FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Local Government Powers[1]

Article VIII of the Florida Constitution establishes the authority for home rule by counties and municipalities in Florida. The Legislature is required to divide the state into counties[2] and has the authority to choose to create municipalities.[3] The Florida Constitution recognizes two types of county government in Florida: those operating under a county charter and those without a charter. Florida currently has 67 counties.[4] County ordinances must be filed with the custodian of state records, and take effect at the time provided by law.[5]

Noncharter Counties

[redacted]

Section 125.01, F.S., also provides:

- The enumeration of powers herein may not be deemed exclusive or restrictive, but is deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated.
- The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution.

The governing body of a county also has the power to establish, and subsequently merge or abolish, dependent special districts including both incorporated and unincorporated areas.

This delegation of home rule power to noncharter counties is broad.[10] Nevertheless, it is a legislative, not a constitutional, grant of home rule power, and as such is subject to legislative regulation through law in the same manner as is a municipality.[11]

Noncharter counties must organize their governing body either in the traditional commission form or the commission-administrator form of county government, which may be enacted by county ordinance.[12] If an ordinance enacted by a noncharter county conflicts with a municipal ordinance, the county ordinance is not effective within the municipality to the extent of the conflict.[13]

Charter Counties

Pursuant either to general[14] or special law, a county government may be adopted by charter approved by the county voters. A county with a charter has all powers of self-government *not inconsistent with* general law or special law approved by the county voters. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. In the event of a conflict between a county and municipal ordinance, the charter must provide which ordinance prevails.[15]

Article VIII, section 6(e) of the Florida Constitution incorporates by reference sections of the 1885 Constitution, providing unique authorization[16] for specific home rule charters including those of Duval[17] and Miami-Dade Counties.[18] Currently, 20 Florida counties have adopted charters.[19]

The most significant distinction between charter and non-charter county power is the constitutional provision for direct power of self-government to a county upon charter approval, whereas a non-charter county has "such power of self-government as is provided by general or special law." Charter counties possess greater home rule authority than non-charter counties, as follows[20]:

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[10] *Santa Rosa County v. Gulf Power Corp.*, 635 So. 2d 96 (Fla. 1st DCA. 1994).
[11] David G. Tucker, *A Primer On Counties and Municipalities - Part 1,* 81 FLA. BAR J. 49 (2007).
[12] *See* ss. 125.01(1), 125.72, F.S.
[13] *Id.*
[14] S. 125.60, F.S.
[15] FLA. CONST. art. VIII, s. 1(g).
[16] Article VIII, section 6(e) of the Florida Constitution, states that specific provisions for Duval, Miami-Dade, Monroe, and Hillsborough Counties "shall remain in full force and effect as to each county affected, as if this article had not been adopted, until that county shall expressly adopt a charter or home rule plan pursuant to this article."
[17] The consolidated government of the City of Jacksonville was created by Ch. 67-1320, Laws of Fla., adopted pursuant to article VIII, section 9 of the 1885 Florida Constitution.
[18] Dade County, now known as Miami-Dade County, has unique home rule status. Article VIII, section 11(5) of the 1885 Florida Constitution, now incorporated by reference in article VIII, section 6(e) of the 1968 Florida Constitution, further provided the Metropolitan Dade County Home Rule Charter, and any subsequent ordinances enacted pursuant to the charter, may conflict with, modify, or nullify any existing local, special, or general law applicable only to Dade County. Accordingly, Miami-Dade County ordinances enacted pursuant to the Charter may implicitly, as well as expressly, amend or repeal a special act that conflicts with a Miami-Dade County ordinance. Effectively, the Miami-Dade Charter can only be altered through constitutional amendment, general law, or County actions approved by referendum. *Chase v. Cowart*, 102 So. 2d 147, 149-50 (Fla. 1958).
[19] Alachua, Brevard, Broward, Charlotte, Clay, Columbia, Duval (consolidated government with the City of Jacksonville, ch. 67-1320, Laws of Fla.), Hillsborough, Lee, Leon, Miami-Dade, Orange, Osceola, Palm Beach, Pinellas, Polk, Sarasota, Seminole, Volusia, and Wakulla Counties. Local Government Formation Manual 2018-2020, p. 4.
[20] *Id.* at 4.

- A special act of the Legislature may not diminish the home rule powers of a charter county unless the act is approved by electors in the county.[21]
- A county's charter may authorize the county to regulate an activity on a countywide basis and provide that the county regulation prevails over any conflicting municipal ordinance.[22]
- A charter county may levy any tax within its jurisdiction that is authorized by general law for a municipality unless the general law prohibits levy by a county.[23]

Municipalities[24]

A municipality is a local government entity created to perform functions and provide services for the particular benefit of the population within the municipality, in addition to those provided by the county. The term "municipality" may be used interchangeably with the terms "town," "city," and "village."

Article VIII, section 2 of the Florida Constitution provides that municipalities "shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.[25]

Chapter 166, F.S., also known as the Municipal Home Rule Powers Act,[26] acknowledges the constitutional grant to municipalities of governmental, corporate, and proprietary power necessary to conduct municipal government, functions, and services.[27] Chapter 166, F.S., provides municipalities with broad home rule powers, respecting expressed limits on municipal powers established by the Florida Constitution, applicable laws, and county charters.[28] Pursuant to these powers, approximately 32 Florida municipalities own, operate, and control electric utilities, and 26 municipalities own, operate and control natural gas utilities. At least one municipality provides liquefied petroleum gas (propane) service.[29]

Currently, there are approximately 412 municipalities in Florida.[30] With the exception of Miami-Dade County, the Legislature is authorized to establish or abolish municipalities or amend their charters by general or special law.[31] In Miami-Dade County, the Board of County Commissioners has exclusive authority to provide a method for establishing new municipalities and prescribing their jurisdiction and powers.[32]

Special Districts[33]

Special districts are separate governmental entities existing for specific purposes and having substantial fiscal and administrative independence from general purpose governments. Special districts have existed in the United States for over 200 years and are found in every state and the District of Columbia.

In Florida, special districts perform a wide variety of functions, such as providing fire protection services, delivering urban community development services, and managing water resources. Special districts typically are funded through ad valorem taxes, special assessments, user fees, or impact fees. The Uniform Special District Accountability Act, ch. 189, F. S., generally governs the creation and

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[21] FLA. CONST. art. VIII, s. 1(g).
[22] *Id.*
[23] *McLeod v. Orange County,* 645 So. 2d 411, 413 (Fla. 1994); *State ex rel. Volusia County v. Dickerson,* 269 So. 2d 9, 11 (Fla. 1972).
[24] *See generally* Local Government Formation Manual 2018-2020, Chapter 2.
[25] FLA. CONST. art. VIII, s. 2(b).
[26] S. 166.011, F.S.
[27] Local Government Formation Manual 2018-2020, p. 16.
[28] S. 166.021(4), F.S.
[29] Clearwater Gas System, *Services, Propane*, https://www.clearwatergas.com/services/services/propane (last visited March 7, 2021).
[30] *See* Local Government Formation Manual 2018-2020, Appendix E for a list of these cities and their dates of incorporation.
[31] Local Government Formation Manual 2018-2020, p. 15.
[32] FLA. CONST. art. VIII, s. 6(e), incorporating 1885 FLA. CONST. art. VIII, s. 11(e).
[33] *See generally* Local Government Formation Manual 2018-2020, Chapter 5.

operations of special districts; however, other general laws may more specifically govern the operations of certain types of special districts.

As of February 28, 2021, there are 628 active dependent[34] special districts and 1,158 active independent special districts in Florida.[35] Community development districts are the most frequently created form of independent special district. Other common special districts in Florida include drainage and water control districts, fire control districts, and community redevelopment districts.[36] Currently, one special electric district and four special natural gas districts exist in Florida.[37]

Local Government Authority over Matters Related to Utility and Energy Services

Many of the powers granted to local governments by general law relate, directly or indirectly, to the provision of utility or other energy services to property owners or utility customers in general or to the authority of local governments to provide these services themselves. These powers include, but may not be limited to, the authority to:

- Prepare and enforce comprehensive plans for development.[38]
- Issue development permits and orders.[39]
- Establish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public.[40]
- Enforce the Florida Building Code and adopt and enforce local technical amendments thereto.[41]
- Enter into contracts with utility companies or others for the supply of water, electricity, or telephone service to or in connection with any project.[42]
- Construct, operate, and maintain gas plants and distribution systems for domestic, municipal, and industrial uses,[43] construct such other buildings and facilities as may be required to properly and economically operate and maintain such works,[44] and make all necessary rules or regulations governing the use, control and operation of such works;[45]
- Contract with private companies for the right to construct, operate, and maintain gas plants and distribution systems for domestic, municipal, and industrial uses, including the privilege or franchise of exercising its corporate powers for such terms of years and upon such conditions and limitations as may be deemed expedient and for the best interest of the municipality, for up to 30 years, provided that the rates or charges to be made by the private company to the individual users of the utility are fixed by the municipality.[46]
- Provide and regulate roads, rights-of-way, and related transportation facilities.[47]
- License the use of gas and power lines in rights-of-way.[48]
- Adopt, revise, and amend, from time to time, appropriate ordinances, rules, and regulations reasonably necessary to maintain air quality standards established pursuant to state and federal law, including the federal Clean Air Act.[49]

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[34] Dependent special districts are under some control by a single county or municipality, whereas independent special districts do not have any dependent characteristics. A special district that includes more than one county is independent unless it lies wholly within the boundaries of a single municipality.
[35] Florida Department of Economic Opportunity, Division of Community Development, Special District Accountability Program, Official List of Special Districts Online, *State Totals*, http://dca.deo.myflorida.com/fhcd/sdip/OfficialListdeo/report.cfm (last visited Feb. 28, 2021).
[36] Florida Department of Economic Opportunity, Division of Community Development, Special District Accountability Program, Official List of Special Districts Online, *Special District Function Totals* at http://www.floridajobs.org/community-planning-and-development/assistance-for-governments-and-organizations/special-district-accountability-program (last visited Feb. 28, 2021).
[37] *See* PSC, Facts & Figures of the Florida Utility Industry http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Factsandfigures/April%202020.pdf (last visited Feb. 28, 2021).
[38] S. 125.01(1)(g), F.S.
[39] Ss. 125.022, F.S. and 166.033, F.S.
[40] S. 125.01(1)(h), F.S.
[41] S. 125.01(1)(bb), F.S.
[42] S. 125.012(19), F.S.
[43] S. 180.06(8), F.S.
[44] S. 180.06(9), F.S.
[45] S. 180.13, F.S.
[46] S. 180.14, F.S.
[47] S. 125.01(1)(m), F.S.
[48] S. 125.42, F.S.
[49] S. 125.275, F.S.

