

## Key Provisions of Energy Assessment Program Authority under S.L. 2009-522 (H1389), S.L. 2008-165 (H1770), and S.L. 2009-525 (S97)

*The following highlights some of the key features of the special assessment authority, as it relates to an energy assessment program. For general guidance on imposing special assessments, including the statutory procedural requirements, see Kara A. Millonzi, An Overview of Special Assessment Bond Authority in North Carolina, LOCAL FINANCE BULLETIN NO. 40 (Nov. 2009), available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/lfb40.pdf>.*

- **A local government must receive a petition for any of the authorized projects to be financed by assessments, signed by at least a majority of the owners of real property to be assessed and who represent at least 66 percent of the assessed value of all real property to be assessed.**

This requirement applies to all authorized special assessment projects. It 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 benefitted properties. It is not entirely clear how to apply this petition requirement when a property owner voluntarily authorizes a local government to impose a special assessment on her property to fund an energy improvement that directly benefits only that property. Perhaps the best way to interpret the requirement in this context is that it obliges each property owner that wishes to participate in the energy assessment program to sign a petition containing the required statutory language.<sup>1</sup> Submitting the signed petition to the local government likely binds the property owner to participate in the program unless the petition is withdrawn according to the statutory procedures outlined in G.S. 160A-239.3 (municipalities) and G.S. 153A-210.3 (counties).

*Note: Unlike in other states, under North Carolina law there are no special assessment districts. Not having defined assessment districts actually allows a local unit to avoid having an "opt-out" process for property owners within a district who do not want to participate in the energy project assessment program. Instead, property owners essentially must "opt-in" to the program by submitting the petition to the local government.*

- **A local government that imposes a special assessment to fund an authorized project may appropriate general revenues to front the costs of the project.**

"General revenues" likely comprise any of a local government's General Fund revenues (as opposed to Enterprise Fund revenues), the expenditure of which are not otherwise

---

<sup>1</sup>See G.S. 160A-239.3 (municipalities); G.S. 153A-210.3 (counties).

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 also may be used to fund an energy RLF program). The same restrictions apply to the use of property tax revenue as in an energy RLF program. 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>2</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 assessment program constitutes an 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 program without specific voter approval.

- **A local government that imposes a special assessment to fund an authorized project may borrow money to front the costs of the project by one or more of the following methods: revenue bonds,<sup>3</sup> and general obligation bonds.<sup>4</sup>**

Some special limitations apply to issuing general obligation debt to fund an energy assessment program. A local unit likely is limited to using its voted general obligation debt to fund the energy projects assessment program. Thus, a municipality or county is not authorized to use its two-thirds bond capacity,<sup>5</sup> or other non-voted general obligation debt capacity, to fund its energy assessment program because of a constitutional prohibition on gifts or loans of credit.<sup>6</sup>

---

<sup>2</sup> 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 state 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 \$100.00 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.

<sup>3</sup> See G.S. Ch. 159, Art. 5.

<sup>4</sup> See G.S. Ch. 159, Art. 4.

<sup>5</sup> 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 through-out 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 year.

For an explanation of the two-thirds rule, see DAVID M. LAWRENCE, FINANCING CAPITAL PROJECTS IN NORTH CAROLINA (2d ed. UNC Institute of Government 1994), *available at* <http://shopping.netsuite.com/s.nl/c.433425/it.A/id.111/f> (last visited Nov. 17, 2009).

<sup>6</sup> N.C. CONST. ART. V, SEC. 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

- **A county and (likely) municipality<sup>7</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.**

A local government that wishes to partner with one or more financial institutions to fund the energy projects may issue revenue bonds, the proceeds of which will front the costs of the projects. The revenue bonds will be secured by, and retired from, the special assessment revenue. The unit must follow all of the procedural requirements for issuing the revenue bonds detailed in G.S. Ch. 159, Art. 5, including securing Local Government Commission (LGC) approval of the borrowing. Furthermore, the unit must covenant to enforce the payment of the assessments.

As a practical matter, it is unclear if there is a market for this type of debt at a reasonable cost. 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 its energy assessment program with revenue bond proceeds.

- **A local government may impose a special assessment before the project being financed is complete.**

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 wishes to issue revenue bonds to fund the energy projects, secured by the special assessment revenue, it likely will have to impose the special assessments before it completes the borrowing transaction.

- **The assessment payment period may not exceed 30 years and the annual interest rate charged for use of the funds may not exceed 8 percent.**

A special assessment must be paid within thirty days of the publication of the notice of the confirmation of the assessment roll, unless the governing board of the local unit has authorized payment in installments. A governing board may establish a schedule of discounts for payments received within the thirty-day period. A local unit also may authorize up to thirty yearly installment payments, at the rate of interest set in the final

---

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 (UNC Institute of Government 2000), *available at* <http://shopping.netsuite.com/s.nl/c.433425/it.A/id.31/f> (last visited Nov. 17, 2009).

<sup>7</sup> G.S. 160A-239.4 [as modified by S.L. 2009-525 (S97)] 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.

Kara A. Millonzi  
[Millonzi@sog.unc.edu](mailto:Millonzi@sog.unc.edu)

©UNC-CH School of Government 2009

assessment resolution. Each yearly installment is included on the property owner's property tax bill and due on the date that property taxes are due.

As a practical matter, a local unit likely will determine the maximum repayment period in relation to the useful life of the project being funded. Likewise, the interest rate charged will be a product both 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. 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. 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.

- **North Carolina law does not impose a “no due on sale” requirement for special assessment installment payments.**

The special assessment lien remains attached to the real property until the special assessments are paid in full, regardless of who owns the property. Under current practice, though, special assessment liens likely will be satisfied upon the sale of the assessed property. This may undercut one of the advantages to individual property owners of participating in the energy project assessment program—that is, the ability to transfer the repayment obligation when the benefitted property is sold, allowing property owners to invest in improvements that will pay back over a longer timeframe than the owner intends to retain the property.