An Assessment of PACE Local Government Financing Issues in Three States:

How the Local Government Finance Authority and Culture of Special Assessments in North Carolina, Georgia, and Florida Impact Property Assessed Clean Energy Programs in Each State

by Adam C. Parker and Jeffrey A. Hughes

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EXECUTIVE SUMMARY

Many studies have examined the effectiveness or prescribed best practices for the use of Property Assessed Clean Energy (PACE) programs, but few have taken an in-depth look at the law surrounding the local government financing instrument at the heart of PACE—the special assessment. This white paper explores the different features of local government finance that impact how special assessments and PACE are used in North Carolina, Georgia, and Florida. Each state demonstrated different applications of different elements often related to different cultures of public debt financing in each state. This bore out in several areas, including:

- The units of local government which can undertake a special assessment to begin a PACE program.
- The types of special-assessment backed debt financing that are available in each state.
- The structure of lien priorities and who may foreclose on a property when a special assessment becomes delinquent.
- Whether the entirety of a PACE assessment becomes due upon failure to pay a single installment of the special assessment (known as acceleration).

This white paper considers these and numerous other differences in depth through the lens of the three selected states and also recounts the history of special assessment and PACE use by each state to this point.
Local government financing mechanisms are typically not the subject of large national debates or Vice Presidential policy recommendations. Property Assessed Clean Energy (“PACE”), however, is not the typical local government financing mechanism, and has been the subject of much national attention, including gaining the personal attention of Vice President Joe Biden.1 Despite the publicity and discussions surrounding PACE, PACE has enjoyed limited successes to this point.2 A few programs in a few states have led to the installation of energy efficiency and renewable energy projects, however the number of false starts far outweigh the successes. Along with federal regulatory battles, a primary reason for the inconsistency across the country may be due to the vast differences between local governments and their statutory finance authorities. These differences are explored in this white paper through the lens of three states’ statutory mechanisms of special assessment and PACE. This paper does not consider the merits of PACE and focuses instead on the differences between states in implementation and administration of PACE assessments.

PACE is a recently developed program of financing renewable energy and energy efficiency (“REEE”) installations on commercial and residential buildings through the use of a vintage local government finance instrument—the special assessment. PACE programs typically involve a local government agreeing to finance improvements (or arrange financing of improvements) to private property in the form of either installation of energy efficiency measures (such as insulation or other retrofits) or installation of renewable energy projects (such as solar panels). Under PACE, property owner voluntarily allows a “special assessment” to be placed on the property by a unit of government to pay for the improvement

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1 THE WHITE HOUSE, POLICY FRAMEWORK FOR PACE FINANCING PROGRAMS 1 (Oct. 18, 2009), available at http://www.whitehouse.gov/sites/default/files/PACE_Principles.pdf (announcing Vice President Joe Biden’s support of using federal funds for pilot programs to implement PACE financing).

2 See, e.g., CLINTON FOUND., POLICY BRIEF: PROPERTY ASSESSED CLEAN ENERGY (PACE) FINANCING: UPDATE ON COMMERCIAL PROGRAMS 1 (Mar. 23, 2011) (noting that, since beginning in 2008, there have been 71 total PACE projects approved and financed in four active commercial PACE programs, totaling just over $9.69 million in approved funding).
over time. Special assessments are generally defined as a taxing mechanism that allows a local government to target specific benefitted property owners (rather than a general tax that is applied to all residents in a unit of government). If the special assessment is not paid by the property owner, the owner risks losing the property because of a lien that is granted priority over many of the property owner’s other liabilities, including over existing mortgages.

Under the PACE model, special assessments are normally used to obtain financing (capital funds) by the unit of government to construct REEE installations, thereby helping the end-user address the typically large upfront costs of installations. PACE advocates point to many benefits of this energy financing mechanism, first introduced in Berkley, California in 2007. Proponents cite PACE’s ability to offset the large upfront capital costs of REEE installations, the transferability of assessments between subsequent property owners, and financing that mirrors the typically long payoff times of these REEE installations, which helps to equalize out equipment costs with energy savings. Many states soon followed in Berkley’s footsteps and authorized PACE in some form, but the actual


5 See, e.g., N.C. GEN. STAT. §§ 153A-200, 160A-233 (2011). For further discussion of lien priority in the PACE regime, see infra Part V.

