

#### *What Is a Revolving Loan Fund?*

A revolving loan fund (RLF) is a pool of money that is used to make loans to individuals or entities. Typically, as the loans are repaid, the pool is refunded, allowing more loans to be made to new individuals or entities. During the 2009 legislative session, the General Assembly authorized North Carolina municipalities and counties to create RLFs to finance energy projects (energy RLF programs), subject to certain limitations and restrictions.<sup>18</sup>

The legislation affords much discretion to a local governing board to structure an energy RLF program, including the ability to determine program goals and objectives, identify the types of projects that will be funded, establish eligibility criteria for real property owners, and detail the procedural requirements for participation in the program. Despite the flexibility afforded to local governments in structuring the energy RLF programs, however, there are a few statutory requirements and restrictions related to program funding, loan terms, and collection remedies.

#### *Energy RLF Program: Funding*

Among the important initial steps in establishing an energy RLF is identifying the revenue sources that legally—and practically—may be used to seed the loan pool. (Once the pool is established, future loans will be funded by repayment proceeds from past loans.) North Carolina law authorizes a local government to fund its energy RLF with federal *Energy Efficiency Conservation Block Grant (EECBG)*<sup>19</sup> proceeds and other *unrestricted revenue*.

**EECBG proceeds.** The EECBG program provides federal aid to state and local governments to fund programs and projects that reduce energy use and fossil fuel emissions and improve energy efficiency.<sup>20</sup> The program was authorized in 2007 by the federal Energy Independence and Security Act (EISA)<sup>21</sup> but was funded for the first time by the ARRA.<sup>22</sup> According to EISA, the purpose of the

18. S.L. 2009-522.

19. For information on the federal Energy Efficiency Conservation Block Grant (EECBG) program, including competitive funding opportunities, see [www.eecbg.energy.gov/](http://www.eecbg.energy.gov/) (last visited Nov. 18, 2009).

20. For a detailed guide to the federal EECBG program, including answers to frequently asked questions, see [www.eecbg.energy.gov/about/faq.html#le1](http://www.eecbg.energy.gov/about/faq.html#le1) (last visited Nov. 25, 2009).

21. Pub. L. No. 110-140 (2007).

22. Pub. L. No. 111-5 (2009). The EECBG program is one of several initiatives funded by the ARRA to promote clean energy at the state and local level. For details about the other programs, see U.S. ENVIRONMENTAL PROTECTION AGENCY, AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: A GUIDE TO RENEWABLE ENERGY AND ENERGY EFFICIENCY OPPORTUNITIES FOR LOCAL AND TRIBAL GOVERNMENTS (Feb. 2009), [www.epa.gov/statelocalclimate/documents/pdf/local\\_guide\\_to\\_arra.pdf](http://www.epa.gov/statelocalclimate/documents/pdf/local_guide_to_arra.pdf) (last visited Jan. 5, 2010).

EECBG program is to assist state and local governments, among others, in implementing energy efficiency and conservation strategies that reduce fossil fuel emissions created as a result of activities within a state's or local government's jurisdiction; reduce total energy use; and improve energy efficiency in transportation, building, and other appropriate sectors.<sup>23</sup> Furthermore, pursuant to the ARRA, the EECBG funds should be used to invest in programs and projects that create or retain jobs and stimulate the economy while meeting long-term energy goals. The program is modeled after the federal Community Block Grant Program—a program familiar to many local governments in North Carolina.<sup>24</sup>

Under the ARRA, Congress appropriated \$3.2 billion for the EECBG program, most of which is distributed to state and local governments and other entities through formula grants.<sup>25</sup> The balance includes nearly \$455 million for competitive grants, which will be awarded to eligible local governments and other entities through a separate funding opportunity announcement.<sup>26</sup>

**Formula grants.** Formula grant funds may be used to establish local “financial incentive programs and mechanisms for energy efficiency improvements, such as . . . revolving loan funds.” No more than 20 percent of a unit's grant allotment or \$250,000, whichever is greater, may be used to establish an energy RLF program, though. Furthermore, the grant proceeds must be committed within eighteen months from the effective date of the award and spent within thirty-six months. And there are fairly detailed reporting requirements for recipients of formula grant fund allocations.<sup>27</sup> The U.S. Department of Energy (DOE) has published a guide to establishing RLFs with EECBG proceeds, which local governments are strongly encouraged to follow.<sup>28</sup>

**Competitive grants.** According to an October 19, 2009, funding opportunity announcement from DOE,<sup>29</sup> competitive grant fund awards fall into one of two topic areas. The first is the retrofit ramp-up program, which will award funding for large-scale programs that are structured to provide whole neighborhood building energy retrofits—providing for energy upgrades to a large percentage of a particular community's residential, commercial, industrial, and public buildings. No more than 20 percent of a unit's grant allotment or \$250,000, whichever is greater, may be used to establish an energy RLF program. The second program is referred to as the general innovation fund. Under this program, DOE will award funds to cities, counties, and other entities that are not eligible to receive the population-based formula grant allocations referenced above.

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23. Pub. L. No. 110-140, Title V, Subtitle E, Sect. 542 (2007).

24. For information on the Community Block Grant program, as it relates to North Carolina local governments, see [www.nccommerce.com/en/CommunityServices/CommunityDevelopmentGrants/CommunityDevelopmentBlockGrants/](http://www.nccommerce.com/en/CommunityServices/CommunityDevelopmentGrants/CommunityDevelopmentBlockGrants/) (last visited Nov. 24, 2009).

25. See Energy Efficiency and Conservation Block Grant program—State, Local and Tribal Allocation Formulas, 74 Fed. Reg. 17,461 (Apr. 15, 2009), available at [www.eecbg.energy.gov/downloads/EECBG\\_Federal\\_Register\\_Notice\\_04\\_15\\_09.pdf](http://www.eecbg.energy.gov/downloads/EECBG_Federal_Register_Notice_04_15_09.pdf) (last visited Nov. 25, 2009) (detailing formula methodology).

26. On October 19, 2009, the U.S. Department of Energy issued a funding opportunity announcement for competitive grant awards to fund Retrofit Ramp-up and General Innovation Fund Programs. The application deadline was Dec. 14, 2009. To view the funding opportunity announcement, see [www.naseo.org/programs/sep/documents/EECBGCompetitiveFOA148MON.pdf](http://www.naseo.org/programs/sep/documents/EECBGCompetitiveFOA148MON.pdf) (last visited Nov. 25, 2009).

27. For more information about grant fund restrictions and reporting requirements, see U.S. Department of Energy, Funding Opportunity Announcement for Recovery Act—Energy Efficiency and Conservation Block Grant—Formula Grants (May 11, 2009). It is available at [www.eecbg.energy.gov/downloads/DE\\_FOA\\_0000013\\_Amendment\\_000003.pdf](http://www.eecbg.energy.gov/downloads/DE_FOA_0000013_Amendment_000003.pdf) (last visited Nov. 25, 2009).

28. The federal RLF guidance is available at [www.eecbg.energy.gov/Downloads/Revolving\\_Loan\\_Funds\\_070609.pdf](http://www.eecbg.energy.gov/Downloads/Revolving_Loan_Funds_070609.pdf) (last visited Nov. 18, 2009).

29. See note 26, *infra*.

Funds may be used to establish financial incentive programs for energy efficiency improvements, energy efficiency and conservation programs for buildings and facilities, energy distribution technologies for energy efficiency, reduction and capture of methane and greenhouse gases, and building energy audits. Similarly detailed reporting requirements apply to recipients of competitive grant awards as apply to formula grant fund recipients.<sup>30</sup>

**Unrestricted revenue.** The other source of funds, unrestricted revenue, is not statutorily defined. It likely includes a unit's sales and use tax revenue (to the extent it is not otherwise earmarked for another purpose) and other general revenue that is not statutorily or contractually designated for a specific purpose. But, does it include property tax revenue? It is not entirely clear. In order to use property tax revenue to fund a particular program or service without receiving explicit voter approval, the program or service must be listed in G.S. 160A-209 (municipalities) or G.S. 153A-149 (counties).<sup>31</sup> These statutes explicitly authorize expenditure of property tax revenue to fund "air pollution control programs," defined elsewhere as local programs to develop comprehensive plans for the control and abatement of new and existing sources of air pollution; perform air quality monitoring and emissions inventories; establish air quality and emission control standards; and provide for the control or abatement of existing sources of air pollution.<sup>32</sup> If the central purpose of an energy RLF program is to reduce carbon emissions, it may qualify as a component of a local unit's air pollution control program. And, if so, a local unit likely may fund the energy RLF, or a portion of the energy RLF, with property tax dollars. If a local unit does not have an air pollution control program or determines that its energy RLF program is not part of its air pollution control program, however, property tax proceeds likely may not be used to finance the loan funds without specific voter approval.

