
Coates' Canons Blog: Modifications to Local Energy Financing Authority

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Article: <https://canons.sog.unc.edu/modifications-to-local-energy-financing-authority/>

This entry was posted on September 07, 2010 and is filed under Energy Finance, Finance & Tax, Special Assessments

Last fall I **blogged** about new legislation (**S.L. 2009-522 (H 1389)** and **S.L. 2009-525 (S 97)** (hereinafter 2009 Acts)) authorizing North Carolina counties and municipalities to adopt programs to finance certain energy efficiency improvements and distributed generation renewable energy sources (collectively, energy finance programs) on private property.

Ostensibly, the 2009 Acts authorized counties and municipalities to establish at least two different types of energy financing programs: (1) energy revolving loan funds, whereby a 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 private, real property; and (2) energy assessments, whereby a local government installs a specified project on private, real property (or contracts for its installation) and imposes a special assessment on the real property to recoup the costs of the project. As I detailed in that **post**, and discussed more extensively in **Local Finance Bulletin No. 41**, the legislation was not without complications and left many local government officials wondering if, and how, to legally structure programs to benefit their communities.

This summer the Legislature enacted **S.L. 2010-167 (H 1829)** (hereinafter 2010 Act) which, among other things, clarifies local governments' legal authority to establish and fund certain energy finance programs. To be sure, the new legislation does not address all of the potential legal issues surrounding the implementation of energy financing programs by North Carolina local governments. However, it does provide more concrete guidance to counties and municipalities about the contours of their authority to establish at least some types of programs.

Changes to Authorized Financing Mechanisms under 2010 Act

As stated above, the Legislature addressed some, but not all, of the legal problems with the authorizations in the 2009 Acts. Specifically, the 2010 Act modifies the provisions that govern energy RLFs, and energy financing programs generally, but it does not alter any of the provisions that deal directly with energy assessment programs. (I will discuss the state of the authority to establish energy assessment programs, commonly referred to as property assessed clean energy (PACE) programs, in a future post.)

The following is a brief description of some of the potential legal issues raised by the 2009 Acts and how those issues were addressed by the 2010 Act.

Potential Issue 1:

- The statutory provisions enacted by **S.L. 2009-522 (H 1389)** provided authority for counties and municipalities to "establish a program to finance the purchase and installation of" certain energy projects. The statutes, however, spoke specifically only of energy RLFs. Thus, it was unclear whether the authority was limited to energy RLFs or also allowed local governments to establish other types of programs, such as loan loss reserve programs or energy assessment programs.

Statutory Modification:

- The 2010 Act modifies **G.S. 153A-455** and **G.S. 160A-459.1** to authorize counties and municipalities, respectively, to establish "revolving loan fund[s]," "loan loss reserve fund[s]," and "other local government energy efficiency and distributed generation renewable energy source finance programs funded through federal grants." Thus, a local government now has authority to establish a broad range of energy financing programs to meet the specific needs of its community. Such programs include, but are not limited to, energy rebate programs, energy audit and retrofit

programs, and weatherization programs. (See the **US Department of Energy's website** for information on local energy programs for which federal grant funding is available.) The only catch is that any program, other than a revolving loan fund or a loan loss reserve fund, must be funded at least in part (and possibly in its entirety) with federal grant proceeds. (See Potential Issue 3 below for more information.)

Potential Issue 2:

- Although not a legal problem per se, **S.L. 2009-522 (H 1389)** limited any loan period to a maximum of fifteen years. Several local government officials expressed concern that this period was too short to make a RLF program attractive to its citizens.

Statutory Modification:

- The 2010 Act extends the maximum loan period to twenty years.

Potential Issue 3:

- The statutory authority to finance an energy RLF program was limited to "Energy Efficiency Conservation Block Grant" proceeds and other "unrestricted revenues." It was unclear whether or not the General Assembly intended for local governments to be able to use other types of federal or state grant or loan program revenues or local property tax proceeds to seed their energy RLFs.

Statutory Modification:

- The 2010 Act authorizes counties and municipalities to fund their revolving loan funds and loan loss reserve funds with "State and federal grants and loans," as well as "general revenues." And, the Act makes clear that general revenues include local property tax proceeds.
- It is unclear, however, whether local units may use general revenues to finance other types of energy finance programs. The statutes specifically state the following: "A [local government] may establish a revolving loan fund and a loan loss reserve fund A [local government] may establish other local government energy efficiency and distributed generation renewable energy source finance programs funded through federal grants. A [local government] may use State and federal grants and loans and its general revenue for this financing."
- I believe that the best interpretation of these provisions is that a local unit must use federal grants to fund at least a portion of its "other" energy finance programs but does not have to finance the programs in their entirety with federal dollars. The statutory language, however, is susceptible to an interpretation that any energy finance programs, other than energy RLFs and loan loss reserve funds, must be funded only with federal grant proceeds.

Potential Issue 4:

- **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 benefit of particular persons, interests, or estates. It was unclear whether, and how, a local unit could establish an energy financing program that satisfied this constitutional requirement.

Statutory Modification:

- The 2010 Act modifies **G.S. 153A-455** (counties) and **G.S. 160A-459.1** (municipalities) to provide that local governments play an integral role in promoting and encouraging renewable energy and energy efficiency within their territorial jurisdictions – which is in "the best interest of the citizens of North Carolina. . . ."
- As I detailed in **Local Finance Bulletin No. 41**, North Carolina courts have been deferential to the Legislature with respect to deciding what activities satisfy the public purpose clause. That said, the language quoted above is not determinative of the inquiry. We will not know for sure if local energy financing programs satisfy the constitutional requirement unless and until a program is legally challenged. In the absence of concrete guidance from the courts, I believe that a local government board should do the following when adopting an energy financing program—clearly articulate the public purpose (benefit to the citizens of the unit generally) of the program; ensure

that the program is tailored to serve that public purpose; and take proper steps to verify that the program is ultimately working for the public benefit.

So, what types of energy financing programs are local governments implementing in North Carolina? Well, I put that question to all of you—how, if at all, are you using this new authority in your communities?

Links

- canons.sog.unc.edu/?p=1319
- www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H1389v7.pdf
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- www.energy.gov/
- www.ncga.state.nc.us/Legislation/constitution/article5.html