6 Reynolds, supra note 4, at 90–91 (noting that financing is typically undertaken through the issuance of bonds to pay for the PV costs upfront or lending from reserve funds that are then paid by the property tax assessment).

7 See Cox, supra note 3, at 89–91 (noting that a three kilowatt PV system may cost around $22,500); see also Russell Nichols, Clean Energy Programs Pit Advocates Against Mortgage Lenders, GOVERNING MAGAZINE, Sep. 2010, at 54, available at http://www.governing.com/topics/energy-env/Clean-Energy-Programs-Pit-Advocates-Against-Mortgage-Lenders.html (noting that programs may cost upwards of $30,000 before tax incentives).

8 See, e.g., Nichols, supra note 7 (noting Cisco DeVries, Chief of Staff to Mayor Tom Bates, developed the idea for PACE while working on an unrelated project that placed utility wires underground in a special assessment district). Sonoma County, California and Boulder County, Colorado are two other localities that have implemented PACE programs. CLINTON FOUND., supra note 2, at 4 (noting that Sonoma County has approved $7.27 million in PACE projects, and that Boulder County has approved over $1.52 million in PACE projects). The authors would like to thank Mr. DeVries for his review of this white paper.

9 Id. (noting a twenty to thirty year payoff period in the initial Berkley PACE project); see also Property Assessed Clean Energy, PACENOW.ORG (last visited June 6, 2012) (arguing that the PACE financing mechanism creates local jobs, uses private capital to fund the projects, is voluntary, saves money for building owners, reduces air pollution, and other benefits) [hereinafter PACENow Blog].

10 See PACENOW Blog, supra note 9 (noting that twenty-eight states and the District of Columbia authorize the use of PACE). For a list of all states’ authorizing
implementation and use of PACE throughout the country has been sparse to this point.\textsuperscript{11}

There are several reasons beyond the variance of local governments’ statutory authorities that use of PACE has stalled, not the least of which was the Federal Housing Finance Agency (“FHFA”) directing Fannie Mae and Freddie Mac\textsuperscript{12} to cease purchasing mortgages subject to PACE assessments until issues were resolved with PACE’s first lien status.\textsuperscript{13} The FHFA’s order to the two large mortgage purchasers effectively halted the continued development of residential PACE,\textsuperscript{14} and litigation arguing the FHFA used faulty administrative procedures when issuing its order against purchasing mortgages with PACE assessed properties was recently dismissed by the Ninth Circuit.\textsuperscript{15}

\textsuperscript{11}See Keeley Webster, \textit{PACE Program Sees Hope for a New Lease on Life}, \textit{The Bond Buyer}, Feb. 3, 2012, at 3, available at http://www.bondbuyer.com/issues/121_23/pace--program-munis-energy-efficient-1035957-1.html (noting that despite the initial wave of legislation, only three total bond issues have gone to market, with only one of these bonds being large enough to be rated). But cf. San Francisco – GreenFinancesSF, PACENOW.ORG, http://pacenow.org/blog/san-francisco-greenfinancesf/ (providing an example of a recent commercial PACE program launched in San Francisco in October 2011 which allows commercial property owners to negotiate project financing, which is then presented to the city, who in turn sells a bond to the project lender); Shelly Sigo, \textit{Florida Judge Validates $2 Billion of Statewide Bonds for PACE}, \textit{The Bond Buyer}, Oct. 18, 2011, http://www.bondbuyer.com/issues/120_200/pace-florida-judge-validate-initiatives-1032154-1.html (noting the creation of $2 billion in bonding authority for a statewide PACE funding agency in Florida).

\textsuperscript{12}About FHFA, FED. HOUS. FIN. AGENCY (last visited June 20, 2012), http://www.fhfa.gov/Default.aspx?Page=4 (noting that the FHFA was created to oversee vital components of the nation’s secondary mortgage markets, including the supervision, regulation, and housing mission oversight of Fannie Mae and Freddie Mac).


\textsuperscript{14}See Webster, supra note 11, at 3.