Further, general law provides a role for local governments in state proceedings related to the siting of certain new electrical power plants, transmission lines, and natural gas pipelines. Specifically, part II of ch. 403, F.S., requires local governments to provide a report to the Department of Environmental Protection (DEP) as to the consistency of proposed electrical power plants, transmission lines, and natural gas pipelines with all applicable local ordinances, regulations, standards, or criteria that apply to the proposed facility, including local comprehensive plans, zoning regulations, land development regulations, and any applicable local environmental regulations.[50]

Municipalities are authorized to levy a public service tax on the purchase of electricity, natural gas liquefied petroleum gas, and manufactured gas.[51]

As noted above, many municipalities own and operate electric utilities and natural gas utilities and govern the operation of those utilities through ordinance, code, or policies. These governing provisions include terms of service, similar to those of non-governmental utilities, which restrict use of service where unsafe conditions exist or when specified deposits or payments are not made. Some special districts provide these services, likely under similar terms common to the industry.

State Preemption

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. A local government enactment may be inconsistent with state law if (1) the Legislature "has preempted a particular subject area" or (2) the local enactment conflicts with a state statute. Where state preemption applies it precludes a local government from exercising authority in that particular area.[52]

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.[53] Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.[54] In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.[55] In cases determining the validity of ordinances enacted in the face of state preemption, the effect has been to find such ordinances null and void.[56]

Effect of the Bill

The bill prohibits a municipality, county, special district, or other political subdivision of the state from enacting or enforcing a resolution, ordinance, rule, code, or policy, or take any action that restricts or prohibits or has the effect of restricting or prohibiting a property owner, tenant, or utility service customer from selecting his or her utility service. The bill provides that these utility services include electric, manufactured gas, liquefied petroleum gas (propane), natural gas, hydrogen, fuel oil, a renewable source, or any other source from a utility service provider that serves the affected property.

The bill defines a "utility service provider" as any person, public or private corporation, partnership, association, or political subdivision that sells or supplies electricity or gas to the public.

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[50] Ss. 403.507(2)(a)3., F.S., s. 403.526(2)(a)5., F.S., and s. 403.941, F.S.
[51] S. 166.231, F.S.
[52] Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009). Historically, certain types of local action have been found to frustrate the purpose of state law, and, thus, conflict has resulted. Specifically, Florida jurisprudence makes clear that local action cannot 1) provide for more stringent regulation than the state legislation in violation of the express wording of the statute; 2) provide for a more stringent penalty than that allowed by state statute; 3) prohibit behavior otherwise allowed by state legislation; 4) allow behavior otherwise prohibited by state statute; or 5) provide for a different method for doing a particular act than the method proscribed by state legislation.
Generally, a local government can pass more stringent regulations than those provided for by statute. However, if the state legislation expressly forbids a stricter regulation or if the imposition of a stricter regulation frustrates the purpose of the statute, the local government must abstain
[53] *See City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008).
[54] *Mulligan*, 934 So. 2d at 1243.
[55] *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).
[56] *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

The bill provides that it does not restrict a municipality's power to levy a public services tax under existing law[57] or to receive revenue from any public utility.[58]

The bill provides that any municipality, county, special district, or political subdivision charter, resolution, ordinance, rule, code, policy, or action that is preempted by this act that existed before or on July 1, 2021, is void.

B. SECTION DIRECTORY:

Section 1 Creates s. 377.707, F.S.; providing a definition; providing legislative findings; intent; prohibiting a local government from regulating energy infrastructure; preempting such regulation to the state.

Section 2 Provides for an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   Indeterminate. *See* Fiscal Comments.

2. Expenditures:

   Indeterminate. *See* Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. *See* Fiscal Comments.

[57] S. 166.231, F.S., authorizes municipalities to levy a tax on the purchase of electricity, metered natural gas, liquefied petroleum gas either metered or bottled, manufactured gas either metered or bottled, and water service. Generally, the tax may be levied only upon purchases within the municipality and may not exceed 10 percent.

[58] S. 366.02(1), F.S., defines a "public utility" as "every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state." The term "public utility" does not include rural electric cooperatives, municipal electric utilities, special natural gas districts, natural gas transmission pipeline companies, natural gas marketers, or propane suppliers.

D. FISCAL COMMENTS:

Due to uncertainty as to the specific impact of the bill's preemption provisions, the potential fiscal impacts to local government and the direct economic impact on the private sector cannot be determined.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill defines a "utility service provider" to include any entity that sells or supplies *electricity or gas* to the public within this state. The bill also provides a list of utility services from which a local government may not prohibit a "utility service customer" from selecting. In addition to electricity and various forms of gas, this list includes "hydrogen, fuel oil, a renewable source, or any other source from a utility service provider that serves the affected property." Many of these energy sources cannot be separately selected when purchasing from a utility service provider, as defined in the bill. Thus, this list is inconsistent with this bill's definition of "utility service provider."

The bill creates a broad preemption over any actions of local governments in relation to a customer's choice of utility service. Other than an exception for municipal public service taxes, the bill does not provide for local governments to exercise powers granted by general law, such as permitting and code enforcement, to the extent that the exercise of those powers may be construed to have the effect of restricting a customer's choice of utility service. Further, a local government that owns and operates a utility may not be able to adopt or enforce ordinances, codes, or policies providing requirements for persons who wish to receive service, including restrictions on connection of service to a property where unsafe conditions exist or when specified deposits or payments are not made.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to preemption over restriction of utility services; creating s. 366.032, F.S.; defining the term "utility service provider"; prohibiting municipalities, counties, special districts, or other political subdivisions from restricting or prohibiting customers from selecting their utility service; authorizing municipalities to levy taxes on public services; voiding existing specified documents and policies that are preempted by this act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 366.032, Florida Statutes, is created to read:

366.032 Definition; preemption over utility service restrictions.—

(1) As used in this section, the term "utility service provider" means any person, any corporation, whether public or private, any partnership, any association, or any political subdivision, whether a municipality, county, special district, or other political subdivision that sells or supplies electricity or gas to the public within this state.

(2) A municipality, county, special district, or other

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

political subdivision of the state may not enact or enforce a resolution, ordinance, rule, code, policy, or take any action that restricts or prohibits or has the effect of restricting or prohibiting a property owner, tenant, or utility service customer from selecting his or her utility service, whether electric, manufactured gas, liquefied petroleum gas, natural gas, hydrogen, fuel oil, a renewable source, or any other source from a utility service provider that serves the affected property. However, nothing in this section restricts a municipality the right and power to levy taxes on public services under s. 166.231 or affect the right of any municipality to receive revenue from any public utility.

Section 2. Any municipality, county, special district, or political subdivision charter, resolution, ordinance, rule, code, policy, or action that is preempted by this act that existed before or on July 1, 2021, is void.

Section 3. This act shall take effect July 1, 2021.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

TOURISM, INFRASTRUCTURE & ENERGY SUBCOMMITTEE

HB 919 by Rep. Tomkow
PREEMPTION OVER RESTRICTION OF UTILITY SERVICES

AMENDMENT SUMMARY
MARCH 11, 2021

Amendment 1 by Rep. Tomkow

- Prohibits a municipality, county, special district, or other political subdivision of the state from enacting or enforcing a resolution, ordinance, rule, code, or policy or taking any other action that restricts or prohibits or has the effect of restricting or prohibiting the types or fuel sources of energy production which may be used, delivered, converted, or supplied by specified electric and natural gas utilities, entities formed by interlocal agreement to generate and transmit electricity, natural gas transmission companies, and propane dealers, dispensers, and gas cylinder exchange operators.
- Provides that the bill may not be construed to alter current Public Service Commission jurisdiction.
- Removes an exception for levying public services taxes.
- Removes a definition for the term “utility service provider” and removes references to that term.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Tourism, Infrastructure & Energy Subcommittee

Representative Tomkow offered the following:

Amendment (with title amendment)

Remove lines 17-37 and insert:

366.032 Preemption over utility service restrictions.-

(1) A municipality, county, special district, or other political subdivision of the state may not enact or enforce a resolution, ordinance, rule, code, policy, or take any action that restricts or prohibits or has the effect of restricting or prohibiting the types or fuel sources of energy production which may be used, delivered, converted, or supplied by a public utility or an electric utility as defined in this chapter, an entity formed under ch. 163.01 that generates, sells, or transmits electrical energy, a natural gas utility as defined in

s. 366.04(3)(c), a natural gas transmission company as defined in ch. 368, or a Category I liquefied petroleum gas dealer or Category II liquefied petroleum gas dispenser or Category III liquefied petroleum gas cylinder exchange operator as defined in ch. 527 to customers such entities are authorized to serve.

(2) This section may not be construed to expand or alter the jurisdiction of the commission over public utilities or electric utilities.

T I T L E A M E N D M E N T

Remove lines 3-9 and insert:

utility services; creating s. 366.032, F.S.; prohibiting municipalities, counties, special districts, or other political subdivisions from restricting or prohibiting the types or fuel sources of energy production used, delivered, converted, or supplied by certain entities to customers; providing for construction; voiding existing specified documents and

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1143 Funding of Aviation Development Projects
SPONSOR(S): Grall
TIED BILLS: **IDEN./SIM. BILLS:** SB 1466

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Tourism, Infrastructure & Energy Subcommittee		Johnson	Keating
2) Infrastructure & Tourism Appropriations Subcommittee			
3) Commerce Committee			

SUMMARY ANALYSIS

Under federal regulations, commercial service airports are categorized into large hub, medium hub, small hub, and non-hub airports, based upon the number of passenger boardings in a given year.

Under Florida law, when federal funds are not available, the Department of Transportation (DOT) may fund up to 80 percent of the costs for certain projects at airports that do not have any scheduled commercial service. DOT may only fund up to 50 percent of the project cost if the airport has scheduled commercial service.

The bill authorizes DOT to fund up to 80 percent of the costs for eligible airport projects, with a 20 percent local match at all publicly-owned, public-use general aviation airports and commercial service airports not classified as large hub, medium hub, or small hub airports by the Federal Aviation Administration (FAA).

Under the bill, eligible projects at the following commercial service airports could receive DOT funding of up to 80 percent of the project costs with a 20 percent local match: Daytona Beach International, Gainesville Regional, Melbourne International, Tallahassee International, and Vero Beach Regional Airports.

The bill has an indeterminate impact on state government expenditures and no impact on state government revenues or local government revenues or expenditures. The bill will increase the opportunity for certain airports to engage in state-funded aviation projects. *See* Fiscal Analysis for details.