**Debt financing not authorized.** What about borrowing money to fund an energy RLF program? Is debt financing considered unrestricted revenue? The answer is no. A local government may *not* issue debt (that is, borrow money) to fund its energy RLF program. Governments in other states have partnered with local financial institutions to borrow the money to seed their RLFs.

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30. For more information about grant fund restrictions and reporting requirements, see U.S. Department of Energy, Funding Opportunity Announcement for Recovery Act: Energy Efficiency and Conservation Block Grants: Competitive Solicitation: Retrofit Ramp-up and General Innovation Fund Programs (Oct. 19, 2009). It is available at [www.eecbg.energy.gov/Downloads/EECBG\\_Competitive\\_FOAI48\\_Amendment3.pdf](http://www.eecbg.energy.gov/Downloads/EECBG_Competitive_FOAI48_Amendment3.pdf) (last visited Dec. 2, 2009).

31. Property taxes levied for certain purposes are subject to rate limitations and, in a very few cases, must be approved by the voters. These restrictions are pursuant to Article V, Section 2(5), of the North Carolina Constitution. To implement Article V, Section 2(5), the General Assembly has enacted G.S. 153A-149, for counties, and G.S. 160A-209, for cities. These two statutes place functions that counties and cities are authorized to undertake in three groups. The governments may levy property taxes for Group I functions without restriction on tax rate or amount. For cities, this group includes only debt service on general obligation debt, but for counties the group includes the most important state-mandated functions: schools and social services. Counties and cities may levy property taxes for Group II functions without a vote, to a maximum rate of \$1.50 per \$100 valuation of taxable property. A local government may hold a referendum on the levy of property taxes for any Group II function. If such a referendum passes, the tax levied under it does not count against the \$1.50 limitation. A local government may also hold a referendum to raise the \$1.50 limitation. Group III functions include all authorized activities that the General Assembly has not specified as either Group I or Group II functions. The statute does not identify Group III functions. If the voters approve the levy of property taxes for a Group III function, any tax levied for that function does not count against the \$1.50 rate limitation.

32. See G.S. 143-215.112.



This type of arrangement is currently not authorized under North Carolina law. (As discussed below, however, a local government likely may issue debt, in the form of general obligation bonds, revenue bonds, or project development financing debt instruments, to fund a special assessment program to accomplish the same purpose.)

***Energy RLF Program: Loan Terms***

As stated above, a local government has broad authority to establish the terms of its energy RLF program. There are a few statutory limitations. The loan repayment period may not exceed fifteen years and the annual interest rate charged for use of the funds may not exceed 8 percent. (The 8 percent interest rate limit does not include fees for loan application review and origination.) As a practical matter, a local unit likely will determine the repayment period in relation to the useful life of the project being funded. Likewise, the interest rate charged will be a product of both the administrative and other costs to the local government and the demand for these types of loans.

***Energy RLF Program: Loan Collection Remedies***

One issue that local government officials likely will consider particularly important is determining what tools will be available to local units to aid in the collection of loan repayments. As a condition of receiving an energy RLF loan, a local government will enter into a contractual agreement with the property owner whereby the property owner agrees to repay the loan according to the terms set by the local unit. Thus, at a minimum, in the event of nonpayment a local unit may sue the property owner for breach of the contractual agreement.<sup>33</sup> The statute of limitations to collect on the debt is three years from the date each loan payment becomes delinquent.<sup>34</sup> Also, if the amount owed exceeds \$50, a local unit may submit the debt to the state's debt setoff program for potential recovery against a state income tax refund or lottery winnings owed to the debtor.<sup>35</sup>

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33. Note, however, that if the property owner subsequently transfers ownership of the property that was benefited by the DGRES or EEI project before the loan is fully repaid, the local unit must proceed against the individual who entered into the contractual loan agreement. The unit will not be able to enforce collection of delinquent loan payments against the new property owners.

34. G.S. 1-52.

35. See G.S. Ch. 105A. A local government may submit a delinquent public enterprise utility account that is at least \$50 to the state to be recouped from a state refund (of at least \$50) owed to the delinquent customer. G.S. 105A-4. Before a local government may submit a debt to the state for collection under the state's debt setoff program, it must provide written notice to the debtor and afford the debtor an opportunity to contest the proposed setoff. The notice must inform the debtor that the local government intends to submit the debt owed for collection by setoff, explain the bases for the unit's claim to the debt, and inform the debtor that the local government intends to apply the debtor's refund against the debt and that a collection assistance fee of \$15 will be added to the debt if it is submitted for setoff. The notice also must inform the debtor that the debtor has the right to contest the matter by filing a request for a hearing with the local government and must state the time limits and procedure for requesting the hearing. It also must notify the debtor that failure to request a hearing within the required time will result in setoff of the debt.

A debtor has thirty days after the date the local government mails a notice of a proposed debt setoff to file a written request for a hearing with the governing body of the local government or a person designated by the governing body. The governing body, or a person designated by the governing body, conducts the hearing and determines whether a debt is owed to the local government and in what amount.

Several of the energy loan programs in other states authorize local governments to impose statutory assessments on the property that is benefited by the energy project funded with the loan proceeds (commonly referred to as property-backed assessments or property assessed clean energy (PACE)). The assessments are a lien on the benefited property, allowing a local government to foreclose on the property in the event of nonpayment. And, an assessment lien typically has priority status over private liens, including mortgage liens, on the property. This provides a local unit with a powerful “stick” to aid in the collection of loan payments. Under current law, North Carolina local governments *may not* impose a property-backed assessment for an energy RLF loan. As discussed below, a local unit must use the second potential financing mechanism—special assessment program—to impose an assessment. Thus the special assessment program more closely resembles the PACE programs in other states than the energy RLF program.

A local government may, however, require security (collateral) for any loan made from its energy RLF. In fact, in its discretion, a local unit may acquire a mortgage interest in the real property to which the energy projects will be affixed as collateral for the loan, which translates to a lien on the property. Unlike a property-backed assessment lien (or a property tax lien), the mortgage interest (lien) will not have priority status; instead, it will have the same status as a private lien.<sup>36</sup> If a loan is not repaid according to the loan contract terms, a local government may foreclose on the underlying real property according to the statutory procedures set forth in G.S. Chapter 45. But, the lien will be junior to most statutory liens and other private liens (including home mortgages) that attached before the energy RLF lien. And, liens with priority status over the RLF lien will be satisfied first.

What about enforcing loan repayments through the collection remedies authorized for utilities—specifically, listing the amount owed on a property owner’s utility bill and ordering partial payments in order to discontinue utility services for nonpayment of the full amount due?<sup>37</sup> As a matter of convenience, a local unit may list the amount due for an energy RLF loan on the property owner’s monthly utility bill. A unit may not take advantage of ordering partial payments and discontinuing utility services for nonpayment of the loan, though. Similarly, a unit may include the loan amount on the property owner’s property tax bill, but it may not

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If the debtor disagrees with the decision, the debtor may file a petition for a contested case within thirty days after the decision, pursuant to G.S. Ch. 150B, Article 3.

Once the local government sends the appropriate notice and establishes the debt owed, it must submit the debt to the North Carolina Department of Revenue through one of the following three agencies: the North Carolina League of Municipalities, the North Carolina Association of County Commissioners, or a clearinghouse that has been established pursuant to an interlocal agreement adopted under Article 20 of Chapter 160A of the General Statutes and has agreed to submit debts on behalf of a local government. G.S. 105A-3(b1). A local government should provide the clearinghouse agency with the full name, Social Security number, address, and other pertinent identifying information of the debtor. (A unit should collect this information from a potential public enterprise utility services customer before establishing the account for service.)

36. For a detailed analysis of liens and lien status, see Christopher B. McLaughlin, *The Property Tax Lien*, PROPERTY TAX BULLETIN NO. 150 (Oct. 2009), [www.sog.unc.edu/pubs/electronicversions/pdfs/ptb150.pdf](http://www.sog.unc.edu/pubs/electronicversions/pdfs/ptb150.pdf) (last visited Nov. 17, 2009).