\textsuperscript{15}County of Sonoma et. al v. Fed. Hous. Fin. Auth., No. 12-16986, 2013 WL 3835318 (9th Cir. 2013) (“The Federal Housing Finance Agency was acting as conservator, not regulator, when it issued guidance to Fannie Mae and Freddie Mac that caused the GSEs to discontinue buying mortgages secured by properties that
Proponents of PACE believe that distributed energy improvements are a valid and worthy use of the assessment mechanism and this approach promotes cleaner energy without leading to increased financial risk. Critics of PACE tend to point towards its similarity to a private loan, that the disjointed geographical nature of PACE is out of character with a traditional special assessment, that PACE may not ultimately pass the “public purpose” test that is required when a unit of government takes on public debt, and that because PACE is treated as an assessment, it is provided with a senior lien status to traditional property mortgages also secured first lien loans under Property-Assessed Clean Energy programs. As conservator, the FHFA had the authority to take any actions needed to carry on the business of the GSEs and conserve their assets and property, and part of the business of the GSEs was to buy mortgages. A decision not to buy risky mortgages was an exercise of the conservator’s authority. Therefore, there was no court jurisdiction over a challenge to the guidance.

The previous notice and comment proceedings did not produce a change in the FHFA’s position against allowing Fannie and Freddie to take on PACE encumbered mortgages, although the FHFA said it was still considering alternatives to alleviate the lien seniority issues associated it has with PACE. Enterprise Underwriting Standards, 77 Fed. Reg. 36,086, 36099 (June 15, 2012) (“FHFA’s supervisory judgment continues to be that first-lien PACE programs would materially increase the financial risks borne by mortgage holders such as [Fannie Mae and Freddie Mac].”). The FHFA also believes that the structure of PACE and the barriers it is designed to overcome are “reasonable credit standards that operate to protect both homeowners and mortgage holders from financial risk.” Id. at 36104. Lastly, FHFA does not believe that the legal definition of PACE as an “assessment” or a “loan” are material to the risk that PACE poses to mortgage underwriters, nor does the FHFA believe its actions affect state and local government’s abilities to impose assessments such as PACE. Id. at 36105.


17 See Cox, supra note 3, at 91 n. 37 and accompanying text.

18 See, e.g., Kara Millonzi, Modifications to Local Energy Financing Authority, COATES’ CANNONS: NC LOCAL GOV’T BLOG, UNIV. OF N.C. AT CHAPEL HILL SCH. OF GOV’T (Sep. 7, 2010), http://canons.sog.unc.edu/?p=3121 (noting that while North Carolina courts are deferential to the General Assembly in deciding which activities constitute a “public purpose” and that the statute in question has explicit language to conform with the public purpose clause, it remains unclear whether a PACE program would be found to satisfy the “public purpose” requirement until a legal challenge is mounted).
despite holding many similarities to a traditional loan (which would have a lower priority lien).

Critics, proponents, and, most importantly, potential implementers of PACE working at a national level may not have focused in depth on the significant differences and practical realities between state statutory structures underlying the financing instrument at the heart of PACE—the special assessment. This white paper aims to illuminate the common variations between underlying local government financing mechanisms essential to PACE programs and the impact these variations will have for implementers and reformers of PACE. Ultimately, while there are some similarities between PACE programmatic structures across states, like many other public financing instruments, there are often such significant differences between local and state provisions and historic practices that PACE in one state barely resembles PACE in another. This heterogeneity will ultimately impact national proliferation of PACE.

To highlight key differences across states, this white paper focuses on the divergent local government finance rules and practices in three regionally similar states with very different local government finance laws and practices, and considers how PACE has been or could be implemented within those structures. Several important local government finance features are studied in detail in this analysis, including: i.) what units of government are authorized to implement

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19 Ian M. Larson, Law Summary, *Keeping Pace: Federal Mortgage Lenders Halt Local Clean Energy Programs*, 76 MO. L. REV. 599, 600 (2010) (“The controversy surrounding PACE programs stems from the nature of local assessment law and the doctrine of ‘tax lien seniority’; because the PACE program administers funds to homeowners via assessments against their property, rather than as loans to the homeowners, municipalities are entitled to senior status in the case of default.”).