The bill has an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Airport Oversight

At the federal level, the Federal Aviation Administration (FAA) is responsible for planning and developing a safe and efficient national airport system. This includes all programs related to airport safety and inspections and standards for airport design, construction, and operation. Federal law requires each commercial service airport to operate under a federal certificate and comply with federal aviation requirements. The FAA is responsible for national airport planning and environmental and social requirements and establishes policies related to airport rates and charges, compliance with grant assurances, and airport privatization.[1]

In Florida, the Department of Transportation (DOT) is responsible for planning airport systems and promoting the further development and improvement of airport facilities.[2] The owner or lessee of a proposed public airport[3] must receive DOT approval before site acquisition, construction, or establishment of a public airport facility.[4] DOT is also responsible for licensing public airport facilities before the operation of aircraft to or from the facility and must inspect such facilities prior to licensing or license renewal.[5] Florida law authorizes local governments to establish and operate airports[6] and governs airport zoning and land use issues.[7]

Airport Categories

Under federal regulations, a commercial service airport is defined as a public airport that the FAA determines has at least 2,500 commercial passenger boardings each year and is receiving scheduled passenger service.[8] A large hub airport is a commercial service airport that has at least 1 percent of the commercial passenger boardings in United States.[9] A medium hub airport is a commercial service airport that has at least 0.25 percent but less than 1 percent of the commercial passenger boardings in the United States.[10] A small hub airport is a commercial service airport that has at least 0.05 percent but less than 0.25 percent of the commercial passenger boardings in the United States.[11] A non-hub airport has less than 0.05 percent of all commercial passenger boardings in the United States but has more than 10,000 passenger boardings.[12]

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[1] *See* Federal Aviation Administration, *Airports*, https://www.faa.gov/about/office_org/headquarters_offices/arp/ (last visited on March 5, 2021).
[2] S. 332.001. F.S.
[3] Section 330.27(6), F.S. For purposes of DOT approval and licensure, the term "public airport" means an airport, publicly or privately owned, which is open for use by the public.
[4] S. 330.30(1), F.S.
[5] S. 330.30(2), F.S.
[6] *See* Ch. 332, F.S.
[7] *See* Ch. 333, F.S.
[8] 49 U.S.C. § 47102(7).
[9] 49 U.S.C. § 47102(11). Florida's large hub airports are Miami International, Orlando International, Ft. Lauderdale/Hollywood International, and Tampa International.
[10] 49 U.S.C. § 47102(13). Florida's medium hub airports are Southwest Florida International (Ft. Myers), Palm Beach International, and Jacksonville International.
[11] 49 U.S.C. § 47102(25). Florida's small hub airports are Orlando Sanford International, St. Pete-Clearwater International, Pensacola International, Sarasota/Bradenton International, Northwest Florida-Beaches International (Panama City), Punta Gorda, Destin-Ft. Walton Beach, and Key West.
[12] 49 U.S.C. § 47102(14). Florida's non-hub airports are Tallahassee International, Daytona Beach International, Melbourne International, and Gainesville Regional.

Nonprimary airports are commercial service airports that have at least 2,500 and no more than 10,000 passenger boardings each year.[13] Primary airports are commercial service airports that have more than 10,000 passenger boardings each year.[14]

Federal Airport Funding

At the federal level, airports receive federal grants administered by the FAA. The main grant program for federal funds is the Airport Improvement Program (AIP). The AIP provides grants to public agencies — and, in some cases, to private owners and entities — for the planning and development of public-use airports.[15]

Eligible AIP projects include airport improvements related to enhancing airport safety, capacity, security, and environmental concerns. In general, airports may receive AIP funds for most airfield capital improvements or rehabilitation projects and, in some specific situations, for terminals, hangars, and nonaviation development. Certain professional services that are necessary for eligible projects may also be eligible. The FAA must be able to determine that the projects are justified based on civil aeronautical demand. The projects must also meet federal environmental and procurement requirements.[16]

State Airport Funding

Sections 332.003 through 332.007, F.S., create the Florida Airport Development and Assistance Act (Act). The act provides the following duties of the Department of Transportation (DOT):

- Provide coordination and assistance for the development of a viable aviation system.
- Advise and assist the Governor in all aviation matters.
- Upon request, assist airport sponsors in airport master planning.
- Upon request, provide financial and technical assistance to public agencies which operate public-use airports[17] by making DOT resources available on a cost-reimbursement basis to such agencies for special needs of limited duration.
- Participate in research and development programs relating to airports.
- Administer DOT's participation in the program of aviation and airport grants.
- Develop, promote, and distribute supporting information and educational services.
- Encourage the maximum allocation of federal funds to local airport projects in this state.
- Support the development of land located within the boundaries of airports for the purpose of industrial or other uses compatible with airport operations.[18]

Section 332.007, F.S., relates to the administration and financing of aviation and airport programs and projects. DOT must prepare and continuously update an aviation and airport work program based on a collection of the local sponsors'[19] proposed projects to be included in DOT's work program.[20] DOT's airport work program must separately identify development projects and discretionary capacity improvement projects.[21] DOT's airport work program must be consistent with the statewide aviation system plan and, to the maximum extent feasible, consistent with approved local government

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[13] *See* Federal Aviation Administration, *Airports, Planning and Capacity, Airport Categories*, https://www.faa.gov/airports/planning_capacity/categories/ (last visited on February 24, 2021). Florida's only non primary airport is Vero Beach Regional Airport.

[14] *Id.*

[15] See Federal Aviation Administration, *Airports, Airport Improvement Program (AIP), Overview: What is AIP?* https://www.faa.gov/airports/aip/overview/ (last visited on February 24, 2021).

[16] Department of Transportation, Agency Analysis of 2021 House Bill 1143, p. 4. (February 25, 2021).

[17] Section 332.004(14), F.S., defines the term "public-use airport" as any publicly owned airport which is used or to be used for public purposes.

[18] S. 332.006, F.S.

[19] Section 332.004(15), F.S., defines the term "sponsor" as any eligible agency which, either individually or jointly with one or more eligible agencies, submits to the department an application for financial assistance for an airport development project in accordance with this act.

[20] DOT's work program is developed pursuant to s. 339.135, F.S.

[21] S. 332.007(2)(a), F.S.

comprehensive plans. Projects involving DOT-administered funds to be undertaken and implemented by the airport sponsor must be included in the aviation and airport work program.[22] Assistance may only be provided for projects which are included in the department's adopted work program.[23]

Only projects or programs provided for in the Act that will contribute to the implementation of the state aviation system plan, that are consistent with and will contribute to the implementation of any airport master plan or layout plan, and that are consistent, to the maximum extent feasible, with the approved local government comprehensive plans are eligible for the expenditure of state funds in accordance with fund participation rates and priorities.[24]

Subject to appropriations, DOT may fund up to 50 percent of the portion of eligible airport project costs which are not funded by the federal government, except that DOT may initially fund up to 75 percent of the cost of land acquisition for a new airport or for the expansion of an existing airport which is owned and operated by a municipality, a county, or an authority.[25]

However, subject to appropriation, DOT may help fund the capital cost of eligible public airport and aviation development projects at a higher rate for various types of projects. When federal funds are not available, DOT may fund up to 80 percent of master planning and eligible aviation development projects at publicly owned, publicly operated airports. If federal funds are available, DOT may fund up to 80 percent of the nonfederal share of such projects. Such funding is limited to airports that have no scheduled commercial service.[26]

DOT requires statutory compliance via assurances included with each grant agreement. The agency certifies that, with respect to a project, it will comply, within its authority, with all applicable, current laws and rules of the state and local government, as well as DOT policies, guidelines, and requirements. The sponsor also certifies, with respect to a construction-related project, that all design plans and specifications will comply with applicable federal, state, local, and professional standards, as well as FAA advisories and FAA issued waivers. Failure by the agency to satisfactorily remedy the non-compliance absolves DOT's continued financial commitment to the project and immediately requires the agency to repay DOT the full amount of funds expended by DOT on a project.[27]

Effect of the Bill

The bill authorizes DOT to fund up to 80 percent of the costs for eligible airport projects, with a 20 percent local match, at all publicly-owned, public-use general aviation airports and commercial service airports not classified as large hub, medium hub, or small hub by the FAA. Thus commercial service airports with less than approximately 470,000 passenger boardings per year will qualify for this funding.[28] This number will change over time with the number of passenger boardings at United States airports.

Based on current passenger boardings, the bill would allow DOT to fund eligible projects at up to 80 percent with a 20 percent local match at the following commercial service airports: Daytona Beach International, Gainesville Regional, Melbourne International, Tallahassee International, and Vero Beach Regional airports.

The bill has an effective date of July 1, 2021.

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[22] S. 332.007(2)(b), F.S.
[23] S. 332.007(3), F.S.
[24] S. 332.007(5), F.S.
[25] S. 332.006(6)(a), F.S.
[26] S. 332.007(6)(c), F.S.
[27] Florida Department of Transportation, Agency Analysis of 2021 House Bill 1143.
[28] FAA. Commercial Service Airports (Rank Order) based in Calendar Year 2019, September 25, 2020. https://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/passenger/media/cy19-commercial-service-enplanements.pdf (last visited March 9, 2020).

B. SECTION DIRECTORY:

Section 1 Amends s. 332.007, F.S., relating to the administration and financing of airport programs and projects.

Section 2 Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Indeterminate.[29]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill changes the match requirement for certain commercial service airport projects for DOT aviation funds. This change will impact the opportunity of these airports to engage in these projects. However, the impact of the match is indeterminate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of sales tax shared with counties or municipalities.

2. Other:

   None.

[29] Florida Department of Transportation, Revised Agency Analysis of HB 1143, p. 6.

B. RULE-MAKING AUTHORITY:

The bill does not require rulemaking, nor does it provide a grant of rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to funding of aviation development projects; amending s. 332.007, F.S.; providing that specified funding of aviation development projects is limited to general aviation airports or commercial service airports under certain circumstances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (c) of subsection (6) of section 332.007, Florida Statutes, is amended to read:

332.007 Administration and financing of aviation and airport programs and projects; state plan.—

(6) Subject to the availability of appropriated funds, the department may participate in the capital cost of eligible public airport and aviation development projects in accordance with the following rates, unless otherwise provided in the General Appropriations Act or the substantive bill implementing the General Appropriations Act:

(c) When federal funds are not available, the department may fund up to 80 percent of master planning and eligible aviation development projects at publicly owned, publicly operated airports. If federal funds are available, the department may fund up to 80 percent of the nonfederal share of

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

such projects. Such funding is limited to general aviation airports, or commercial service airports that are not classified as large, medium, or small hub airports by the Federal Aviation Administration ~~have no scheduled commercial service~~.

Section 2. This act shall take effect July 1, 2021.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 387 Property Assessed Clean Energy Program
SPONSOR(S): Tourism, Infrastructure & Energy Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:** SB 1208

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Tourism, Infrastructure & Energy Subcommittee		Willson MW	Keating CK

SUMMARY ANALYSIS

In 2010, the Legislature provided specific authority for local governments to create Property Assessed Clean Energy (PACE) programs to provide up-front financing for certain qualifying improvements. Under these programs, property owners may apply to the local government for funding to finance a qualifying improvement and voluntarily enter into a financing agreement with the local government. "Qualifying improvements" include energy conservation and efficiency improvements, renewable energy improvements, and wind resistance improvements to existing facilities. Property owners finance qualifying improvements through a non-ad valorem assessment on their property. Local governments determine whether to offer a residential or commercial PACE program, whether to administer the program directly or through a for-profit or not-for-profit administrator, or any combination thereof.