37. G.S. 160A-314 and G.S. 153A-277 authorize municipalities and counties, respectively, to include charges for all public enterprise utility services on the same bill and, by ordinance, indicate the order of charges to which partial payments will be applied. Often local units apply payments to the water bill last, allowing the units to disconnect water service if the bill that includes charges for all of the public enterprise utility services is not paid in full.

employ the collection remedies authorized under the Machinery Act<sup>38</sup> for collecting delinquent property tax payments (such as levy, or attachment and garnishment, or foreclosure) to collect delinquent loan payments.

### **Special Assessment Programs**

The act that authorizes local governments to establish energy RLF programs arguably also authorizes units to create other types of financing programs.<sup>39</sup> In fact, along with other recent legislation,<sup>40</sup> the act potentially allows local governments to impose special assessments on the real properties to which the energy projects are affixed, although, as currently enacted, this authority is not assured.

#### ***What Is a Special Assessment?***

A special assessment typically is levied against property to pay for public improvements that benefit that property. For example, a local government may extend its water or sewer lines to the properties located within a subdivision and impose a special assessment on those properties to recoup some or all of the costs of installing the infrastructure. Similarly, a local government may install sidewalks or streetlights in a particular area and impose assessments on all the properties that benefit from the improvements. Like a user charge (and unlike a property tax), a special assessment is levied in some proportion to the benefit received by the assessed property. Unlike a user charge, a special assessment is levied against property rather than persons and typically is used to fund public improvements rather than services.<sup>41</sup> Furthermore, a special assessment is a lien on the real property that is assessed. And, as discussed below, that lien has priority status over most other liens.

#### ***Statutory Authority for an Energy Assessment Program***

During the 2008 and 2009 legislative sessions, the General Assembly bestowed new special assessment authority on municipalities and counties to fund a wide range of capital projects.<sup>42</sup> Most of the statutorily authorized projects for which assessments may be imposed involve public infrastructure projects, but the list also includes the installation of DGRES or EEI projects on private property.<sup>43</sup>

The special assessment legislation merely authorizes local governments to impose the special assessments to fund the energy projects, however; it does not authorize local governments to actually expend public moneys to construct the energy projects. (In North Carolina, a local

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38. The Machinery Act, codified at Subchapter II of Chapter 105 of the General Statutes, sets forth the procedures for assessing and collecting property taxes.

39. S.L. 2009-522.

40. S.L. 2008-165 (H 1770); S.L. 2009-525 (S 97).

41. Note also that special assessments, unlike property taxes, are not tax deductible.

42. See S.L. 2008-165; S.L. 2009-525. Note that before 2008, local governments had the authority to impose assessments for a few specified types of projects. See G.S. Ch. 160A, Art. 10 (municipalities); G.S. Ch. 153A, Art. 9 (counties). The new authority does not replace the traditional authority. The authorities overlap to some extent but differ in several respects. For a description of the new authority and a comparison of the new authority and the traditional authority, see Kara A. Millonzi, *An Overview of Special Assessment Bond Authority in North Carolina*, LOCAL FINANCE BULLETIN No. 40 (Nov. 2009), [www.sog.unc.edu/pubs/electronicversions/pdfs/lfb40.pdf](http://www.sog.unc.edu/pubs/electronicversions/pdfs/lfb40.pdf) (last visited Dec. 20, 2009).

43. G.S. 160A-239.2(a) (municipalities); G.S. 153A-210.2(a) (counties).

government must have explicit authority from the General Assembly in order to expend moneys for any purpose.) Thus, in order to take advantage of the new special assessment authority to fund energy projects, a local government must have independent authority to create a financing program to fund the energy projects.

Arguably, the act that authorizes local governments to establish an energy RLF program<sup>44</sup> also bestows broader authority on local governments to create other energy financing programs. To understand why, one may review the structure of the two parallel statutory provisions authorized by the act (one applies to municipalities and one to counties).<sup>45</sup> The statutes provide, in relevant part:

- (a) Purpose.—The General Assembly finds it is in the best interest of the citizens of North Carolina to promote and encourage renewable energy and energy efficiency within the State in order to conserve energy, promote economic competitiveness, and expand employment in the State. In furtherance of this purpose, *a [local government] may establish a program to finance the purchase and installation of distributed generation renewable energy sources or energy efficiency improvements that are permanently affixed to residential, commercial, or other real property.*
- (b) Revolving Loan Fund.—A [local government] may establish a revolving loan fund for the purpose of providing loans to finance the purchase and installation of distributed generation renewable energy sources or energy efficiency improvements that are permanently fixed to residential, commercial, or other real property. A [local government] may use Energy Efficiency and Conservation Block Grant Funds and its unrestricted revenue to fund the revolving loan fund. The annual interest rate charged for the use of funds from the revolving fund may not exceed eight percent (8%) per annum, excluding other fees for loan application review and origination. The term of any loan originated under this section may not be greater than 15 years.<sup>46</sup>

Note that the statutory provisions are divided into two subsections. Subsection (b) authorizes local governments to establish the energy RLFs. Preceding this subsection, however, is Subsection (a), which includes the italicized language that states that a local government “may establish a program to finance” the energy projects. A plausible reading of this language is that Subsection (a) authorizes local governments to establish a program, the purpose of which is to expend public moneys on energy projects, whereas Subsection (b) details one type of authorized financing program—the energy RLF program. Under this reading of the act, in addition to establishing an energy RLF program, a local government could set up other types of financing programs—including other loan programs, and possibly even grant programs—to fund the installation of distributed generation renewable energy sources or energy efficiency improvements that are permanently affixed to real property.<sup>47</sup>

44. S.L. 2009-522.

45. See G.S. 160A-459.1 (municipalities); G.S. 153A-455 (counties).

46. S.L. 2009-522 (emphasis added).

47. A counterargument to this interpretation is that S.L. 2009-522 only authorizes the creation of RLFs; the subsections are set out merely for ease of exposition. In fact, the titles of the individual statutory provisions at issue (which read “Revolving loan program for energy improvements”) might indicate that the authorizing legislation is limited to revolving loan funds. The title of a statute may be considered

Assuming that a local government has the authority to institute an energy assessment program (whereby it installs certain DGRES or EEI projects on private property and imposes a special assessment on that property to recoup some or all of the costs of the installation), a local governing board has broad discretion to determine the types of projects that will be funded and establish eligibility criteria for property owners.<sup>48</sup> Special assessments, however, are imposed only pursuant to detailed statutory procedural requirements. The following sections discuss a few key statutory requirements and limitations on the special assessment authority.

### ***Energy Assessment Program: Funding***

An energy assessment program ultimately will be funded by the assessments imposed on the real property to which the DGRES or EEI projects are permanently affixed. Because the assessments likely will be paid over time (in up to thirty yearly installments, as determined by the governing board), as a practical matter a local government will need to identify other revenue sources to front the costs of the energy projects. A local government may use its general revenues for this purpose. It also may issue debt—specifically, general obligation bonds and revenue bonds—to raise the necessary funds to seed its energy assessment program.

**General revenues.** A local government that imposes a special assessment to fund an authorized energy project may appropriate general revenues to front the costs of the project. General revenues likely comprise a local government's General Fund revenues (as opposed to its Enterprise Fund revenues), the expenditure of which is not otherwise restricted to a different purpose. Examples include sales and use tax proceeds (to the extent that they are not otherwise earmarked for a different purpose) and grant proceeds (including the federal EECBG proceeds that may be used to fund an energy RLF program). The restrictions on the use of property tax revenue for an energy RLF program apply here as well. In order to use property tax revenue to fund a particular program or service without receiving explicit voter approval, the program or

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only when there is confusion about the wording of the text, however. *See Toomey v. Lumber Co.*, 171 N.C. 178, 88 S.E. 215 (1916). When the legislative intent is clearly expressed in the statutory language itself, however, that language is controlling. *See In re Forsyth County*, 285 N.C. 64, 203 S.E.2d 51 (1974). Arguably, the legislative intent is clear on the face of the statutes—and it authorizes various types of financing programs.

In further support of an expansive reading of Subsection (a) is the actual legislative history of the act, as well as that of S.L. 2009-525. *See Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 403 S.E.2d 291 (1991) (noting that “after analyzing the text, structure, and policy of the statute, [if the court is] still in doubt as to legislative intent, [it also may] examine the history of the legislation in question.”). The first several versions of H 1389 explicitly authorized local governments to impose special assessments to fund the DGRES and EEI projects. *See* H 1389, Edition 4, available at [www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H1389v4.pdf](http://www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H1389v4.pdf) (last visited Dec. 20, 2009). This authority was eliminated from the bill shortly before it was enacted. At the time the special assessment authority was removed from H 1389, the act was amended to include the language in “Subsection (a).” And, at that time, the authority to impose special assessments to fund the energy projects already had been added to S 97. Thus, the legislature simply may have determined that the duplicative authority to impose the special assessments was unnecessary.