20 See, e.g., PACENOW Blog, supra note 9 (noting benefits of “bonds . . . secured solely by the assessment payments of opt-in participants,” that the “[a]ssessment transfers upon sale,” and that the lien risk is minimized because of non-acceleration provisions); Sichtermann, supra note 16, at 297 (arguing that special assessments “cannot be dependent on the property owner’s consent”). In particular, the notion that a special assessment cannot be “voluntary” is problematic, as this appears to be an issue of statutory construction. See, e.g., N.C. GEN. STAT. §§ 153A-210.3 (counties), 160A-239.3 (municipalities) (2011) (providing that critical infrastructure special assessments may not be provided for unless there is a petition of sixty-six percent of the assessed value of all real property owners who would be assessed). The notion that an assessment travels with the property, rather than the homeowner is perhaps an element of special assessments, but some also argue that this does not account for the possibility that a purchaser or mortgage holder might require payment of the entire assessment, or that a purchaser would negotiate a lower sale price based on the outstanding assessment obligations. See Cox, supra note 3, at 96–97.
assessments and PACE programs; ii.) the purposes for which assessments may be used; iii.) the ability to use debt to finance PACE improvements, the ability to use assessment flows to securitize debt, and the types of available debt financing for PACE in each state; iv.) how lien priorities affect who is paid in case of a special assessment default; v.) whether special assessments transfer with the property upon sale of a benefitted property; vi.) whether assessments accelerate upon non-payment; vii.) what recourse is available for collecting delinquent assessments and who may foreclose upon delinquent properties; viii.) the length of various forms of special assessment; and ix.) additional restrictions that the PACE statutes place on PACE participants and local governments. At the end of the analysis, PACE alternatives are considered as well as a discussion of the prevalence of assessment and PACE in each state. Lastly, a summary table is provided of the respective state statutory provisions.

I. HISTORY AND FEATURES OF SPECIAL ASSESSMENTS

Special assessments are one of the oldest forms of public finance, dating to seventeenth-century America and pre-colonial Great Britain. Assessments were typically narrow in focus and would provide for neighborhood streetlights, sidewalks, and, most commonly, street improvements. The special assessment commonly requires that two court-imposed criteria be met; that a special benefit is provided to the assessed property and that the benefit conferred to the individual is proportional to the assessment paid. Over time, some jurisdictions have broadened the permitted uses of special assessments considerably, including allowing for the repair (rather than construction) of capital assets, provision of services associated with capital assets (such as electricity provided to streetlights), and later the concept was extended even further to provision of services traditionally paid for with general tax revenues, such as fire protection, storm water management services, maintaining public

21 See Reynolds, infra note 4, at 397; see also Londoner v. City & County of Denver, 210 U.S. 373, 375–76 (1908) (providing a well-known example of a special assessment “district” as well as the more commonly cited discussion of due process concerns with adjudication).
22 See Reynolds, infra note 4, at 397–98.
23 Id. at 398.
24 Id. at 399.
25 See, e.g., Ankeny v. City of Spokane, 159 P. 806, 809 (Wash. 1916).
26 See, e.g., Purdy v. City of York, 500 N.W.2d 841, 845 (Neb. 1993) (allowing special assessment and finding assessment payers' property was benefitted by “enhanced fire protection” as well as improvements to water quality).
27 See, e.g., Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 182 (Fla. 1995).
parks, and residential beautification. In addition to the expanse of purposes for which special assessments may be used, some jurisdictions also began to allow for a wide use of debt which is supported or backed by special assessments.

Methods of collection and the size of areas subjected to special assessments have also changed considerably from the initial origins of assessment, leading some to note that certain jurisdictions’ use of assessment more closely resembles a general tax. Some also point towards the growth in special assessment use as derivative of constitutional restrictions placed on property tax levels, such as those in Florida and California. Besides these criticisms, some have critiqued use of the special assessment because it often creates higher administrative costs, and as applied, has led to a more regressive and regional form of taxation than a generally applicable tax. Regardless of criticisms, special assessments remain a popular tool in local governance.