The bill adds several consumer protections relating to the current PACE program, including:

- Specifying that a financing agreement may not be used to fund unnecessary ancillary work.
- Capping the total of all non-ad valorem assessments, plus any mortgage-related debt on the property, at 97% of a residential property's fair market value.
- Requiring a determination that a residential property owner is able to pay the assessment and meets certain minimum creditworthiness requirements.
- Allowing property owners to cancel a financing agreement within 3 days of execution.
- Requiring verification that any mortgage holders or loan servicers with an interest secured by the property have received notice of the assessment.
- Ensuring that financing agreements do not exceed the estimated useful life of the qualifying improvement.
- Requiring acknowledgement of a number of key terms and disclosures, both orally and in writing, before execution of the financing agreement by the property owner.
- Requiring licensure and background screening for contractors who install qualifying improvements under a PACE program.
- Requiring verification that the work was completed to code before funds are disbursed.
- Imposing of certain marketing and communication guidelines, including limitations and prohibitions on solicitation, advertising, and other inducements.
- Specifying terms relating to enforceability of contracts for qualifying improvements and associated remedies.

The bill also requires the local government to post an online annual report documenting certain PACE activities.

The bill does not have a fiscal impact on state government. The bill does not appear to impact local government revenues, but may have an insignificant negative fiscal impact on local government expenditures.

The bill takes effect on July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Property Assessed Clean Energy (PACE) Programs

Generally, Property Assessed Clean Energy (PACE) programs enable local governments to establish programs to provide financing for certain qualifying improvements on real property which reduce energy consumption and increase energy efficiency. PACE allows individual property owners to contract directly with qualified contractors for energy efficiency and renewable energy projects. The local government provides the upfront funding for projects from the proceeds of a revenue bond issuance, which are repaid by non-ad valorem assessments on participating property owners' tax bills.[1] The first residential PACE program was launched in 2008 in Berkeley and Palm Desert, California.[2] PACE programs are active in 24 states plus Washington D.C., but only California, Florida, and Missouri offer residential PACE programs.[3]

PACE in Florida

In 2010, the Legislature provided specific authority for local governments to create PACE programs.[4] Section 163.08, F.S., provides supplemental authority to local governments[5] concerning qualified improvements to residential and non-residential real property. The law provides that if a local government authorizes a PACE program, property owners may apply to the local government for funding to finance a qualifying improvement and voluntarily enter into a financing agreement with the local government.[6] "Qualifying improvements" include energy conservation and efficiency improvements, renewable energy improvements, and wind resistance improvements to existing facilities.[7]

At least 30 days before entering into the financing agreement, the property owner must provide notice to any mortgage holder or loan servicer of the intent to enter into the agreement, the maximum amount to be financed, and the maximum annual assessment that will be required to repay the amount.[8] The law provides that an acceleration clause for "payment of the mortgage, note, or lien or other unilateral modification solely as a result of entering into a financing agreement … is not enforceable."[9] However, the mortgage holder or loan servicer may increase the required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment.

The law authorizes a local government to partner with one or more local governments for the purpose of providing and financing qualifying improvements, levy a non-ad valorem assessment to fund a qualifying improvement, incur debt to provide financing for qualifying improvements, and collect costs

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[1] For more information, *See* http://www.pacenation.org and http://floridapace.gov/ (last visited Mar. 7, 2021).
[2] NCSL, *PACE Financing* https://www.ncsl.org/research/energy/pace-financing.aspx (last visited Mar. 7, 2021).
[3] California offers residential PACE financing for improvements related to electric vehicle charging, infrastructure, energy efficiency, renewable energy, seismic strengthening and water efficiency. Missouri offers PACE financing for improvements related to energy efficiency and renewable energy. Additionally, Maine offers residential programs without holding a lien against properties. NCSL, *A Clean-Energy Financing Program for Homeowners Now Has Tougher Consumer Protections* (Nov. 17, 2017) https://www.ncsl.org/bookstore/state-legislatures-magazine/clean-energy-financing-consumer-protection.aspx. *See also* PACE Nation, *PACE Programs* https://www.pacenation.org/pace-programs/ (last visited Mar. 9, 2021).
[4] Ch. 2010-139, Laws of Fla.
[5] Section 163.08(2)(a), F.S., defines "local government" as a county, a municipality, a dependent special district as defined in s. 189.012, or a separate legal entity created pursuant to s. 163.01(7) [known as the Florida Interlocal Cooperation Act]."
[6] S. 163.08(4), F.S.
[7] S. 163.08(2)(b), F.S.
[8] S. 163.08(13), F.S.
[9] S. 163.08(15), F.S.

incurred from financing qualifying improvements through a non-ad valorem assessment. These non-ad valorem assessments are senior to existing mortgage debt, so if the homeowner defaults or goes into foreclosure, the delinquent payments would be recovered before the mortgage. Current law also specifies that a PACE program may be administered by a for-profit entity or a not-for-profit organization on behalf of and at the discretion of the local government.

In 2012, the Legislature expanded the definition of "local government" to allow a partnership of local governments formed pursuant to the Florida Interlocal Cooperation Act,[10] to enter into a financing agreement wherein the partnership, as a separate legal entity, imposes the PACE assessment.[11]

To participate in a PACE program, a property owner must have paid property taxes and not been delinquent for the previous three years.[12] The total assessment cannot be for an amount greater than 20 percent of the just value of the property as determined by the county property appraiser, unless consent is obtained from the mortgage holders.[13]

In Florida, local governments typically have multiple non-exclusive agreements with a number of PACE providers.[14] Generally, PACE providers are private companies that administer the local government's PACE program on behalf of the local government and provide funding from private sources. PACE providers generally act as the program administrator for special districts created pursuant to an interlocal agreement between two or more Florida local governments. Once the PACE district is created, additional counties or municipalities may join the special district as members, authorizing the PACE provider for the special district to administer PACE programs on behalf of the newly joined members.[15] PACE providers generally maintain a list of approved contractors authorized to provide qualifying improvements.[16]

For example, Broward County authorizes the following PACE providers:[17]

- CounterPointe Energy Solutions provides financing under the "AllianceNRG" Program (residential) and the "CounterpointeSRE" Program (commercial). Administers PACE program for the Florida PACE Funding District.
- Berkadia administers a commercial PACE program. Administers program for the Florida Renewable Energy District.
- CleanFund administers a commercial PACE program. Administers program for the Florida Renewable Energy District.
- Dividend Finance administers the "Dividend" Program. Administers PACE program for the Florida Renewable Energy District.
- Greenworks Lending administers a commercial PACE program. Administers program for the Florida Renewable Energy District.
- Lever Energy Capital administers a commercial PACE program. Administers program for the Florida Resiliency and Energy District.
- PACE Funding Group, LLC administers the "PACEfunding" Program (residential). Administers program for the Florida Resiliency and Energy District.
- Rahill administers a commercial PACE program. Administers program for the Florida Resiliency and Energy District.

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[10] S. 163.01(7), F.S.
[11] Ch. 2012-117, Laws of Fla.
[12] S. 163.08(9), F.S.
[13] S. 163.08(12)(a), F.S.
[14] https://floridapace.gov/serviceareas/
[15] *See* Green Corridor Property Assessed Clean Energy (PACE) District Town of Cutler Bay, Florida Financial Report for the Fiscal Year Ended Sept. 30, 2014, at 13. https://flauditor.gov/pages/specialdistricts_efile%20rpts/2014%20green%20corridor%20property%20assessed%20clean%20energy%20(pace)%20district.pdf (last visited Mar. 9, 2021).
[16] *See* Sarasota County, *PACE*, https://www.scgov.net/government/uf-ifas-extension-and-sustainability/pace (last visited Mar. 9, 2021)
[17] Broward County, *Energy & Sustainability Program: Property Assessed Clean Energy (PACE)* https://www.broward.org/Climate/EnergyAndSustainabilityProgram/pages/pace.aspx (last visited Mar. 9, 2021).

- Renew Financial administers PACE programs under the "RenewPACE" Program (residential and commercial). Administers program for the Florida Green Finance Authority.
- Structured Finance Associates administers a commercial PACE program. Administers program for the Florida Renewable Energy District.
- Renovate America administers the "HERO" Program.
- Twain Financial Partners administers a commercial PACE program. Administers program for the Florida Resiliency and Energy District.
- Ygrene administers the "Clean Energy Program" (residential and commercial). Administers program for the Clean Energy Green Corridor Pace District.[18]

It is up to the local government to determine whether to offer a residential or commercial PACE program, whether to administer the program directly or through a third-party PACE provider, or any combination thereof.

Currently, PACE financing typically offers an average interest rate of 6-8%, not including additional associated fees, which is repaid over a term of 15 to 20 years. Interest rates and fees for a project are set by the PACE provider when the agreement is finalized with the property owner.[19]

Federal Housing Finance Agency and Super-Priority Liens

In 2010,[20] and again in 2014[21], the Federal Housing Finance Agency (FHFA) directed mortgage underwriters Fannie Mae and Freddie Mac not to purchase mortgages of homes encumbered by a first-lien PACE loan due to its senior status above a mortgage. Under normal circumstances, real estate lien priority is established by the order in which the liens are filed.[22]

According to the FHFA, such super-priority liens increases the risk of losses to taxpayers. Fannie Mae and Freddie Mac support the housing finance market by purchasing, guaranteeing, and securitizing single-family mortgages. Therefore, mortgages supported by Fannie Mae and Freddie Mac must remain in first-lien position, meaning that they have first priority in receiving the proceeds from the sale of a house in foreclosure. Although FHFA generally supports energy retrofit financing programs, the Agency acknowledges that such programs need to be structured in a manner which ensures protection of the core financing for the home.[23]

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[18] *See* PACE Broward, *Frequently Asked Questions* https://www.broward.org/Climate/EnergyAndSustainabilityProgram/Documents/PACE%20Broward%20FAQ%20Sheet_Update4_09212018.pdf (last visited Mar. 9, 2021).

[19] Palm Beach County, *PACE Frequently Asked Questions* https://discover.pbcgov.org/resilience/Pages/PACE-Frequently-Asked-Questions.aspx (last visited Mar. 9, 2021).

[20] Federal Housing Finance Agency, *FHFA Statement on Certain Energy Retrofit Loan Programs* (July, 6, 2010), http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Statement-on-Certain-Energy-Retrofit-Loan-Programs.aspx (last visited Mar. 7, 2021). *See also* Federal Housing Financial Agency, *Statement of the Federal Housing Finance Agency on Certain Super Priority Liens* (December 22, 2014)("FHFA wants to make clear to homeowners, lenders, other financial institutions, state officials, and the public that Fannie Mae and Freddie Mac's policies prohibit the purchase of a mortgage where the property has a first-lien PACE loan attached to it") http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx (last visited Mar. 7, 2021).

[21] FHFA, *Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens* (Dec. 22, 2014) https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx (last visited Mar. 9, 2021).

[22] "Real estate liens generally are ordered so that prior liens are paid in foreclosure before liens filed later in time. For example, a mortgage loan used to buy the property takes priority over a later mortgage loan used to remodel the home. The earliest and thus highest priority mortgage loan is known as a first lien, while the subsequent mortgage loan is deemed a second lien. If the homeowner defaults on the second lien loan, the first lien mortgage holder retains the lien even if the second lien mortgage holder forecloses; however, the converse is not true. Tax assessments are an exception to this lien priority rule. Generally, unpaid property tax assessments have priority over other liens, regardless of the date the prior liens were recorded or when the tax assessments became delinquent. This makes the lien priority for PACE financing senior to liens for mortgage loans closed prior to the homeowner's acceptance of the PACE financing. In the case of default by the homeowner on the PACE assessment, local governments and investors in PACE bonds can expect to collect the balance owed on a PACE assessment before any recovery by a mortgage lender." Prentiss Cox, *Keeping PACE?: The Case Against Property Assessed Clean Energy Financing Programs*, 83 U. Colo. L. Rev. 83, 94 (2011), https://scholarship.law.umn.edu/faculty_articles/549 (last visited Mar. 9, 2021).