48. The remainder of this bulletin assumes that a local government has the authority to impose the special assessments to finance the energy projects. Note, however, that a governing board is cautioned to solicit the opinion of its unit's attorney before establishing programs other than the energy RLF program explicitly authorized by G.S. 160A-459.1(b) and G.S. 153A-455(b).

service must be listed in G.S. 160A-209 (municipalities) or G.S. 153A-149 (counties).<sup>49</sup> These statutes explicitly authorize expenditure of property tax revenue to fund air pollution control programs. Thus, if a local government determines that its energy project is part of its air pollution control program, it may fund it with property tax dollars. If not, property tax proceeds likely may not be used to finance the energy assessment program without specific voter approval.

**Debt financing authorized.** A local government is explicitly authorized to borrow money to front the costs of an energy assessment program by issuing revenue bonds,<sup>50</sup> project development financing debt instruments,<sup>51</sup> or general obligation bonds.<sup>52</sup> (Note that a local government is not authorized to front the costs of its energy assessment program through installment purchase financing or by issuing certificates of participation (COPS)). And, project development financing debt instruments will not be available to a local unit unless the energy projects are installed as part of an economic development effort in a project development financing district. However, a local government may borrow money to front the costs of the energy projects by issuing general obligation bonds or revenue bonds.

**General obligation bonds.** Although a local government likely may issue general obligation bonds to fund its energy assessment program, because of a constitutional provision prohibiting a local government from providing a loan or gift of the unit's credit, except under certain circumstances a local unit is limited to using its voted general obligation debt.<sup>53</sup> What that means is that all general obligation bonds issued to fund energy assessment programs must first be approved by a majority of the unit's voters participating in a referendum on this issue. A municipality or county is not authorized to use its two-thirds bond capacity<sup>54</sup> or other nonvoted general obligation debt to fund an energy assessment program.

If a local government issues general obligation bonds to front the costs of its energy assessment program and the annual assessment payments are insufficient to meet its debt service obligations, the unit likely will be forced to use property tax revenue to cover the shortfall.

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49. See note 31, *supra*.

50. See G.S. Ch. 159, Art. 5.

51. See G.S. Ch. 159, Art. 6.

52. See G.S. Ch. 159, Art. 4.

53. N.C. CONST. art. V, § 4(3) ("No county, city or town, special district, or other unit of local government shall give or lend its credit in aid of any person, association, or corporation, except for public purposes as authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon.") For a description of this constitutional provision and its limitations, see DAVID M. LAWRENCE, *ECONOMIC DEVELOPMENT LAW FOR NORTH CAROLINA LOCAL GOVERNMENT* (2000). This UNC School of Government publication is available for purchase at <http://shopping.netsuite.com/s.nl/c.433425/it.A/id.31/f>. Note that the prohibition on loans or gifts of credit does not apply to revenue bond proceeds. Cf. *Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973) (interpreting prior N.C. constitutional provision relating to loans and gifts of credit).

54. A local unit generally must secure voter approval before issuing general obligation bonds. There are several constitutional exceptions to this requirement; the principal exception applies to debt issued under the two-thirds rule. Specifically, Article V, Section 4(2), of the state constitution excepts from the voter approval requirement debt issued "for purposes authorized by general laws uniformly applicable throughout the State, to the extent of two-thirds of the amount by which the unit's outstanding indebtedness shall have been reduced during the next preceding fiscal year."

For an explanation of the two-thirds rule, see DAVID M. LAWRENCE, *FINANCING CAPITAL PROJECTS IN NORTH CAROLINA* (2d ed. 1994). This UNC School of Government publication is available for purchase at <http://shopping.netsuite.com/s.nl/c.433425/it.A/id.111/f>.

The security for a debt is defined by reference to the contractual rights of the lender—what the lender can require the borrowing government to do or give up should it fail to repay the loan. The security for general obligation bonds is the unlimited taxing power of the local government. Although a local government may use special assessment revenue to meet its general obligation debt service obligations, if the revenue is insufficient a lender may force a local government to raise its property tax rate to a sufficient level to satisfy any outstanding debt service payments.

**Revenue bonds.** A local government also may issue revenue bonds to seed its energy assessment program. And, a county, and likely a municipality,<sup>55</sup> that issues revenue bonds to fund an authorized project for which assessments are imposed may pledge the special assessment revenue as security for the bonds. The revenue bonds will be secured by, and retired from, the special assessment revenue. The unit must follow all of the procedural requirements detailed in G.S. Chapter 159, Article 5, for issuing the revenue bonds, including securing Local Government Commission (LGC) approval of the borrowing. Furthermore, the unit must covenant to enforce the payment of the assessments.<sup>56</sup>

What if the unit does not collect enough yearly revenue from special assessment payments to meet its debt service obligations? The answer depends on what is pledged as security for the revenue bonds. If the municipality or county pledges only the special assessment revenue as security for the revenue bonds and the special assessment revenue is insufficient to meet the debt service payments, the lender may not force the local unit to repay the loan from any other source of revenue. In fact, state law prohibits the payment of the principal of and interest on a revenue bond from any revenue sources except those explicitly pledged to its payment.<sup>57</sup> As a practical matter, a local government likely will covenant to maintain at least one year's worth of debt service payments in a reserve account to cover any unforeseen shortfalls.

It is unclear if there is a market for this type of debt at a reasonable interest rate. A local unit is advised to consult with financial professionals, bond counsel, and the LGC early in the planning process if it intends to front the costs of energy projects with revenue bond proceeds.<sup>58</sup>

#### **Energy Assessment Program: Assessment Terms**

A local government has broad discretion in determining the types of projects that will be funded and establishing eligibility criteria for participation in an energy assessment program. There are, however, statutory limitations on the assessment period—it may not exceed thirty years (that is, thirty annual installment payments), and the interest rate may not exceed 8 percent. Each yearly installment is included on the property owner's property tax bill and is due on

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55. G.S. 160A-239.4 (as modified by S.L. 2009-525) states that “[a]n assessment imposed [by a municipality] may be pledged to secure revenue bonds under G.S. 153A-210.6 . . .” G.S. 153A-210.6 authorizes counties to issue revenue bonds to finance a project for which an assessment is imposed. It appears that the legislature likely meant to instead reference G.S. 160A-239.6, which authorizes municipalities to issue revenue bonds to finance a project for which an assessment is imposed. Despite this apparent drafting error, municipalities likely may pledge special assessment revenue as security for revenue bonds issued to finance all or a portion of a project financed by the assessments, under the authority of G.S. 160A-239.6 itself.

56. See G.S. 160A-239.4(b) (municipalities); G.S. 153A-210.4(b) (counties).

57. See G.S. 159-94.

58. A unit also is cautioned to consult with financial professionals, the Local Government Commission (LGC), and national credit rating representatives about the potential impact, if any, on a local government's credit rating in the event of a default on the bonds.

the date that property taxes are due. A local government may impose the special assessments before the projects being financed are completed. Thus a local government may, but does not have to, start collecting the assessment payments before an energy project is fully installed on the real property. If a unit issues revenue bonds secured by the special assessment revenue to fund the energy projects, it likely will have to impose the special assessments before it completes the borrowing transaction. Note, however, that once the final assessment roll is confirmed (see statutory procedural Step 10 in Appendix B), the assessment is fixed. The unit may not subsequently revise the assessment amount to reflect any cost increases or decreases associated with a project, even if a property owner consents.

#### ***Energy Assessment Program: Procedural Requirements***

A local government does not have broad discretion in structuring the procedural process for imposing the assessments in an energy assessment program. In fact, there are fairly detailed statutory procedural requirements that a unit must follow before imposing an assessment.

Many of the procedural requirements arise because special assessments typically are imposed for public improvements that benefit multiple properties within a defined geographic area.<sup>59</sup> The procedures do not easily lend themselves to a situation where a local government lends money to various property owners located throughout the unit for improvements that directly benefit only individual properties. Therefore, although a local unit is not exempt from complying with the statutory requirements when imposing special assessments to fund an energy project, it may need to make some modifications. A step-by-step guide to the procedural requirements for imposing assessments is provided in Appendix B. Note that this is a guide to the statutory procedural steps only. A local unit likely will need to devote a significant amount of time to setting up its energy assessment program; determining what energy projects will be funded and how the projects will be implemented; establishing eligibility criteria; adopting supplemental policies and procedures; identifying and securing funding streams and, potentially, cultivating funding and administrative partners before it even begins the statutory procedural process.

