
Coates' Canons Blog: Authorized Local Government Financing Programs for Energy Efficiency Improvements and Distributed Generation Renewable Energy Sources on Private Property

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Update April 2010. For a more detailed review of this issue see the following article: ***Addressing Climate Change Locally: North Carolina Local Government Financing Programs for Private Energy Efficiency Projects.***

Local governments across the country are becoming increasingly involved in promoting, facilitating, and even funding private 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).

A relatively new initiative, however, is for local governments to provide some form of direct funding for energy efficiency improvements and renewable energy projects on private property. To date, local governments in a handful of states have instituted grant or loan programs to aid households and other private sector entities with energy conservation efforts. During the 2009 legislative session, the General Assembly added North Carolina local governments to the list—authorizing counties and municipalities to establish programs to finance certain renewable energy and energy efficiency projects on private property (energy finance programs).

The energy finance programs authorized by the North Carolina legislation differ in many respects from those authorized in the 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 post briefly explains the current legal framework for the energy finance programs in North Carolina—it details the basic contours of the statutory authority, requirements, and limitations, and highlights the potential legal hurdles to establishing the programs in this state.

AUTHORIZED FINANCING MECHANISMS

Under current law, there are (potentially) two different authorized financing mechanisms to fund distributed generation renewable energy sources and energy efficiency projects that are permanently affixed to real property (collectively, energy projects)—*revolving loan fund programs* and *special assessment programs*.

Revolving Loan Fund Programs

S.L. 2009-522 (H 1389) enacts two new statutory provisions (G.S. 160A-459.1 and G.S. 153A-455), which expressly authorize municipalities and counties, respectively, to create revolving loan funds 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” (energy RLFs), subject to certain limitations and restrictions. The statutory provisions afford much discretion to a local governing board to structure an energy RLF program to finance the authorized energy projects, including establishing eligibility criteria, determining the types of projects that will be funded (discussed below), and detailing procedural requirements for participation in the program. Despite the flexibility afforded to local governments in structuring an energy RLF program, there are a few key statutory requirements and limitations. They are summarized **here**.

Special Assessment Programs

In addition to the energy RLFs, **S.L. 2009-522 (H 1389)** arguably also authorizes local governments to establish other types of financing programs. In fact, along with **S.L. 2008-165 (H1770)** and **S.L. 2009-525 (S97)**, the Act potentially authorizes local governments to impose special assessments on the real properties to which the energy projects are

affixed (energy assessment program)—although, as currently enacted, this authority is not assured.

As discussed in a previous **post**, 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. See **S.L. 2008-165 (H1770)** and **S.L. 2009-525 (S97)**. Most of the statutorily authorized projects for which assessments may be imposed involve public infrastructure projects, but the list also includes “the installation of distributed generation renewable energy sources or energy efficiency improvements that are permanently fixed to residential, commercial, industrial, or other real property.”

S.L. 2008-165 (H1770) and **S.L. 2009-525 (S97)**, however, merely authorize local governments to impose the special assessments to fund the energy projects; they do not authorize local governments to actually engage in the energy projects. In other words, in order to take advantage of the new special assessment authority to fund energy projects, a local government must have independent authority to actually expend public monies to support the energy assessment program.

Arguably, **S.L. 2009-522 (H1389)** provides this authority. To understand why, let us review the structure of the statutory provisions authorized by the Act. The statutory provisions are divided into two subsections. G.S. 160A-459.1(b) and G.S. 153A-455(b) authorize municipalities and counties, respectively, to establish the RLFs. Proceeding these subsections, however, are G.S. 160A-459.1(a) and G.S. 153A-455(a), which include the following language—“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.” A plausible reading of this language is that G.S. 160A-459.1(a) and G.S. 153A-455(a) authorize local governments to create financing programs generally, whereas G.S. 160A-459.1(b) and G.S. 153A-455(b) detail one type of authorized financing program—the revolving loan funds. 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.