[23] FHFA, *supra.*

This restriction has two potential implications for borrowers. First, a homeowner with a first-lien PACE loan may not refinance their existing mortgage with a Fannie Mae or Freddie Mac mortgage. Second, anyone wanting to buy a home that already has a first-lien PACE loan cannot use a Fannie Mae or Freddie Mac loan for the purchase. These restrictions may reduce the marketability of the house or require the homeowner to pay off the PACE loan before selling the house.[24]

Additionally, in December 2017, the Department of Housing and Urban Development announced that the Federal Housing Administration will no longer insure new mortgages on properties that include PACE assessments, citing concerns about the potential for increased losses to the Mutual Mortgage Insurance Fund resulting from the priority lien status given to such assessments.[25]

Some residential PACE programs are now operating with loan loss reserve funds, appropriate disclosures, or other protections meant to address FHFA's concerns.[26] For example, in 2013 California created a reserve fund to compensate first mortgage lenders in case of a foreclosure or a forced sale attributable to a PACE loan. Additionally, Oklahoma and Vermont have passed legislation to downgrade PACE from senior lien to junior lien, and there have been attempts by Congress to revise residential PACE programs at the federal level, including the 2014 PACE Assessment Protection Act.[27]

Consumer Protection

Consumer issues have surrounded the PACE programs from their inception[28]. These include the cost of funding, contractor sales techniques (notably, responding to a limited homeowner problem and marketing a full house retrofit), rolling the administrative fees for the local government into the PACE loan amount, product sales at above market interest rates, workmanship issues, inadequate disclosures, and indiscriminate lending regardless of ability to repay.[29]

In response to these consumer issues, Congress amended the Truth in Lending Act in 2018, directing the Consumer Financial Protection Bureau to implement federal regulations which provide more effective consumer protections relating to PACE loans, especially those related to the ability of a homeowner to repay the loan.[30]

The United States Department of Energy maintains "best practice guidelines"[31] for residential PACE financing programs, which includes measures relating to:

- Establishing financial eligibility and verifying property ownership
- Confirming property-based debt, tax assessments, and property valuation
- Reviewing property owner income and debt obligations
- Establishing consumer and lender protections

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[24] FHFA, *supra*.

[25] FHFA, Property Assessed Clean Energy (PACE) Program, 85 Fed. Reg. 11,2738 (Jan. 16, 2020).

[26] Commercial PACE programs were not directly affected by FHFA's actions because Fannie Mae and Freddie Mac do not underwrite commercial mortgages. Database of State Incentives for Renewables & Efficiency, *supra* note 8.

[27] NCSL, *PACE Financing* https://www.ncsl.org/research/energy/pace-financing.aspx (last visited Mar. 7, 2021).

[28] "PACE loans, offered through home improvement contractors, often in door-to-door sales, and secured by a property tax lien, are collected through a property tax assessment that takes priority over any existing mortgage. PACE programs must be authorized by state and local governments, but are privately run with little or no government oversight. Over the last two years, there has been a sharp increase in homeowners seeking assistance from legal services and other organizations in relation to PACE loans. The goal of improving home energy efficiency is being overshadowed by the lack of adequate consumer protection for these loans. Weak PACE loan regulation enables contractors to saddle homeowners with debt they cannot afford and puts their homes at risk for foreclosure." National Consumer Law Center, *Advocates Applaud CFPB's Intention to Deal with PACE Loan Program Abuses* (Mar. 4, 2019) https://www.nclc.org/media-center/advocates-applaud-cfpbs-intention-to-deal-with-pace-loan-program-abuses.html (last visited Mar. 9, 2021).

[29] FHFA, Property Assessed Clean Energy (PACE) Program, 85 Fed. Reg. 11,2738 (Jan. 16, 2020).

[30] FHFA, Property Assessed Clean Energy (PACE) Program, 85 Fed. Reg. 11,2738 (Jan. 16, 2020). *See also* Public Law 115–174 (2018), section 307; codified at 15 U.S.C. 1639c(b)(3)(C). and Bureau of Consumer Financial Protection, Advance Notice of Proposed Rulemaking on Residential Property Assessed Clean Energy Financing, 84 FR 8479 (March 8, 2019).

[31] Department of Energy, *Best Practice Guidelines for Residential PACE Financing Programs* (Nov. 18, 2016) https://www.energy.gov/sites/prod/files/2016/11/f34/best-practice-guidelines-RPACE.pdf (last visited Mar. 9, 2021).

- Establishing property owner education and disclosures
- Providing a right to cancel the purchase
- Determining appropriate minimum equity requirements and appropriate maximum assessments
- Providing equipment specifications and energy assessments
- Defining the relationship between PACE assessments and mortgage financing
- Providing for non-acceleration upon property owner default
- Notifying mortgage holders of record
- Addressing the needs and potential vulnerabilities of low-income and elderly households

Some local governments in Florida have implemented more stringent consumer protections than those required by Florida law.[32]

Effect of the Bill

The bill amends s. 163.08, F.S., providing a number of changes to the PACE program.

Eligibility for PACE Loans

The bill provides that the total amount of any non-ad valorem assessment for a property under this section may not exceed 20 percent of the fair market value of the property. Additionally, the total of any non-ad valorem assessments plus any mortgage-related debt on the property may not exceed 97 percent of the fair market value of the property. The fair market value of the property must be derived using any methodology commonly used in the real estate finance industry.

The bill requires a PACE program administrator to use certain information to reasonably determine whether the property owner has the ability to pay the annual assessment for the qualifying improvement, including the property owner's household income, housing expenses, assets, and other debt obligations.

The bill specifies that a financing agreement may not be used to fund ancillary work unless the scope of the ancillary work is directly related to and necessary for the installation and safe operation of a qualifying improvement and the cost of the ancillary work does not exceed the cost of the individual qualifying improvement to which it is directly related.

The bill creates definitions for the following terms:

- "Facility," means any portion of a building, structure, or site improvement located on a site as defined in Section 202 of the 2020 Florida Building Code.
- "PACE contractor" means an independent contractor who is authorized under this section to contract with a property owner to install qualifying improvements on real property and who is not the owner of the property.
- "Program administrator" means a for-profit or not-for-profit entity which administers a qualifying improvement program on behalf and at the discretion of a local government.
- "Qualifying improvement program" means a program that includes financing and administration activities undertaken by a program administrator or other authorized entity for property owners to purchase and install qualifying improvements on a building or facility.
- "Residential property" means real estate on which any of the following is located:
    - One single-family residential unit or one multifamily structure containing one to four residential units;
    - Single-family residential units such as condominiums, townhouses, timeshares, mobile homes, or houses in a subdivision that may be legally sold, leased, or otherwise conveyed on a unit-by-unit basis, regardless of whether the units are a part of a larger building or parcel containing more than four residential units.

[32] Palm Beach County, Ord. No. 2017-012, Section 6. Disclosure Requirements https://discover.pbcgov.org/resilience/PDF/PACE_ORDINANCE_2017-012%20-%20ADA%20Compliant.pdf (last visited Mar. 9, 2021).

Written Disclosures

The bill specifies that, before entering into a financing agreement for a qualifying improvement, the local government or program administrator must determine that:

- The property owner is current on all mortgage debt on the property and has had no more than one late payment exceeding 30 days during the 12 months immediately preceding the application date.
- The holders or loan servicers of any mortgage encumbering or otherwise secured by the property have received notice of the assessment at least 30 days in advance.
- Property owners whose taxes are paid through an escrow account have notified the holder of the escrow account that a non-ad valorem assessment will be imposed upon the property.
- The term of the financing agreement does not exceed the estimated useful life of the qualifying improvement.
- The property owner has acknowledged certain written disclosures, as described below.
- A residential property owner has not been subject to a bankruptcy proceeding within the last 7 years unless it was discharged or dismissed more than 2 years prior.
- A residential property owner is current on nonmortgage debt excluding medical debt, and has had no more than one late payment exceeding 30 days during the 12 months.
- The property is within the geographic boundaries of the applicable qualifying improvement program.
- The property owner has obtained or sought to obtain additional qualifying improvements on the same property that have not yet been recorded.

The bill requires that the local government or program administrator, before execution of the financing agreement, provide a written disclosure form to the property owner, which contains the key terms of the agreement, including:

- A description of the qualifying improvement;
- The total financed amount, including the cost of the qualifying improvement, ancillary work, installation, program fees, and prepaid interest, if any;
- The annual assessment process and yearly payment schedule;
- The amount of the annual assessment;
- The term of the total financed amount;
- The interest rate for the financed amount;
- The annual percentage rate;
- The total estimated annual costs that the residential real property owner will have to pay under the assessment contract, including applicable fees;
- The total estimated average monthly equivalent amount of funds the residential real property owner would have to save in order to pay the annual costs of the assessment, including applicable fees;
- The estimated date when the residential real property owner's first property tax payment, which includes the assessment, will be due.

The disclosure must form contain the following statements, which must be individually acknowledged in writing:

- "I UNDERSTAND THAT IF I SELL OR REFINANCE THE PROPERTY, I MAY BE REQUIRED TO PAY OFF THE OUTSTANDING FINANCED AMOUNT AS A CONDITION OF THE SALE OR THE REFINANCE OF THE PROPERTY." (This disclosure must be made in 24-point, bold font.)
- "I understand that the annual assessment will be paid when property taxes are paid and will result in a lien being placed on my property."
- "I understand that the annual assessment will be added to my property tax bill and if I pay my property taxes through my mortgage payment using an escrow account, I must notify my mortgage lender."

- "I understand that if I fail to pay the annual assessment, I may incur penalties and fees and the local government could issue a tax certificate which might result in the loss of my property."
- "I understand that any potential utility or insurance savings are not guaranteed and will not reduce the assessment or total assessment amount."
- "I understand that I have 3 days to cancel the financing agreement. The 3-day right expires on midnight of the third business day after I sign the agreement."
- "I understand that the local government, program administrator or PACE contractor do not provide tax advice and that I should seek professional tax advice if I have questions regarding tax credits, tax deductibility, or other tax impacts of the qualifying improvement or the assessment contract.
- "I understand that I cannot be assessed a penalty if I prepay the outstanding financed amount."

A printed cancellation form must be provided to the property owner no later than the time the property owner signs the financing agreement, allowing the property owner to cancel the contract.

Oral Disclosures

The bill requires the local government or program administrator to conduct an oral, recorded, telephone call in the owner's preferred language, and which uses plain language, confirming the disclosures described above. The owner or their representative must provide written acknowledgement that the oral confirmation was given. The bill also requires that the local government or program administrator develop additional procedures to address the needs and concerns of elderly persons.