#### ***Energy Assessment Program: Project Implementation***

A local unit may install a DGRES or EEI project on private property or may contract with one or more public or private agencies to install the energy project. The law does not appear to authorize a unit to simply provide the funding to a property owner to implement the project within the property owner's discretion.<sup>60</sup> It likely requires the local government to be directly involved in selecting and contracting with an appropriate entity to purchase and install the energy improvements. And, unless no more than 25 percent of the estimated cost of a project is funded from the proceeds of general obligation bonds or general revenues (including grant proceeds),

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59. For a description of the special assessment authority generally, see Kara A. Millonzi, *An Overview of Special Assessment Bond Authority in North Carolina*, LOCAL FINANCE BULLETIN No. 40 (Nov. 2009), [www.sog.unc.edu/pubs/electronicversions/pdfs/lfb40.pdf](http://www.sog.unc.edu/pubs/electronicversions/pdfs/lfb40.pdf) (last visited Dec. 20, 2009).

60. It may be possible to structure a transaction whereby the local government contracts with the property owner to install the energy project. The property owner, in essence, would act as general contractor for the project and could subcontract for the actual work to be performed. Note that such a contract between the local government and the property owner is not exempt from the provisions of G.S. Ch. 143A, Art. 8.



a private agency that contracts to implement the project is subject to the provisions in G.S. Chapter 143A, Article 8 (bidding laws).<sup>61</sup>

### ***Energy Assessment Program: Collection Remedies***

How are special assessments collected? And what happens if a property owner fails to make one or more assessment payments? The special assessments are payable in up to thirty annual installments, as determined by the governing board, with an annual interest rate not to exceed 8 percent. The rate of interest must be set in the final assessment resolution. Each yearly installment is listed on the property owner's property tax bill and is due according to the schedule for property tax payments. As a practical matter, a local unit likely will determine the number of yearly installments in relation to the useful life of the project being funded. Likewise, the interest rate charged will be a product of the administrative and other costs to the local government and the market for these types of loans.

A special assessment is a lien on the real property being assessed. The lien attaches from the date the assessment roll is confirmed.<sup>62</sup> The special assessment lien enjoys priority status—it is inferior to all prior and subsequent liens for state, local, and federal taxes but superior to all other liens. Assessment liens may be foreclosed in the same manner as the foreclosure of property tax liens.<sup>63</sup> Foreclosure sales may begin thirty days after the due date for the special assessment payment. If the governing board of the local unit authorizes payment of the assessments in installments and any installment is not paid on or before the due date, all of the installments remaining unpaid immediately become due and payable, unless the governing board waives the acceleration.<sup>64</sup>

## **Potential Constitutional Hurdles to Implementing Energy Financing Programs**

In addition to the statutory impediments to implementing an energy financing program, there are two constitutional provisions that may prohibit a local government from establishing and funding either an energy RLF program or an energy assessment program—the public purpose clause and the privileges and emoluments clause.

### **Public Purpose Clause**

Section 2(1) of Article V of the North Carolina Constitution provides that “[t]he power of Taxation shall be exercised in a just and equitable manner, for public purposes only . . . .” Known as the public purpose clause, this provision requires that all public funds, no matter what their source, be expended for the benefit of the citizens of a unit generally, and not solely for the

61. See G.S. 160A-239.7 (municipalities); G.S. 153A-210.7 (counties).

62. The statute of limitations for enforcing assessment remedies is ten years from the date that the earliest installment became due. See G.S. 160A-233 (municipalities); G.S. 153A-200 (counties).

63. A unit also may proceed to collect a delinquent special assessment through a civil suit or through the state's debt setoff program. See note 35, *supra*.

64. Note that the lien remains attached to the real property until the special assessments are paid in full, regardless of who owns the property. Unlike other states, North Carolina does not mandate “no due upon sale” clauses for its special assessment liens. Under current practice, most liens (including special assessment liens) are satisfied at the time of sale of the real property. This may limit the appeal to current property owners of financing energy projects with special assessments.

benefit of particular persons, interests, or estates.<sup>65</sup> Does the establishment of an energy RLF or energy assessment program to install DGRES or EEI projects on private property satisfy the public purpose clause? Because the energy projects are on private property, it might appear that the energy financing programs violate the public purpose clause. The analysis of what constitutes a public purpose is more nuanced, though. Thus the fact that the projects are on private property is a factor to be considered, but it is not necessarily determinative as to whether or not an energy financing program serves a public purpose. In fact, the answer to the question of whether or not an energy financing program satisfies the public purpose clause is unclear and likely will depend on the contours of the particular program at issue.

### ***Defining Public Purpose***

The North Carolina Supreme Court has not specifically defined the term “public purpose”; instead it has left the issue to be determined on a case-by-case basis.<sup>66</sup> In fact, according to the court, “[t]he initial responsibility for determining what is and what is not a public purpose rests with the legislature,” and the legislature’s determination is “entitled to great weight.”<sup>67</sup> Whether a particular activity, in a particular context, constitutes a public purpose is a legal issue that ultimately must be decided by the courts, though.<sup>68</sup> The court has set forth two guiding principles to analyze whether a government activity satisfies the constitutional requirement. First, the activity must involve a “reasonable connection with the convenience and necessity of the particular” unit of government. Second, the activity must benefit the public generally, as opposed to benefiting special interests or persons.<sup>69</sup>

**Reasonable connection with local government.** The North Carolina Supreme Court has provided further guidance on the first guiding principle, stating that “whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action.”<sup>70</sup> Thus, as to the first prong, there are two parts to the inquiry. The first is whether or not the activity is an appropriate one for a local government to engage in. North Carolina courts routinely have held that traditional government activities—such as fire protection, street construction, or public health programs—serve a public purpose. There is a notion, however, that there are some activities that should be reserved for the private sector of the economy and, therefore, are not appropriate for government action. Determining where the line should be drawn is difficult, though. As the North Carolina Supreme Court repeatedly has explained,

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65. See *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989) (“Although the constitutional language speaks of the ‘power of taxation,’ the limitation has not been confined to government use of tax revenues.”)

66. See *Parker v. New Hanover County*, 173 N.C. App. 644, 619 S.E.2d 868 (2005).

67. *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989); see also *In re Hous. Bonds*, 307 N.C. 52, 296 S.E.2d 281 (1982) (“The presumption is in favor of the constitutionality of an act. All doubts must be resolved in favor of the act. The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision.”).

68. *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

69. *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

70. *Id.*

[a] slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, and necessitates the expenditures of tax funds for purposes which, in an earlier day, were not classified as public.<sup>71</sup>

North Carolina courts, thus, have held that new activities that are perceived as outgrowths of more traditional government functions serve a public purpose. For example, in *Martin v. North Carolina Housing Corporation*,<sup>72</sup> the North Carolina Supreme Court held that government funding of low income residential housing served a public purpose. In so holding, the court tied the government's concern for safe and sanitary housing for its citizens to its traditional role of combating slum conditions. Similarly, in *Madison Cablevision, Inc. v. City of Morganton*,<sup>73</sup> the North Carolina Supreme Court held that the municipal provision of cable television services served a public purpose because such services were a natural outgrowth of the types of communications facilities that local governments had been operating for many years, including auditoriums, libraries, fairs, public radio stations, and public television stations.

In a few cases, however, the courts have found that an activity is neither a traditional government activity nor an outgrowth of a traditional government activity and, consequently, the activity does not serve a public purpose. For example, in *Nash v. Tarboro*,<sup>74</sup> the North Carolina Supreme Court held that it was not a public purpose for a town to issue general obligation bonds in order to construct and operate a hotel, finding that, at least at the time, owning and operating a hotel was purely a private business with no connection to traditional government activities.

And, occasionally courts have determined that activities that appear to be natural extensions of traditional government activities nonetheless do not satisfy the public purpose clause. In *Foster v. North Carolina Medical Care Commission*,<sup>75</sup> for example, the North Carolina Supreme Court held that the expenditure of public funds to finance the construction of a hospital facility that was to be privately operated, managed, and controlled did not serve a public purpose, even though the "primary purpose" of a "privately owned hospital is the same as that of a publicly owned hospital." According to the court, "[m]any objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience but not be public in the sense that the taxing power of the State may be used to accomplish them."<sup>76</sup> Thus a court must look not only at the ends sought but also at the means used to accomplish a public purpose.