28 See, e.g., MICH. COMP. LAWS ANN. § 141.322 (West 2011) (“The county board of commissioners of a county may acquire or improve a park, defray all or part of the cost of the park acquisition or improvement by special assessments, and finance the park acquisition or improvement by borrowing money and issuing bonds in anticipation of the collection of the special assessments.”).
29 See, e.g., Jennifer DePaul, IRS Audits Defaulted Bonds Issued by Florida District, THE BOND BUYER, Mar. 29, 2012, http://www.bondbuyer.com/issues/121_61/Wentworth-Estates-florida-irs-audit-1037959-1.html (noting an IRS audit of two special assessment bonds, totaling over $64 million that were used to finance a storm water management system, roadway improvements, and landscaping associated with a community development district’s 1,044 acre luxury residential golf course community).
30 See, e.g., supra note 28 and accompanying text.
31 See Reynolds, supra note 4, at 401–02 (noting that special assessments are often now calculated using a simple property valuation figure, which has traditionally been used for a general property tax and assessment districts that span entire units of local government). Professor Reynolds argues, however, that the “extension of the definition of special benefit may be unassailable,” producing profound results for local governments. Id. at 402.
32 FLA. CONST. art. VII, § 4 (noting that property tax assessments may not exceed the lower of three percent or the percentage change in the consumer price index).
33 See CAL. CONST. art. 13A, § 1. California voters also passed provisions to limit government spending, see art. 13B, §1, as well as requiring a majority vote of the electorate to allow local governments to impose special assessments. See art. 13C § 2.
34 See Reynolds, supra note 4, at 441.
35 Id.
36 See generally R. Lisle Baker, Using Special Assessments As A Tool for Smart Growth: Louisville’s New Metro Government As A Potential Example, 45 BRANDeIS L. J. 1, 26–49 (2006) (describing use of special assessments to fund golf courses, parks, mass transit, urban redevelopment, and purchase of open spaces in various jurisdictions).
There are several other forms of finance that a special assessment is not. Special assessments are not generalized taxes, and bonds issued that pledge the full faith and credit of the governmental unit (rather than just the assessments) must meet the criteria of general obligation debt issuances. Special assessments also differ from impact fees, which are targeted more towards developers or others constructing new property and impose a condition on new developments to provide community infrastructure. Some also confuse special assessments with sub-units of government: while a sub-unit of government may be created to administer a special assessment (and receive revenues from the assessment as well), special assessments are a method of revenue collection, rather than a unit of governance. Special assessments are also not government loans, despite the tendency of some to refer to PACE financing in particular as a “loan.” Some states, such as Maine, further this

37 See, e.g., KARA A. MILLONZI, An Overview of Special Assessment Bond Authority in North Carolina, 40 PUB. FIN. BULLETIN 13 (Nov. 2009), available at http://sogpubs.unc.edu/electronicversions/pdfs/lfb40.pdf (describing general obligation bonds as a pledge of the unlimited taxing power of the unit). While revenues obtained from the special assessment may be pledged towards payment of general obligation bonds, these special assessment revenues do not form the only underlying security for the general obligation bonds. Id. Often, issuing such debt will require a vote of the citizens in the pledging unit of government. See Josh Reinert, Comment, Tax Increment Financing in Missouri: Is it Time for Blight and Bust-To Go?, 45 ST. LOUIS U. L.J. 1019, 1020 (2001). North Carolina requires such a vote in its state constitution. N.C. CONST. art. V, § 4 (providing that a local government may not contract debts secured by “a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon”).

38 See generally Ronald H. Rosenberg, The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees, 59 SMU L. REV. 177, 182 (2006) (providing a discussion of the general changes in impact fees in American units of government). Of particular note regarding impact fees are two Supreme Court cases which have defined the “double nexus” test that all governments must meet when imposing a conditional impact fee on a developer. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring that the development’s impact is proportional to the impact fee); Nollan v. Ca. Coastal Comm’n, 483 U.S. 829, 836–37 (1987) (requiring that the impact fee (or “exaction”) have an essential nexus to the goal for which it was adopted);.


40 Id. at 417 (“[I]n the traditional special assessment context, the special assessment district is a unit of territory, not of governance.”).

41 See, e.g., Sichtermann, supra note 16, at 264 (arguing “[s]ince they are not assessments, PACE loans are not entitled to a senior lien position ahead of preexisting mortgages”); see also THE WHITE HOUSE, supra note 1, at 4 (describing funding provisions for “PACE loans” by Vice President Joe Biden). PACE financing does share characteristics that some argue are similar to loans, but as implemented, are more properly characterized as a special assessment. See Cox, supra note 3, at 85–86 (noting that PACE programs are repaid in the form of a tax,
confusion by adopting loan programs and referring to them as “PACE,” despite the fact that they do not involve a true special assessment structure. 42

Despite common features and general observations that may be made about special assessments as a public finance tool, each state ultimately has different statutory frameworks, historical experiences, and different tolerances of default risks on public debt that should be considered when contemplating the use of PACE. The following sections explore these differences in depth, as well as how PACE is impacted in North Carolina, Georgia, and Florida by the different features of each state’s legal provisions.