Of course, the counter-argument to this interpretation is that **S.L. 2009-522 (H1389)** only authorizes the creation of RLFs; the subsections are set out merely for ease of exposition. Because the authority to establish an energy assessment program is uncertain, a governing board is cautioned to solicit the opinion of its unit’s attorney before creating such a program.

Assuming that a local government has the authority to institute an energy assessment program, a local governing board has broad discretion to establish eligibility criteria and to determine the types of projects that will be funded (discussed below). Special assessments, however, are imposed only pursuant to detailed statutory procedural requirements. (An energy assessment program is similar, but not identical, to the Property Assessed Clean Energy (PACE) programs in other states.) Click **here** for a summary of the key statutory requirements and limitations on the special assessment authority. And, click **here** for a guide to the procedural requirements for imposing special assessments. (Although a unit must follow all the statutory procedural requirements to impose special assessments to finance energy projects, some of the requirements may need to be modified to reflect the unique nature of an energy assessment program.)

AUTHORIZED PROJECTS

What types of projects may be funded under either an energy RLF program or an energy assessment program? The answer, at least under state law, is the same for both. Recall that G.S. 160A-459.1(a) and G.S. 153A-455(a) authorize North Carolina municipalities and counties to “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.”

Distributed Generation Renewable Energy Sources

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 using small-scale power generation mechanisms to supplant or supplement the traditional electric power system. Renewable energy sources, unlike fossil fuels, comprise a constantly replenished flow of energy, rather than an

existing stock that is diminished by their use. They are statutorily defined, by reference to the definition of renewable energy resource in **G.S. 62-133.8**, as “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 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.” 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 to generate electricity.

Energy Efficiency Improvements

Energy efficiency improvements (EEI) are not statutorily defined. A local government’s governing board has broad discretion to determine what types of projects to fund under its program. Projects could range from sealing leaks in walls, floors, attics, ducts, and windows, to improving ventilation by installing attic or whole house fans, to upgrading lighting, to adding or improving insulation, to installing more efficient heating and cooling systems, to installing reflective roofs. A governing board is advised to set concrete project goals and objectives with respect to required energy savings for approved projects. For example, a unit may wish to adopt specified energy efficiency criteria (such as minimum efficiency and certification requirements) similar to that required to qualify for certain **federal energy efficiency tax credits** under the **American Recovery and Reinvestment Act of 2009 (ARRA)**. (With the added bonus that property owners who avail themselves of the local government’s program also may qualify for the federal tax credits.) A local government also should select projects that will be relatively easy to monitor for compliance with the unit’s goals and objectives.

*Note: There may be limitations on the use of federal grant funds (for example **Energy Efficiency Conservation Block Grant** funds) that are more restrictive as to the types of energy projects that may be funded with the grant proceeds.*

POTENTIAL CONSTITUTIONAL ISSUE

One final legal consideration is whether an energy RLF program or an energy assessment program satisfies the North Carolina Constitution’s requirement that “[t]he power of taxation[] be exercised in a just and equitable manner, for public purposes only” **N.C. Const. Art. V, Sec. 2(1)**. Known as the public purpose limitation, 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 benefit of particular persons, interests, or estates. In other words, according to the North Carolina Supreme Court, “the ultimate net gain or advantage must be the public’s as contradistinguished from that of an individual or private entity.” So, do loans to private property owners to install DGRES or EEI on their properties satisfy this requirement? It is an open question, although I think there are strong arguments that a unit’s energy finance program could serve a public purpose, at least under certain circumstances.

North Carolina courts repeatedly have stated both that an “activity does not lose its public purpose merely because it involves a private actor” and that they will afford much deference to the Legislature and local governing bodies in determining what constitutes a public purpose. I will explore this issue more fully in a future post. I flag it now because, at the very least, local units should be prepared to articulate the direct public benefits (such as decreased carbon emissions, job creation, lower energy costs for electricities) of their energy finance programs.



Links

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