The first guiding principle also requires that the activity benefit the citizens of the unit that is engaging in the activity. That is, the primary public that is to benefit from an expenditure of public funds must be the citizens of the jurisdiction that is making the expenditure. "It is not necessary, [however], in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community. It may be for the inhabitants of a restricted

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71. See, e.g., *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970) (citations and quotations omitted).

72. *Id.*

73. 325 N.C. 634, 386 S.E.2d 200 (1989).

74. 227 N.C. 283, 42 S.E.2d 209 (1947).

75. 283 N.C. 110, 195 S.E.2d 517 (1973).

76. *Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973) (quotations omitted).

locality, but the use and benefit must be in common, and not for particular persons, interests, or estates.”<sup>77</sup> Furthermore, it is the benefit to the unit’s citizens that is important rather than the location of the activity. Courts have upheld expenditures of public funds on activities or projects located outside the jurisdiction of a unit as long as the benefit of the expenditures is for the citizens of the unit.<sup>78</sup> Courts also have rejected challenges to government activities because the purported public benefit is too broad; that is, the benefit extends beyond a unit’s citizens.<sup>79</sup> As long as the local benefit accompanies the broader benefit, the activity may serve a public purpose.

**Benefits the public generally, not special interests or persons.** Even if an activity involves a “reasonable connection” with the unit of government, it does not necessarily mean that it serves a public purpose. The activity also must “primarily benefit the public and not a private party.”<sup>80</sup> According to the North Carolina Supreme Court, “[i]t is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public’s as contradistinguished from that of an individual or private entity.”<sup>81</sup> But, “an activity does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.”<sup>82</sup> Courts often resort to engaging in a balancing test of the public and private benefit; invalidating the expenditure if the private benefit is predominant. Unfortunately, as several courts have noted, “[o]ften public and private interests are so co-mingled that it is difficult to determine which predominates.”<sup>83</sup> And, the outcome of the analysis depends largely on how the benefits are characterized. For example, in *Mitchell v. Financing Authority*,<sup>84</sup> the North Carolina Supreme Court determined it was not a public purpose to use state funds to acquire sites and construct and equip facilities for private industrial development. Significantly the court considered the “benefits” to simply constitute a windfall to only a few private companies, at the expense of other companies and of the public generally. It, thus, found that the expenditure of public funds for this purpose did not serve a public purpose. However, in a more

77. *Briggs v. City of Raleigh*, 195 N.C. 223, 141 S.E. 597 (1928).

78. *See, e.g., Morgan v. Spindale*, 254 N.C. 304, 118 S.E.2d 913 (1961) (holding that city support of armory located outside the city served a public purpose); *Jamison v. Charlotte*, 239 N.C. 682, 80 S.E.2d 904 (1954) (holding that city support of city–county library, even when some of the city funds were spent outside the city, served a public purpose); *Martin County v. Wachovia Bank and Trust Co.*, 178 N.C. 26, 100 S.E. 134 (1919) (holding that county’s payment of three-fourths of the cost of a bridge connecting it with a neighboring county, even though most of the bridge was located in the neighboring county, served a public purpose).

79. *See, e.g., Briggs v. Raleigh*, 195 N.C. 223, 141 S.E. 597 (1923) (holding that city expenditure to support state fair whose location was within the vicinity of the city served a public purpose); *Cox v. Comm’rs*, 146 N.C. 584, 60 S.E. 516 (1908) (holding that county expenditure on teachers’ college served a public purpose); *cf. State v. Club Props.*, 275 N.C. 328, 167 S.E.2d 385 (1969) (holding that state expenditure on national park served a public purpose).

80. *Parker v. New Hanover County*, 173 N.C. App. 644, 619 S.E.2d 868 (2005).

81. *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (citations and quotations omitted).

82. *Parker v. New Hanover County*, 173 N.C. App. 644, 619 S.E.2d 868 (2005) (quotations omitted) (holding that county’s special assessment for inlet relocation project did not violate public purpose clause).

83. *See, e.g., Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (citations and quotations omitted).

84. 273 N.C. 137, 159 S.E.2d 745 (1973).

recent decision in *Maready v. City of Winston-Salem*,<sup>85</sup> the North Carolina Supreme Court held that economic development incentive grants to private businesses did not violate the public purpose clause. In this case, the court took a much broader view of the benefits, stating that the ultimate goal of providing such incentives to one or more private entities was to improve the community at large—through, among other things, increased tax revenues and job opportunities. The *Maready* case appears to reflect the court’s recognition of the “trend toward broadening the scope of what constitutes a valid public purpose that permits the expenditure of public revenues” in modern society.<sup>86</sup>

#### ***Applying the Public Purpose Clause to Energy Financing Programs***

In applying this legal framework to determine if a particular activity serves a public purpose, a unit first must determine whether both the ends sought and the means used comprise a traditional government activity or a natural extension or outgrowth of a traditional government activity. As stated above, energy financing programs are new not only in North Carolina but across the country. But, for years local governments have undertaken significant efforts related to environmental conservation, including protecting against and reducing air pollution. In fact, across the country “local governments have stepped up as first responders to the climate crisis. Cities and counties have committed to concrete greenhouse gas emission reduction targets, such as the over 900 municipalities mayors who signed the U.S. Conference of Mayors Climate Protection Agreement [including close to fifty mayors from North Carolina municipalities].”<sup>87</sup> In North Carolina, municipalities have the explicit authority to “regulate, restrict, or prohibit the emission or disposal of substances or effluents that tend to pollute or contaminate land, water, or air, rendering or tending to render it injurious to human health or welfare, to animal or plant life or to property, or interfering or tending to interfere with the enjoyment of life or property.”<sup>88</sup> And, both municipalities and counties have authority to operate local air pollution control programs, to monitor air quality and establish emission control standards, among other things.<sup>89</sup> Local units also may appropriate property tax dollars to support these programs.<sup>90</sup> More recently, the general assembly has authorized local governments to enter into guaranteed energy savings contracts to implement energy conservation measures on public facilities—presumably to satisfy the dual goals of energy use reduction and cost savings.<sup>91</sup> Furthermore, as noted earlier, local units may provide a variety of incentives to private developers to encourage and support green building initiatives aimed at, among other things, reducing carbon emis-

85. *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

86. *Id.*; see also *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842 (2000) (acknowledging the “expanding scope of the concept of public purpose in modern society” in holding that payments to professional basketball team from public coliseum concessions and parking proceeds served a public purpose as an appropriate economic development incentive) (quotations omitted).

87. For a description of programs in California, Colorado, and New York, see RENEWABLE AND APPROPRIATE ENERGY LABORATORY, UC BERKELEY, GUIDE TO ENERGY EFFICIENCY & RENEWABLE ENERGY FINANCIAL DISTRICTS FOR LOCAL GOVERNMENTS (Sept. 2009), available at [www.ci.berkeley.ca.us/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Energy\\_and\\_Sustainable\\_Development/Guide%20to%20Renewable%20Energy%20Financing%20Districts2009.pdf](http://www.ci.berkeley.ca.us/uploadedFiles/Planning_and_Development/Level_3_-_Energy_and_Sustainable_Development/Guide%20to%20Renewable%20Energy%20Financing%20Districts2009.pdf) (last visited Feb. 1, 2010).

88. G.S. 160A-185.

89. See G.S. 143-215.112.

90. See G.S. 160A-209 (municipalities); G.S. 153A-149 (counties).

91. G.S. Ch. 143, Art. 3B, Part 2.

sions.<sup>92</sup> Against this backdrop, an energy financing program may be characterized as simply another means to carry out a “traditional government activity” of controlling air pollution. It is reported that existing structures account for 72 percent of electricity use and over 36 percent of greenhouse gas emissions.<sup>93</sup> Thus an energy financing program may provide a more effective means to accomplish this goal.