II. UNITS OF GOVERNMENT: WHO LEVIES, APPROVES, AND ADMINISTERS THE ASSESSMENT?

A significant differentiating factor between North Carolina, Georgia, and Florida in levying special assessments and implementing PACE is which units of government are granted the authority to levy special assessments. In North Carolina, there are two different types of special assessment; a “historic” form of assessment 43 and a recently authorized version called the “critical infrastructure assessment.” 44 Historic special assessments in North Carolina help illustrate an overarching public finance strategy that can be described as “conservative.” 45 The historic form of special assessment may be

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42 See Maine PACE Loans, EFFICIENCY ME., (last visited June 19, 2012), http://www.efficiencymaine.com/pace (describing several times the benefits of “PACE loan” programs). Maine’s statute differentiates into two categories a “PACE assessment” and “PACE mortgage,” with the assessment acting as a special assessment and the mortgage acting simply as an additional mortgage placed upon the home. ME. REV.STAT. tit. 35-A, § 10153. Maine’s organizing agency also directs applicants to begin the loan process, rather than undertaking the special assessment. See How It Works, EFFICIENCY ME., (last visited June 19, 2012), http://www.efficiencymaine.com/pace/how-it-works (noting the steps of a PACE loan process, including initiating the loan process by calling a toll-free number to determine if applicants prequalify for a loan).

43 N.C. GEN. STAT. § 153A art. 9 (2011) (counties); § 160A art. 10. (municipalities).


Please note that the use of “historic” has no legal significance and is used only to differentiate between two types of special assessment in North Carolina.

undertaken via imposition of uniform rates based on property area and the value that is added to the property by the improvement.\textsuperscript{46} Local governments (municipalities and counties only) may impose these special assessments \textit{without} a petition (except for street and sidewalk improvements),\textsuperscript{47} but the authority is not granted to other units of government.\textsuperscript{48}

Similarly, only municipalities and counties in North Carolina have been granted the authority to levy “critical infrastructure” special assessments (which includes PACE)—other “subunits” of government (such as a business improvement district) do not have the authority.\textsuperscript{49} Further, the legislation did not use the term “district,” which carries geographic\textsuperscript{50} and governance\textsuperscript{51} overtones from past use governments, that local governments carry higher amounts of fund balance to prevent defaults).

\textsuperscript{46} See MILONZI, supra note 37, at 3.

\textsuperscript{47} Id. at 3–4.

\textsuperscript{48} There are other regional units of government known as the Regional Councils of Government, but these units of government are funded by grants from other units of government, rather than possessing the authority to levy taxes or assessments. See N.C. GEN. STAT. § 160A-475 (2011).

\textsuperscript{49} N.C. GEN. STAT. §§ 153A-210.2(a) (counties), 160A-239.2(a) (cities) (2011). Another structure that may be used in North Carolina is the potential use of a “sustainable energy business improvement district.” This possibility was proposed by one of the authors in another paper. See JEFF HUGHES & ERIN RIGGS, EVOLVING LOCAL GOVERNMENT ROLES IN COMMUNITY ENERGY MANAGEMENT: A DISCUSSION OF THE ROLE OF LOCAL GOVERNMENTS IN PROVIDING DISTRIBUTED ENERGY EFFICIENCY AND RENEWABLE ENERGY SERVICES IN THE STATE OF NORTH CAROLINA 13–15 (2012), available at http://efc.unc.edu/publications/2012/Evolving_Local_Government_Roles_in_Community_Energy_Management.pdf. North Carolina allows municipalities to establish special tax districts, known as Business Improvement Districts (BID) that are intended to fund a number of activities to promote revitalization of a downtown area. N.C. GEN. STAT. § 160A-536 (2011). The language of possible purposes is written broadly, allowing for “other improvements . . . [designed] to further the public health, safety, welfare, and convenience by promoting the economic health of the central city of downtown area.” Id. § 160A-536(b). Special assessments can be used for the \textit{authorized purposes} found in critical infrastructure as well as historic forms of special assessment. See Kara Millonzi, \textit{Funding Capital Projects in a BID (Business Improvement District), COATES’ CANONS: NC LOCAL GOVERNMENT LAW BLOG} (Mar. 31, 2011), http://canons.sog.unc.edu/?p=4273#more-4273 (providing an overview of funding capital projects in a BID). Thus, while a municipality could implement a PACE program using the critical infrastructure assessment (as it is listed in the statute as an authorized use), a municipality could \textit{not} implement a PACE program via a historic special assessment in a BID, as distributed energy and renewable energy systems are not authorized uses of the historic assessment authority. For a list of authorized purposes of both the historic and critical infrastructure special assessment, see MILONZI, supra note 37, at 6–7.