Other Encumbrances on Property

The bill prohibits a PACE loan on any residential real property where an existing loan encumbering the property is subject to:

- A negative amortization schedule;
- A balloon payment; or
- Pre-payment fees, other than nominal administrative costs.

Contractor Screening

The bill states that a local government or program administrator may not enroll a PACE contractor who offers financing on residential real property unless:

- The PACE contractor maintains in good standing an appropriate license from the state, if applicable, as well as any other permits, licenses, or registrations required for engaging in its business in the jurisdiction where it operates and maintains all state required bond and insurance coverage.
- The PACE contractor agrees, in writing, to comply with all applicable laws, including applicable advertising and marketing laws and regulations and other requirements in the bill.
- A process exists to enroll new PACE contractors, including a reasonable review of the contractor's:
    - Relevant work or project history,
    - Financial and reputational background checks, and
    - Status on the Better Business Bureau or other online platforms that track contractor reviews.

Contractor Payment

The bill requires that, before disbursing funds to a PACE contractor for a qualifying improvement on residential real property, the local government or program administrator must first confirm that the applicable work or service has been completed and that the local government has determined the work complies with applicable codes and standards, including but not limited to the Florida Building Code and the Florida Fire Prevention Code.

The bill also prohibits disclosure of the maximum financing amount for which a residential real property owner is eligible to the PACE contractor or to a third party engaged in soliciting assessment contracts under the PACE program.

Marketing and Communications Guidelines

The bill requires that a local government, program administrator, or PACE contractor, or a third party engaged in marketing on the behalf of these entities, must comply with the following marketing and communications guidelines and may not:

- Suggest or imply:
    - That an assessment authorized pursuant to this section is a government assistance program;
    - That qualifying improvements are free or provided at no cost, or that the financing related to an assessment authorized pursuant to this section is a free or no cost program; or
    - That the financing of a qualifying improvement using the PACE program does not require the property owner to repay the financial obligation.
- Make any representation as to the tax deductibility of an assessment on residential real property, but they may encourage a property owner to seek the advice of a tax professional regarding tax matters related to assessments.

Unenforceable Contracts and Associated Remedies

The bill specifies that a contract to sell or install a qualifying improvement that is related to an application for financing under a PACE program for a residential property is unenforceable, and a PACE contractor may not begin work under such a contract, if:

- The property owner would not have entered into the contract but for the belief that the qualifying improvement or its installation would be paid under the financing agreement;
- The property owner applied for, accepted, and canceled a qualifying improvement financing agreement within the 3-day right-to-cancel period.

If a PACE contractor has initiated work on a residential property under an unenforceable contract as determined above, the PACE contractor:

- May not receive compensation for that work under the financing agreement.
- Must restore the property to its original condition at no cost to the property owner.
- Must immediately return any money, property, and other consideration given by the property owner. If the property owner provided any property and the PACE contractor does not or cannot return it, the PACE contractor must immediately return the fair market value of the property or its value as designated in the contract, whichever is greater.

If the PACE contractor has delivered chattel or fixtures to the residential property pursuant to an unenforceable contract, the PACE contractor has 90 days from the date the contract was executed to retrieve the chattel or fixtures provided that:

- The PACE contractor has fulfilled certain requirements under the bill.
- The chattel and fixtures can be removed at the PACE contractor's expense without damaging the property owner's property and practically returned.

- The residential property owner may retain any chattel or fixtures provided pursuant to an unenforceable contract if a PACE contractor fails to comply with these provisions.

A contract which is otherwise unenforceable remains enforceable if the residential property owner waives his or her right to cancel the contract, allows the PACE contractor to proceed with the installation of the qualifying improvement, and cancels the financing agreement.

Limitations and Prohibitions on Solicitation, Advertising, and Other Inducements

The bill specifies that a program administrator may not authorize a PACE contractor or third party to advertise the availability of financing agreements or solicit property owners on behalf of the program administrator, unless:

- The PACE contractor or third party maintains the appropriate registration or certification from the Construction Industry Licensing Board or any other permit, license, or registration required to conduct business in the jurisdiction where it operates, and provides proof of having the required bond and insurance coverage amounts.
- The program administrator obtains the PACE contractor's or third party's written agreement that the PACE contractor or third party will meet applicable laws and rules and qualifying improvement program policies and procedures, including those on advertising and marketing.

A local government or program administrator may not:

- Provide any direct or indirect cash payment or thing of material value to a PACE contractor in excess of the actual price charged by that PACE contractor for the sale and installation of the qualifying improvements that are financed by a financing agreement. However, a local government or program administrator may provide information or services to a PACE contractor to facilitate the installation of a qualifying improvement for a property owner.
- Reimburse a PACE contractor for its expenses for advertising and marketing campaigns and materials. A program administrator and a PACE contractor may share expenses in connection with joint advertising and marketing campaigns and materials, if the expenses are shared on a commercially reasonable basis.
- Provide any direct cash payment or other thing of material value to a property owner explicitly conditioned upon the property owner entering into a financing agreement. However, a program administrator may offer programs or promotions that provide reduced fees or interest rates if the reduced fees or interest rates are reflected in the financing agreements and are not provided to the property owners as cash consideration.
- Provide to a PACE contractor engaged in soliciting financing agreements on its behalf any information that discloses the amount of funds for which a property owner is eligible for qualifying improvements or the amount of equity in a property.

For residential properties, a PACE contractor may not provide a different price for a qualifying improvement financed under this section than the PACE contractor would provide if the property owner paid for the improvement in cash.

Annual Report

The bill requires that each local government post an annual report on its website which contains the following information:

- The number of qualifying improvements funded.
- The aggregate, average, and median dollar amounts of annual and total qualifying improvements assessments funded.
- The percentage, the number, and the dollar value of qualifying improvements assessments represented by the category types consisting of energy efficiency, renewable energy, and wind resistance.

- The number of defaulted assessments including the total number and defaulted amount, the number and dates of missed payments, the total number of parcels defaulted and years in default, and the percentage of defaults by total assessments.
- A summary of all reported violations of this section, including the resolution of each.
- The estimated number of jobs created.
- The number and percentage of homeowners 60 years of age or older participating in a qualifying improvement program.

The report must be posted no later than April 1.

The bill provides for an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1 Amends s. 163.08, F.S., providing for certain requirements related the property assessed clean energy program.

Section 2 Provides for an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The bill may have an insignificant negative fiscal impact on local government expenditures as a result of the annual report requirement.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that a local government or program administrator does not already impose similar consumer protection measures, the bill will benefit property owners who choose to finance qualifying improvements through a PACE program by ensuring that property owners are fully informed as to the key terms and potential consequences of a PACE loan and by requiring a determination that they are capable of repaying the loan. The bill may result in fewer defaults and potential foreclosures.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to improvements to real property; amending s. 163.08, F.S.; providing and revising definitions; prohibiting financing agreements for qualifying improvements to fund ancillary work unless specified criteria are met; prohibiting financing agreements for qualifying improvements from being approved unless specified criteria are met; requiring the program administrator or other entity to use specified information provided by the property owner to determine the owner's ability to pay the annual non-ad valorem assessment; providing criteria to be used in making the determination; requiring the local government or program administrator to develop a written disclosure form to be given to property owners that meets specified criteria; requiring the local government or program administrator to provide a printed cancellation form to and conduct an oral, recorded telephone call with the property owner at a specified time and containing specified information; requiring the local government or program administrator to develop procedures to address the needs of elderly persons; specifying the total amount of any non-ad valorem assessment that may be assessed on properties as a result of qualifying improvements;

prohibiting local governments or program administrators from offering financing for certain qualifying improvements if those financing agreements meet certain criteria; providing criteria that must be met before a local government or program administrator may enroll a PACE contractor to offer financing for residential properties; specifying criteria that must be met before a PACE contractor may receive funds for qualifying improvements on residential properties; providing market and communications guidelines that must be met when communicating with residential real property owners; specifying the types of contracts that are unenforceable and for which PACE contractors may not begin work; providing procedures for the return of chattel and fixtures that were installed in an unenforceable contract; prohibiting PACE contractors from engaging in specified activities concerning PACE contractors; requiring local governments that have authorized qualifying improvement programs to post specified information on their websites on an annual basis; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 163.08, Florida Statutes, is amended to read:

163.08 Supplemental authority for improvements to real property.—

(1)(a) In chapter 2008-227, Laws of Florida, the Legislature amended the energy goal of the state comprehensive plan to provide, in part, that the state shall reduce its energy requirements through enhanced conservation and efficiency measures in all end-use sectors and reduce atmospheric carbon dioxide by promoting an increased use of renewable energy resources. That act also declared it the public policy of the state to play a leading role in developing and instituting energy management programs that promote energy conservation, energy security, and the reduction of greenhouse gases. In addition to establishing policies to promote the use of renewable energy, the Legislature provided for a schedule of increases in energy performance of buildings subject to the Florida Energy Efficiency Code for Building Construction. In chapter 2008-191, Laws of Florida, the Legislature adopted new energy conservation and greenhouse gas reduction comprehensive planning requirements for local governments. In the 2008 general election, the voters of this state approved a constitutional amendment authorizing the Legislature, by general law, to prohibit consideration of any change or improvement made for the purpose of improving a property's resistance to wind damage or

the installation of a renewable energy source device in the determination of the assessed value of residential real property.

(b) The Legislature finds that all energy-consuming-improved properties that are not using energy conservation strategies contribute to the burden affecting all improved property resulting from fossil fuel energy production. Improved property that has been retrofitted with energy-related qualifying improvements receives the special benefit of alleviating the property's burden from energy consumption. All improved properties not protected from wind damage by wind resistance qualifying improvements contribute to the burden affecting all improved property resulting from potential wind damage. Improved property that has been retrofitted with wind resistance qualifying improvements receives the special benefit of reducing the property's burden from potential wind damage. Further, the installation and operation of qualifying improvements not only benefit the affected properties for which the improvements are made, but also assist in fulfilling the goals of the state's energy and hurricane mitigation policies. In order to make qualifying improvements more affordable and assist property owners who wish to undertake such improvements, the Legislature finds that there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance.

(c) The Legislature determines that the actions authorized under this section, including, but not limited to, the financing of qualifying improvements through the execution of financing agreements and the related imposition of voluntary assessments are reasonable and necessary to serve and achieve a compelling state interest and are necessary for the prosperity and welfare of the state and its property owners and inhabitants.

(2) As used in this section, the term:

(a) "Facility" means any portion of a building, structure, or site improvement located on a site as defined in s. 202 of the 2020 Florida Building Code.

(b) "Local government" means a county, a municipality, a dependent special district as defined in s. 189.012, or a separate legal entity created pursuant to s. 163.01(7).

(c) "PACE contractor" means an independent contractor who is authorized under this section to contract with a property owner to install qualifying improvements on real property and who is not the owner of such property.

(d) "Program administrator" means a for-profit or not-for-profit entity which administers a qualifying improvement program on behalf and at the discretion of a local government.