Even so, in order to constitute a public purpose, an activity must benefit the citizens of the unit making the expenditure generally. That does not mean it has to benefit all citizens equally. It also does not mean that the proposed expenditure of public funds cannot significantly and directly benefit specific individuals or entities. But the overall purpose of the activity must be to benefit the unit and its citizens, and this broader public benefit ultimately must predominate over the benefit to any single individual or entity. If the sole purpose of an energy financing program is to help individual property owners reduce their energy demand and costs, the program likely does not satisfy the public purpose requirement. A court probably would deem the program to confer a purely private benefit. (Unless, of course, the local unit is an electricity, in which case the reduced energy demand from individual properties might reduce demand on the system, thereby benefiting the local government and other electric customers generally.) If, on the other hand, the primary purpose of the program is to reduce carbon emissions and control air pollution, this likely benefits the public generally. And if the program is designed to create or maintain jobs in the community or to promote economic development by enticing “green” industries to locate in the unit, it likely benefits the public even more. However, it is not enough for a governing board simply to state that reducing carbon emissions and creating jobs, or supporting economic development are the primary purposes of an energy financing program (although, it is probably a necessary start). The program must be structured to actually accomplish these stated purposes. That means that a local government must include in its program only the EEI and DGRES projects that measurably reduce carbon emissions and spur job creation or economic development in the jurisdiction. Furthermore, the program should be structured to periodically evaluate whether or not, and to what extent, it is meeting the stated goals. This will impose additional administrative burdens and costs on the local unit, but they are likely necessary to ensure that the expenditures of public funds to finance the energy RLF or special assessment programs serve a public purpose.

## **Privileges and Emoluments Clause**

### ***Defining Prohibited Privileges and Emoluments***

A second North Carolina constitutional provision, contained in Article 1, Section 32, is of potential concern to local governments looking to establish an energy financing program. Commonly known as the privileges and emoluments clause, it states that “[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” Not every classification that favors a particular group of persons or entities is an exclusive or separate emolument or privilege, though.<sup>94</sup> North Carolina

92. See G.S. 153A-340; G.S. 160A-381; G.S. 160A-383.4.

93. For a description of programs in California, Colorado, and New York, see RENEWABLE AND APPROPRIATE ENERGY LABORATORY, UC BERKELEY, GUIDE TO ENERGY EFFICIENCY & RENEWABLE ENERGY FINANCIAL DISTRICTS FOR LOCAL GOVERNMENTS (Sept. 2009), available at [www.ci.berkeley.ca.us/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Energy\\_and\\_Sustainable\\_Development/Guide%20to%20Renewable%20Energy%20Financing%20Districts2009.pdf](http://www.ci.berkeley.ca.us/uploadedFiles/Planning_and_Development/Level_3_-_Energy_and_Sustainable_Development/Guide%20to%20Renewable%20Energy%20Financing%20Districts2009.pdf) (last visited Feb. 1, 2010).

94. See *Town of Emerald Isle v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987).

courts have applied a two-part test to determine whether or not a particular “benefit” violates this constitutional provision. First, is the benefit “intended to promote the general welfare rather than the benefit of the individual?” And second, is there is a “reasonable basis for the legislature to conclude that the granting of the . . . benefit serves the public interest?”<sup>95</sup> To determine if a particular benefit has been bestowed in violation of the privileges and emoluments clause, “a court must determine whether the benefit was given in consideration of public services, intended to promote the general public welfare, or whether the benefit was given for a private purpose, benefitting an individual or select group.”<sup>96</sup>

#### ***Applying the Privileges and Emoluments Clause to Energy Financing Programs***

Although the privileges and emoluments clause and the public purpose clause are separate constitutional provisions, North Carolina courts have held that “when legislation is determined to ‘promote the public benefit’ under the Public Purpose Clauses, it necessarily is not an exclusive emolument.”<sup>97</sup> Thus, for example, in *Blinson v. State*,<sup>98</sup> the North Carolina Court of Appeals held that economic development incentives provided to a private corporation by the state were “intended to promote the general economic welfare of the communities involved, rather than to solely benefit” the private corporation. Accordingly, they did not amount to exclusive emoluments or privileges. And, if a benefit does not constitute an exclusive emolument or privilege, it does not violate the privileges and emoluments clause. Thus, if an energy financing program satisfies the public purpose clause (as outlined above), it likely also satisfies the privileges and emoluments clause.

### **Structuring Energy Financing Programs**

In addition to meeting the constitutional and statutory requirements, a local government should adopt detailed administrative provisions for its energy RLF program or energy assessment program, for a number of reasons—not the least of which are to provide clear guidance to potential participants, allow for fair and efficient allocation of limited resources, and ensure compliance with all constitutional, statutory, and (grant) requirements. But how should a local unit structure its energy financing program? Similar types of programs are springing up all over the country, and although it is probably too early to identify best practices, there appears to be early consensus around some key program aspects.

The first key aspect is that a local unit must clearly define its goals and objectives. And, for North Carolina local governments, the primary goals and objectives of either an energy RLF or energy assessment program must be to benefit the citizens of the unit generally, not just individual property owners.<sup>99</sup>

Once a unit establishes concrete goals and objectives, it must choose the types of energy projects to include in its program. Financing should be limited to investments that have a high

95. See *Crump v. Snead*, 134 N.C. App. 353, 517 S.E.2d 384, *disc. review denied*, 351 N.C. 101, 541 S.E.2d 143 (1999) (quotations and citation omitted).

96. *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842 (2000).

97. *Blinson v. State*, 186 N.C. App. 328, 651 S.E.2d 268 (2007).

98. *Id.*

99. As discussed above, a unit must clearly define its goals and objectives to ensure that the program serves a public purpose.

return in terms of energy efficiency gains and corresponding carbon emission reductions. A unit should consider including in its program only those projects that have well-documented efficiency gains for the climate zone in which it is located.

A unit also should consider including in its program effective consumer protections, both to entice property owners to participate and to protect against future defaults on loan or assessment payments. Property owners must be well-informed about the benefits, costs, and risks associated with participating in an energy financing program. A unit likely will have to engage in a detailed information campaign to promote its program and the potential benefits to both individual property owners and the larger community. And, the energy projects generally should be designed to pay for themselves within a reasonable period. Some local governments have incorporated a requirement that the savings-to-investment ratio for any given project should be greater than one. That means that the expected average monthly utility savings to a property owner should be greater than the expected monthly loan payments. If this is not feasible, at a minimum there should be a positive net present value, so that the expected total savings to the property owner exceeds the estimated total payments under the loan terms. Finally, a unit likely should take some steps to ensure that the energy projects are constructed as intended and that program goals and objectives are realized over time.

## Conclusion

Because of the threat of climate change, states all over the country are exploring and implementing creative programs to promote energy conservation and reduce citizens' reliance on foreign oil. In North Carolina, two mechanisms are available to assist private property owners. The first, energy RLF programs, allow a unit to lend money to property owners to install DGRES and EEI projects that are permanently affixed to real properties. The second, energy assessment programs, allow a unit to install (or contract for the installation of) DGRES and EEI projects on private real properties and impose an assessment on the properties to recoup the costs of the project over time. Both of the programs come with different sets of regulations and procedures that must be followed by the local unit implementing the program. Most importantly, a local government must ensure that its energy financing program serves a public purpose—that is, that the primary benefit of the program inures to the unit and its citizens



## Appendix A. Comparison of Energy RLF Programs and Energy Assessment Programs

	<b>Energy RLF Programs</b>	<b>Energy Assessment Programs</b>
<b>Authorized Revenue Sources</b>	Energy Efficiency Community Block Grant (EECBG) Proceeds Unrestricted Revenue	General revenue
<b>Debt Authorized?</b>	No	Yes—general obligations bonds, revenue bonds, and project development financing debt instruments  (Note that assessment revenue may be pledged as security for revenue bonds)
<b>Authorized Projects</b>	DGRES* projects authorized by G.S. 62-133.8 EEI** projects (Specific projects within discretion of governing board)	DGRES* projects authorized by G.S. 62-133.8 EEI** projects (Specific projects within discretion of governing board)
<b>Program Terms</b>	Generally within the discretion of the unit's governing board Loan repayment period no longer than 15 years Loan interest rate no greater than 8 percent per year	Generally within the discretion of the unit's governing board Assessment payment period no longer than 30 years Assessment interest rate no greater than 8 percent per year
<b>Project Implementation</b>	Property owner may install energy project or contract for its installation	Local government must install energy project or contract for its installation
<b>Procedural Requirements</b>	Generally within the discretion of the unit's governing board	Detailed statutory procedures to impose assessments (see Appendix B)
<b>Collection Remedies</b>	Civil suit Debt setoff Unit may require collateral as security for loan, but no priority status for lien	Civil suit Debt setoff Assessment is lien on real property to which projects are affixed (The lien has priority status over all other liens except tax liens)