in other jurisdictions.\textsuperscript{52} North Carolina’s structure provides a clear mechanism for assessments that undertake PACE—a municipality or county must levy the assessment\textsuperscript{53} and the municipality or county must authorize any debt issued.\textsuperscript{54} A change with critical infrastructure assessments is that the local government may administer the assessment, but the local government does have the option to contract with private groups to help implement the projects financed with critical infrastructure assessments.\textsuperscript{55}

All Georgia municipalities and some counties have authority to assess street improvements against adjoining property owners.\textsuperscript{56} Special assessments may also be levied by other units of government (referred to as Local Government Authorities)\textsuperscript{57} in Georgia, including the use of Community Improvement Districts (“CID”).\textsuperscript{58} These CIDs are formed to construct streets, parks, storm water and sewer facilities, water treatment facilities, terminals, docks, and parking.\textsuperscript{59} The authorizing local government may administer CIDs, but local governments also retain the option to create administrative bodies to oversee governance of the CID, so long as there are representatives from the governing authority in the administrative body of the CID.\textsuperscript{60} Additionally, CIDs are allowed to issue debt that is backed by “the full faith, credit, and taxing power of the community improvement district,” however, the CID debt does not create obligations for the state or any other unit of government besides the CID.\textsuperscript{61} However,

\textsuperscript{51} See supra Part I.
\textsuperscript{52} See infra notes 57–102 and accompanying text.
\textsuperscript{54} Id. §§ 153A-210.4 (counties), 160A-239.4 (cities).
\textsuperscript{55} Id. §§ 153A-210.7 (counties), 160A-239.7 (cities). This private administration is also subject to a restriction that no more than twenty-five percent of the project is funded from the proceeds of a general obligation bond or general revenue. Id.
\textsuperscript{57} See Local Government Authorities, GA. DEP’T OF CMTY. AFFAIRS (last visited June 12, 2012), http://www.dca.state.ga.us/development/research/programs/lga.asp. There are eleven types of Local Government Authorities, including Development Authorities, Downtown Development Authorities, Hospital Authorities, Housing Authorities, Joint Development Authorities, Recreation Authorities, Regional Jail Authorities, Regional Solid Waste Management Authorities, Residential Care Facilities for the Elderly Authorities, Resource Recovery Development Authorities, and Urban Residential Finance Authorities. Id. These authorities may act as independent or dependent units of government, depending on whether the finances are included in another local government’s financial reports. Id.
\textsuperscript{58} GA. CONST. art. IX, § 7, ¶ I, III(c). CIDs may levy taxes, fees, and additionally, assessments. ¶ III(c).
\textsuperscript{59} § 7, ¶ II.
\textsuperscript{60} § 7, ¶ III.
\textsuperscript{61} § 7, ¶ IV.
these CIDs and other “special tax districts” are also given a lower priority in the lien collection statutes.\(^{62}\)

Another Georgia unit of government that may impose special assessments is a Downtown Development Authority (“DDA”).\(^ {63}\) DDAs are designed to aid central business districts of Georgia municipalities and counties in stimulating economic development and revitalization.\(^ {64}\) DDAs may finance improvements through debt in a number of ways, including revenue bonds, and may secure these debts “as may be necessary or desirable” in the judgment of the DDA.\(^ {65}\) Much like CID issued debt,\(^ {66}\) DDA issued bonds and any other debt issued by the DDAs do not create a debt obligation for any other Georgia unit of government,\(^ {67}\) and they are also subordinate in the lien structure.\(^ {68}\) DDAs may also contract with municipalities to provide “supplemental services” in BIDs.\(^ {69}\)

Georgia municipalities, as well as DDAs, may also impose assessments in a defined area known as a Business Improvement District (“BID”).\(^ {70}\) Municipalities creating such districts may impose an annual millage upon real and personal property within the district, and to make assessment liens upon these properties.\(^ {71}\) A BID can be differentiated from a special assessment, in that a BID simply imposes an additional layer of taxation upon residents in a particular area, unlike a historic assessment that is more limited in nature and targeted toward specific infrastructure improvements.\(^ {72}\) BIDs are limited to between five and ten-year terms, but they may also be renewed via ordinance.\(^ {73}\)

Georgia’s statutory implementation of PACE allows only DDAs to provide PACE program financing for renewable energy sources and improvements to reduce water or energy consumption.\(^ {74}\)