(e) ~~(b)~~ "Qualifying improvement" includes any:

1. Energy conservation and efficiency improvement, which is a measure to reduce consumption through conservation or a more efficient use of electricity, natural gas, propane, or

other forms of energy on the property, including, but not limited to, air sealing; installation of insulation; installation of energy-efficient heating, cooling, or ventilation systems; building modifications to increase the use of daylight; replacement of windows; installation of energy controls or energy recovery systems; installation of electric vehicle charging equipment; and installation of efficient lighting equipment.

2. Renewable energy improvement, which is the installation of any system in which the electrical, mechanical, or thermal energy is produced from a method that uses one or more of the following fuels or energy sources: hydrogen, solar energy, geothermal energy, bioenergy, and wind energy.

3. Wind resistance improvement, which includes the products and installation for~~, but is not limited to~~:

a. Improving the strength of the roof deck attachment;

b. Creating a secondary water barrier to prevent water intrusion;

c. Installing wind-resistant shingles;

d. Installing gable-end bracing;

e. Reinforcing roof-to-wall connections;

f. Installing storm shutters; or

g. Installing opening protections.

(f) "Qualifying improvement program" means a program that includes the financing and administration activities undertaken

by a local government or program administrator for property owners to purchase and install qualifying improvements on a building or facility.

(g) "Residential property" means real property upon which any of the following is located:

1. One single-family residential unit or one multifamily structure containing one to four residential units; or

2. Single-family residential units such as condominiums, townhouses, timeshares, mobile homes, or houses in a subdivision that may be legally sold, leased, or otherwise conveyed on a unit-by-unit basis, regardless of whether the units are a part of a larger building or parcel containing more than four residential units.

(3) A local government may levy non-ad valorem assessments to fund qualifying improvements.

(4) Subject to local government ordinance or resolution, a property owner may apply to the local government for funding to finance a qualifying improvement and enter into a financing agreement with the local government. Costs incurred by the local government for such purpose may be collected as a non-ad valorem assessment. A non-ad valorem assessment shall be collected pursuant to s. 197.3632 and, notwithstanding s. 197.3632(8)(a), shall not be subject to discount for early payment. However, the notice and adoption requirements of s. 197.3632(4) do not apply if this section is used and complied with, and the intent

resolution, publication of notice, and mailed notices to the property appraiser, tax collector, and Department of Revenue required by s. 197.3632(3)(a) may be provided on or before August 15 in conjunction with any non-ad valorem assessment authorized by this section, if the property appraiser, tax collector, and local government agree.

(5) Pursuant to this section or as otherwise provided by law or pursuant to a local government's home rule power, a local government may enter into a partnership with one or more local governments for the purpose of providing and financing qualifying improvements.

(6) A qualifying improvement program may be administered by a for-profit entity or a not-for-profit organization on behalf of and at the discretion of the local government.

(7) A local government may incur debt for the purpose of providing such improvements, payable from revenues received from the improved property, or any other available revenue source authorized by law.

(8) A local government may enter into a financing agreement only with the record owner of the affected property. Any financing agreement entered into pursuant to this section or a summary memorandum of such agreement shall be recorded in the public records of the county within which the property is located by the sponsoring unit of local government within 5 days after execution of the agreement. The recorded agreement shall

provide constructive notice that the non-ad valorem assessment to be levied on the property constitutes a lien of equal dignity to county taxes and assessments from the date of recordation.

(9) A financing agreement may not be used to fund ancillary work unless the scope of the ancillary work is directly related to and necessary for the installation and safe operation of a qualifying improvement and the cost of the ancillary work does not exceed the cost of the individual qualifying improvement to which it is directly related.

(10) ~~(9)~~ A ~~Before entering into a~~ financing agreement for a qualifying improvement may not be approved unless~~,~~ the local government or program administrator, as applicable, has ~~shall~~ reasonably determined ~~determine~~ that:

(a) All property taxes and any other assessments levied on the same bill as property taxes are paid and have not been delinquent for the preceding 3 years or the property owner's period of ownership, whichever is less; ~~that~~

(b) There are no involuntary liens, including, but not limited to, construction liens on the property; ~~that~~

(c) No notices of default or other evidence of property-based debt delinquency have been recorded during the preceding 3 years or the property owner's period of ownership, whichever is less; ~~and that~~

(d) The property owner is current on all mortgage debt on the property and has had no more than one late payment exceeding

30 days during the 12 months immediately preceding the application date; ~~The property owner is current on all mortgage debt on the property.~~

(e) The holders or loan servicers of any mortgage encumbering or otherwise secured by the property have received the written notice required by subsection (16);

(f) Any property owner whose real property taxes are paid through an escrow account has notified the holder of the escrow account that a non-ad valorem assessment will be imposed upon the property pursuant to this section;

(g) The term of the financing agreement does not exceed the estimated useful life of the qualifying improvement. The local government or program administrator, as applicable, shall determine the useful life using established third-party standards, including certification criteria from government agencies or nationally recognized standards and testing organizations;

(h) The property owner has acknowledged in writing the disclosure statements required by paragraph (12)(b);

(i) For residential properties, the property owner has not been subject to a bankruptcy proceeding within the last 7 years unless it was discharged or dismissed more than 2 years before the date that the property owner applied for funding as set forth in subsection (4);

(j) For residential properties, the property owner is

current on nonmortgage debt excluding medical debt, and has had no more than one late payment exceeding 30 days during the 12 months immediately preceding the date that the property owner applied for funding as set forth in subsection (4);

(k) The property is within the geographic boundaries of the applicable qualifying improvement program; and

(l) The local government or program administrator, as applicable, has asked if the property owner has obtained or sought to obtain additional qualifying improvements on the same property that have not yet been recorded. The failure of a property owner to disclose information set forth in this subsection does not invalidate a financing agreement or any obligation thereunder, even if the total financed amount of the qualifying improvement exceeds the amount that would otherwise be authorized under subsection (15).

The existence of a prior qualifying improvement non-ad valorem assessment or a prior financing agreement is not evidence that the financing agreement under consideration is affordable or meets other program requirements.

(11) In addition to obtaining the information in subsection (10), and before a local government or program administrator, as applicable, approves a qualifying improvement on residential property, he or she must use information contained in the property owner's application, reasonably

reliable third-party records, or an automated verification system to reasonably determine whether the property owner has the ability to pay the annual non-ad valorem assessment for the qualifying improvement. The local government or program administrator, as applicable, must review the property owner's household income, housing expenses, assets, and other debt obligations. If the local government or program administrator, as applicable, uses an automated verification system, it must be a system that can verify the property owner's income, is not based on predictive or estimation methodologies, and has been determined sufficient for such verification purposes by a federal mortgage lending authority or regulator. In reviewing the property owner's ability to pay, the local government or program administrator, as applicable:

(a) When determining the household income, may include the income of any property owner aged 18 years old or older whose name is on the property title. If a person's income is considered, that person's debt obligations must also be considered.

(b) May not consider the equity in the property that will secure the non-ad valorem assessment.

(c) Shall determine the property owner's debt obligations using reasonably reliable third-party records, including at least, one consumer credit report from an agency that meets the requirements of 15 U.S.C. s. 1681a(p). Debt obligations to be

reviewed include:

1. Secured and unsecured debt.

2. Housing expenses. The local government or program administrator, as applicable, shall make a reasonable estimate of the basic housing expenses based on the number of persons in the household.

3. Stated alimony or child support obligations.

(d) Shall determine whether the property owner has sufficient income to pay the annual non-ad valorem assessment and that he or she has sufficient residual income to meet his or her household living expenses.

(12) Each local government or program administrator that offers a qualifying improvement program must:

(a) Develop a written disclosure form that must be provided to the property owner before he or she executes the financing agreement and which contains the key terms of the agreement, including:

1. A description of the qualifying improvement;

2. The total financed amount, including the cost of the qualifying improvement, ancillary work, installation, program fees, and prepaid interest, if any;

3. The annual non-ad valorem assessment process and yearly payment schedule;

4. The amount of the annual non-ad valorem assessment;

5. The term of the total financed amount;

6. The interest rate for the financed amount;

7. The annual percentage rate;

8. The total estimated annual costs that the residential real property owner will have to pay under the assessment contract, including applicable fees;

9. The total estimated average monthly equivalent amount of funds the residential real property owner would have to save in order to pay the annual costs of the non-ad valorem assessment, including applicable fees; and

10. The estimated due date of the residential real property owner's first property tax payment that includes the non-ad valorem assessment.

(b) Include the following statements in the written disclosure form, using the same order as listed in this paragraph, each of which must be individually acknowledged in writing by the property owner:

1. "I UNDERSTAND THAT IF I SELL OR REFINANCE THE PROPERTY, I MAY BE REQUIRED TO PAY OFF THE OUTSTANDING FINANCED AMOUNT AS A CONDITION OF THE SALE OR THE REFINANCE OF THE PROPERTY."

The previous statement must be made in at least 24-point boldfaced type.

2. "I understand that the annual non-ad valorem assessment will be paid when property taxes are paid and will result in a

lien being placed on my property."

3. "I understand that the annual non-ad valorem assessment will be added to my property tax bill and if I pay my property taxes through my mortgage payment using an escrow account, I must notify my mortgage lender."

4. "I understand that if I fail to pay the annual non-ad valorem assessment, I may incur penalties and fees and the local government could issue a tax certificate which might result in the loss of my property."

5. "I understand that any potential utility or insurance savings are not guaranteed and will not reduce the annual non-ad valorem assessment or total assessment amount."

6. "I understand that I have 3 days to cancel the financing agreement. The 3-day right expires at midnight of the third business day after I sign the agreement."

7. "I understand that the local government, program administrator, or PACE contractor do not provide tax advice and that I should seek professional tax advice if I have questions regarding tax credits, tax deductibility, or other tax impacts of the qualifying improvement or the assessment contract.

8. "I understand that I cannot be assessed a penalty if I prepay the outstanding financed amount."

(c) Provide a printed cancellation form to the property owner no later than the time the property owner signs the financing agreement which allows the property owner to cancel

the contract, within the 3-day period specified in subparagraph (b)6.

(d) Conduct, with at least one residential real property owner or an authorized representative, an oral, recorded telephone call during which time the local government or program administrator, as applicable, must use plain language. The local government or program administrator, as applicable, must ask the residential real property owner if he or she would like to communicate primarily in a language other than English and, if so, must conduct the call in the owner's preferred language. A local government or program administrator, as applicable may not leave a voicemail to the residential real property owner to satisfy this requirement. The owner or their representative must provide written acknowledgement that the oral confirmation was given. A local government or program administrator, as applicable, as part of this telephone call, must confirm with the residential real property owner:

1. That at least one residential real property owner has access to a copy of the assessment contract and financing estimates and disclosures.

2. The qualifying improvement that is being financed.

3. The total estimated annual costs that the residential real property owner will have to pay under the assessment contract, including applicable fees.

4. The total estimated average monthly equivalent amount

of funds the residential real property owner would have to save in order to pay the annual costs of the non-ad valorem assessment, including applicable fees.

5. The estimated due date of the residential real property owner's first property tax payment that includes the non-ad valorem assessment.