\*Distributed Generation Renewable Energy Sources

\*\*Energy Efficiency Improvements

## Appendix B. Step-by-Step Guide to the Procedural Requirements for Imposing Energy Assessments

*The notes throughout explain how these requirements might be adapted for application to an energy assessment program.*

### **Step 1. The local government determines the estimated cost of each of the energy projects that it will fund.**

The governing board may include any expenses necessary to provide sufficient moneys for the acquisition, construction, reconstruction, extension, betterment, improvement, or payment of the cost of each project, including the following:

- Engineering, inspection, legal, and financial fees and costs
- The cost of rights-of-way
- Working capital
- The amount of interest paid during construction
- The interest on any bonds or notes issued in anticipation of a revenue bond issuance during construction
- The establishment of debt service reserves
- The cost of publishing and mailing notices and resolutions
- All other incidental and necessary costs

### **Step 2. The local government receives a petition from the majority of owners of the real property to be assessed, who also represent at least 66 percent of the assessed value of all the real property to be assessed.**

The petition must include the following:

- A statement of the project proposed to be financed by the assessment
- An estimate of the cost of the project
- An estimate of the portion of the cost of the project to be assessed

*Note:* This requirement reflects the fact that special assessments typically are imposed involuntarily on multiple properties within a defined geographic area that benefit from a public improvement project. The petition requirement is a limitation on a local governing board's ability to impose the assessments in its discretion on benefited properties. It is not entirely clear how to apply this petition requirement to individual projects funded through an energy assessment program. One possible interpretation of this provision in this context is that it obliges each property owner who wishes to (and qualifies to) participate in an energy assessment program to sign a petition containing the required statutory language. Submitting the signed petition to the local government likely binds the property owner to participate in the energy assessment program unless the petition is withdrawn according to the prescribed procedures.<sup>1</sup>

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1. According to G.S. 160A-239.3 (municipalities) and G.S. 153A-210.3 (counties), a petition may be withdrawn up to ten days after the public hearing held on the preliminary assessment resolution. For a petition to be withdrawn, the governing board must receive notice of the petition withdrawal in writing.

### **Step 3. The local government adopts the preliminary assessment resolution.**

The resolution must include the following:

- A statement of the intent to undertake the projects

*Note:* The preliminary assessment resolution likely may include all of the projects being funded through the energy assessment program (or all of the projects in a particular phase of the program).

- A general description of the nature and location of the projects
- A statement of the estimated cost of the projects
- A statement of the amount of the estimated cost of the projects that the local government expects to derive from each respective financing source
- A statement as to the proposed basis for making assessments that includes a general description of the boundaries of the area benefited if the basis of assessment is either area or valuation

*Note:* A local governing board has full discretion to determine the basis of assessment, as long as it bears some relationship to the benefit to the real property being assessed. Thus a local government may assess the full cost (or up to the full cost) of an energy project on the real property parcel to which the project is permanently affixed.

- A statement as to the percentage of the cost of the work that is to be specially assessed
- A statement as to which, if any, assessments will be held in abeyance and for how long
- A statement as to the proposed terms of payment of the assessments
- An order setting a time and place for a public hearing on all matters covered by the preliminary assessment resolution

*Note:* G.S. 153A-192 (counties) and G.S. 160A-225 (municipalities) specifically state that the percentage of the cost of the project to be funded by special assessments may not differ from that proposed in the preliminary assessment resolution and that the scope of the project authorized may not be greater than the project described in the preliminary assessment resolution.

### **Step 4. The local government publishes notice that the preliminary assessment resolution has been adopted.**

The notice must describe the nature and location of the proposed project and announce the time and place for a public hearing on the resolution. It must be published at least ten days before the public hearing. Also, at least ten days before the public hearing, a copy of the preliminary assessment resolution must be mailed by first-class mail to each owner of property subject to assessment if the project is undertaken.

*Note:* Even though all assessments for energy projects will be imposed on a voluntary basis, under current law the local government still must comply with the statutory notice and public hearing requirements.

### **Step 5. The local government holds a public hearing.**

The public hearing must be held between three and ten weeks from the date the preliminary assessment resolution is adopted.

*Note:* Even though all assessments for energy projects will be imposed on a voluntary basis, under current law the local government still must comply with the statutory notice and public hearing requirements.

### **Step 6. The local government adopts the final assessment resolution.**

The local government must wait at least ten days after the public hearing to adopt the final assessment resolution. If a property owner withdraws a petition within the ten-day period, the local government may not proceed to impose an assessment for that particular energy project

The final assessment resolution may direct that the entire project be undertaken or that only portions of the project be undertaken.

The final assessment resolution must

- describe the projects in general terms

*Note:* The final assessment resolution likely may include all of the projects being funded through the energy assessment program (or all of the projects in a particular phase of the program).

- state the estimated cost of the projects
- state the amount of the estimated cost of the projects that will be derived from one or more of the following financing sources: revenue bonds, general obligation bonds, and general revenues
- describe the basis on which the assessments will be levied, together with a general description of the boundaries of the area benefited if the basis of assessment is either area or value added

*Note:* A local governing board has full discretion to determine the basis of assessment, as long as it bears some relationship to the benefit to the real property being assessed. Thus a local government may assess the full cost (or up to the full cost) of an energy project on the real property parcel to which the project is permanently affixed.

- specify the percentage of the cost of the project that will be funded by special assessments
- state the terms of the payment and any applicable interest rate
- state any conditions under which assessments will be held in abeyance.

*Note:* Based on an interpretation of the special assessment statutory scheme as a whole, the local unit likely is prohibited from altering the terms of the payment of the assessments from those stated in the final assessment resolution.

**Step 7. The local government prepares a preliminary assessment roll.**

The preliminary assessment roll must contain

- a brief description of each lot, parcel, or tract of land assessed
- the basis for the assessment

*Note:* A local governing board has full discretion to determine the basis of assessment, as long as it bears some relationship to the benefit to the real property being assessed. Thus a local government may assess the full cost (or up to the full cost) of an energy project on the real property parcel to which the project is permanently affixed.

- the amount assessed against each lot, parcel, or tract of land
- the terms of payment, including any authorized schedule of discounts
- the name of the owner of each parcel of land, as ascertained by the county tax records<sup>2</sup>

**Step 8. The local government files the preliminary assessment roll in the county or municipal clerk's office for public inspection, publishes notice of the preliminary assessment roll, and distributes the notice by first-class mail to each property owner listed on the preliminary assessment roll.**

The notice must describe each of the projects in general terms, state that the preliminary assessment roll is available in the clerk's office for inspection, and state the time and place for the public hearing on the preliminary assessment roll. The notice must be published and distributed at least ten days before the public hearing.

*Note:* Even though all assessments for energy projects will be imposed on a voluntary basis, under current law the local government still must comply with the statutory notice and public hearing requirements.

**Step 9. The local government holds a public hearing on the assessment roll.**

All interested persons must be given an opportunity to be heard. Either at or after the public hearing, the governing board may confirm, annul, or modify the assessments in whole or in part. The board may place on the roll any property that is omitted from the preliminary assessment roll.

*Note:* Even though all assessments for energy projects will be imposed on a voluntary basis, under current law the local government still must comply with the statutory notice and public hearing requirements.

**Step 10. The governing board confirms the assessment roll.**

From the time of confirmation, the assessments are a lien on the property assessed. The lien is of the same nature and to the same extent as a lien for local property taxes. The lien is inferior to all prior and subsequent liens for state, local, and federal taxes and superior to all other liens. A

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2. A map of the project with the required information is sufficient to satisfy the statutory requirements.

copy of the assessment roll is delivered to the local government tax collector for collection in the same manner as property taxes.

Property owners have ten days from the date the assessment roll is confirmed to file a notice of appeal with the General Court of Justice. The property owner must file a statement of the facts upon which the appeal is based with the county or municipal clerk within twenty days of the confirmation.

**Step 11. The local government publishes notice of the confirmation of the assessment roll.**

After the expiration of twenty days from the confirmation of the assessment roll, the unit's tax collector must publish a notice that the assessment roll has been confirmed.

**Step 12. If a local government chooses to pay for all or a portion of the costs of a project for which special assessments are imposed with revenue bonds or general obligation bonds, it will need to follow the applicable statutory procedures for issuing the debt.**

A local government will need to proceed with at least some of the procedural steps for issuing debt concurrently with the procedures outlined above for imposing the special assessments, if not before.

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