6. The term of the assessment contract.

7. That payments for the assessment contract will cause the residential real property owner's annual tax bill to increase, that payments will be made through an additional annual non-ad valorem assessment on the property, and will be paid either directly to the county tax collector's office as part of the total annual secured property tax bill or may be paid through the residential real property owner's mortgage escrow account.

8. That the qualifying residential property owner has disclosed whether the property has received or is seeking additional non-ad valorem assessments and has disclosed all other assessments or special taxes that are or are about to be placed on the property.

9. That the property will be subject to a lien during the term of the assessment contract and that the obligations under the contract may be required to be paid in full before the residential real property owner sells or refinances the property.

10. That any potential utility or insurance savings are not guaranteed and will not reduce the annual non-ad valorem assessment or total assessment amount.

11. That the local government, program administrator, or PACE contractor do not provide tax advice and that the residential real property owner should seek professional tax advice if he or she has questions regarding tax credits, tax deductibility, or other tax impacts of the qualifying improvement or the assessment contract.

(e) The local government or program administrator shall develop additional procedures under this subsection to address the needs and concerns of elderly persons.

(13) ~~(10)~~ A qualifying improvement shall be affixed or connected to a building or facility that is part of the property and shall constitute an improvement to the building or facility or a fixture attached to the building or facility. An agreement between a local government and a qualifying property owner may not cover wind-resistance improvements in buildings or facilities under new construction or construction for which a certificate of occupancy or similar evidence of substantial completion of new construction or improvement has not been issued.

(14) ~~(11)~~ Any work requiring a license under any applicable law to make or install a qualifying improvement shall be performed by a contractor properly certified or registered

pursuant to ~~part I or part II of~~ chapter 489.

(15)~~(12)(a) Without the consent of the holders or loan servicers of any mortgage encumbering or otherwise secured by the property,~~ The total amount of any non-ad valorem assessment for a property under this section may not exceed 20 percent of the fair market value of the property ~~just value of the property as determined by the county property appraiser~~. In addition, the total of any non-ad valorem assessments plus any mortgage-related debt on the property may not exceed 97 percent of the fair market value of the property. The fair market value of the property shall be derived using any methodology commonly used in the real estate finance industry.

~~(b) Notwithstanding paragraph (a), a non-ad valorem assessment for a qualifying improvement defined in subparagraph (2)(b)1. or subparagraph (2)(b)2. that is supported by an energy audit is not subject to the limits in this subsection if the audit demonstrates that the annual energy savings from the qualified improvement equals or exceeds the annual repayment amount of the non-ad valorem assessment.~~

(16)~~(13)~~ At least 30 days before entering into a financing agreement, the property owner shall provide to the holders or loan servicers of any existing mortgages encumbering or otherwise secured by the property a notice of the owner's intent to enter into a financing agreement together with the maximum principal amount to be financed and the maximum annual

assessment necessary to repay that amount. A verified copy or other proof of such notice shall be provided to the local government or program administrator, as applicable. A provision in any agreement between the ~~a~~ mortgagee or other lienholder and a property owner, or otherwise now or hereafter binding upon a property owner, which allows for acceleration of payment of the mortgage, note, or lien or other unilateral modification solely as a result of entering into a financing agreement as provided for in this section is not enforceable. This subsection does not limit the authority of the holder or loan servicer to increase the required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment.

(17) ~~(14)~~ At or before the time a purchaser executes a contract for the sale and purchase of any property for which a non-ad valorem assessment has been levied under this section and has an unpaid balance due, the seller shall give the prospective purchaser a written disclosure statement in the following form, which shall be set forth in the contract or in a separate writing:

QUALIFYING IMPROVEMENTS FOR ENERGY EFFICIENCY, RENEWABLE ENERGY, OR WIND RESISTANCE.—The property being purchased is located within the jurisdiction of a local government that has placed an non-ad valorem assessment on the property pursuant to s. 163.08, Florida Statutes. The non-ad valorem assessment is for a

qualifying improvement to the property relating to energy efficiency, renewable energy, or wind resistance, and is not based on the value of property. You are encouraged to contact the county property appraiser's office to learn more about this and other assessments that may be provided by law.

(18) ~~(15)~~ A provision in any agreement between a local government and a public or private power or energy provider or other utility provider is not enforceable to limit or prohibit any local government from exercising its authority under this section.

(19) ~~(16)~~ This section is additional and supplemental to county and municipal home rule authority and not in derogation of such authority or a limitation upon such authority.

(20) A local government or program administrator, as applicable, may not offer financing for an qualifying improvement authorized pursuant to this section on any residential real property that includes any of the following:

(a) A negative amortization schedule;

(b) A balloon payment; or

(c) Pre-payment fees, other than nominal administrative costs.

(21) For residential real property, a local government or program administrator, as applicable:

(a) May not enroll a PACE contractor who offers financing on residential real property unless:

1. The local government or program administrator, as applicable, determines that the PACE contractor maintains in good standing an appropriate license from the state, if applicable, as well as any other permits, licenses, or registrations required for engaging in its business in the jurisdiction where it operates and maintains all state required bond and insurance coverage.

2. A local government or program administrator, as applicable, obtains the PACE contractor's written agreement that the PACE contractor will comply with all applicable laws, including applicable advertising and marketing laws and regulations and the requirements of subsection (23).

(b) Must maintain a process to enroll new PACE contractors that includes reasonable review of the following for each contractor:

1. Relevant work or project history.

2. Financial and reputational background checks.

3. The contractor's status on the Better Business Bureau platform or other online platforms that track contractor reviews.

(22)(a) Before disbursing funds to a PACE contractor for a qualifying improvement on residential real property, the local government or program administrator, as applicable, must first confirm that the applicable work or service has been completed and the local government has determined the work complies with

applicable codes and standards, including, but not limited to, the Florida Building Code and the Florida Fire Prevention Code.

(b) A local government or program administrator, as applicable, may not disclose the maximum financing amount for which a residential real property owner is eligible to a PACE contractor or to a third party engaged in soliciting assessment contracts financed pursuant to this section.

(23) When communicating with residential real property owners, a local government, program administrator, PACE contractor, or a third party engaged in marketing on behalf of these entities, must comply with the following marketing and communications guidelines and may not:

(a) Suggest or imply:

1. That a non-ad valorem assessment authorized under this section is a government assistance program;

2. That qualifying improvements are free or provided at no cost, or that the financing related to an non-ad valorem assessment authorized under this section is free or provided at no cost; or

3. That the financing of a qualifying improvement using the program authorized pursuant to this section does not require the property owner to repay the financial obligation.

(b) Make any representation as to the tax deductibility of a non-ad valorem assessment on residential real property. A local government, program administrator, or PACE contractor, or

a third party engaged in marketing on behalf of these entities, may encourage a property owner to seek the advice of a tax professional regarding tax matters related to assessments.

(24)(a) A contract to sell or install a qualifying improvement that is related to an application for financing in a qualifying improvement program for a residential property is unenforceable and a PACE contractor may not begin work under such a contract if:

1. The property owner would not have entered into the contract but for the belief that the qualifying improvement or its installation would be paid under the financing agreement; or

2. The property owner applied for, accepted, and canceled a qualifying improvement financing agreement within the 3-day right-to-cancel period set forth in subparagraph (12)(b)6.

(b) If a PACE contractor has initiated work on a residential property under an unenforceable contract as determined under paragraph (a), the PACE contractor:

1. May not receive compensation for that work under the financing agreement.

2. Shall restore the property to its original condition at no cost to the property owner.

3. Shall immediately return any money, property, and other consideration given by the property owner. If the property owner provided any property and the PACE contractor does not or cannot return it, the PACE contractor shall immediately return the fair

market value of the property or its value as designated in the contract, whichever is greater.

(c) If the PACE contractor has delivered chattel or fixtures to the residential property pursuant to an unenforceable contract, the PACE contractor shall have 90 days from the date the contract was executed to retrieve the chattel or fixtures provided that:

1. The PACE contractor has fulfilled the requirements of subparagraphs (b)2. and 3.

2. The chattel and fixtures can be removed at the PACE contractor's expense without damaging the property owner's property and practically returned.

(d) The residential property owner may retain any chattel or fixtures provided pursuant to an unenforceable contract if a PACE contractor fails to comply with the provisions of this subsection.

(e) A contract which is otherwise unenforceable under this subsection remains enforceable if the residential property owner waives his or her right to cancel the contract, allows the PACE contractor to proceed with the installation of the qualifying improvement, and cancels the financing agreement.

(25)(a) A PACE contractor or third party may not advertise the availability of financing agreements or solicit property owners on behalf of the local government or program administrator unless:

1. The PACE contractor or third party maintains the appropriate registration or certification from the Construction Industry Licensing Board or any other permit, license, or registration required to conduct business in the jurisdiction where it operates, and provides proof of having the required bond and insurance coverage amounts.

2. The local government or program administrator, as applicable, obtains the PACE contractor's or third party's written agreement that the PACE contractor or third party will meet applicable laws and rules and qualifying improvement program policies and procedures, including those on advertising and marketing.

(b) A local government or program administrator may not provide any direct or indirect cash payment or thing of material value to a PACE contractor or third party in excess of the actual price charged by that PACE contractor for the sale and installation of the qualifying improvements that are financed by a financing agreement. However, a program administrator may provide information or services to a PACE contractor to facilitate the installation of a qualifying improvement for a property owner.

(c) A local government or program administrator may not reimburse a PACE contractor or third party for its expenses in advertising and marketing campaigns and materials. A local government or program administrator, as applicable, and a PACE

contractor may share expenses in connection with joint advertising and marketing campaigns and materials, if the expenses are shared on a commercially reasonable basis.

(d) A local government or program administrator may not provide to a PACE contractor engaged in soliciting financing agreements on its behalf any information that discloses the amount of funds for which a property owner is eligible for qualifying improvements or the amount of equity in a property.

(e) For residential properties, a PACE contractor may not provide a different price for a qualifying improvement financed under this section than the PACE contractor would provide if the property owner paid for the improvement in cash.

(f) A program administrator may not provide any direct cash payment or other thing of material value to a property owner explicitly conditioned upon the property owner entering into a financing agreement. However, a program administrator may offer programs or promotions that provide reduced fees or interest rates if the reduced fees or interest rates are reflected in the financing agreements and are not provided to the property owners as cash consideration.

(26) Each local government that has authorized a qualifying improvement program shall post on its website an annual report for the period ending December 31 each year containing the following information:

(a) The number of qualifying improvements funded.

(b) The aggregate, average, and median dollar amounts of annual and total number of assessments that funded qualifying improvements.

(c) The percentage, the number, and the dollar value of assessments that funded qualifying improvements, represented by the category types consisting of energy efficiency, renewable energy, and wind resistance.

(d) The number of defaulted assessments including the total number and defaulted amount, the number and dates of missed payments, the total number of parcels defaulted and years in default, and the percentage of defaults by total assessments.

(e) A summary of all reported violations of this section, including the resolution of each.

(f) Estimated number of jobs created.

(g) The number and percentage of homeowners 60 years of age or older participating in a qualifying improvement program.

This report shall be posted no later than April 1 of the year following the calendar year covered by the report.

Section 2. This act shall take effect July 1, 2021.