\(^{63}\) GA. CODE ANN. § 36-42-16 (2011).
\(^{64}\) Id. §§ 36-42-2; 36-62-4.
\(^{65}\) Id. §§ 36-42-8; 36-62-6. The county provision appears to allow for assessments to be used as a security for issued bonds. Id. § 36-62-6 (13)–(14).
\(^{66}\) See supra note 61 and accompanying text.
\(^{67}\) GA. CODE ANN. § 36-42-12 (2011).
\(^{68}\) Id. § 48-2-56.
\(^{69}\) Id. § 36-42-8.
\(^{70}\) Id. §§ 36-42-3, 36-43-4.
\(^{71}\) Id. § 36-43-4.
\(^{72}\) Id. For an example of a BID, see UPTOWN COLUMBUS, INC & BID, http://www.uptowncolumbusga.com/ (last visited June 12, 2012).
\(^{73}\) GA. CODE ANN. § 36-43-9 (2011).
\(^{74}\) Id. §§ 36-42-3, 36-62-2 (providing authority to provide property owners with financing to install or modify improvements to their property in order to reduce
the legislation, as written, does not allow cities or counties to undertake similar improvements.75 As structured, without the backing of a traditional unit of government, and its accompanying power of taxation, PACE projects in Georgia may incur higher rates of interest than those backed by the taxing authority of a traditional unit of local government.76 However, a positive feature of Georgia’s use of sub-units of government issuing assessment and/or revenue-backed debt is relief from the statutory restrictions against debt obligations of the traditional municipality,77 meaning that only the sub-unit of government, the DDA, will be liable for the PACE debt, rather than the traditional municipality.

Florida has long used special districts and sub-units of government that impose unique fees and assessments, and has used them extensively.78 This may result from constitutional limitations on maximum property tax percentages placed on cities and counties in Florida.79 Regardless, Florida has extensively utilized Community Development Districts (“CDD”) in particular, and they are perhaps the most discussed issuers of special assessments in the state.80

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78 Florida Special District Handbook Online: Introduction to Special Districts, FL. DEPT. OF ECON. OPPORTUNITY, (last visited June 13, 2012) (noting that “[i]n Florida, the first special districts were created almost 190 years ago” and that the legislature allowed the first special district act in 1845). Debt financing is also long standing from special assessment funds. See Harris v. City of Miami, Fla., 6 F. Supp. 305, 307 (S.D. Fla. 1932) (describing a special assessment in Miami in 1932 that was used as security for a bond).
79 See Pamela Dubov, Comment, Circumventing the Florida Constitution: Property Taxes and Special Assessments, Today’s Illusory Distinction, 30 STETSON L. REV. 1469, 1469–70 (2001) (noting, as long ago as 2001, sixteen Florida counties had reached their maximum allowable property tax rate, and that as a result, Florida local governments, with aid of the Florida Supreme Court, circumvented these constitutional amendments by using the special assessment in much the same way as a traditional tax).
80 See infra notes 87–92. Note also that CDDs have issued over $11 billion in bonds since the early 1980s to pay for infrastructure improvements on a range of projects. NAT’L PUB. FIN. GUARANTEE CORP., SECTOR STUDY: FLORIDA COMMUNITY DEVELOPMENT DISTRICT 4 (2010), available at http://www.nationalpfg.com/html/sectorStudies.html [hereinafter CDD Sector Study]. CDDs are sometimes referred to as “dirt bonds,” as they often finance the development of unimproved land. Id.
CDDs have several features that distinguish them from cities and counties that impose special assessments, including their status as autonomous units of government that enjoy many of the traditional powers of a city or county. CDDs may issue debt, backed by special assessments or taxes, for improvements in the CDD. CDDs may also use other revenue generating structures, such as amenities fees, and may use their collected revenues for a broad range of improvements, which has included swimming pools, golf courses, and other recreational facilities in at least one CDD. There are also two typical structures of CDD bonds—“A bonds” and “B bonds.” A bonds are paid over a thirty year period, while B bonds are paid over a five to seven year period and have an immediate acceleration provision (unlike B bonds), which some say raises the risk of developer insolvency. Often, developers who initiate the CDD may pay the assessments prior to the eventual sale of property within the district, which increases the risk of default should sales not materialize.

Some of Florida’s extensive use of special assessments by sub-units of government has drawn significant public scrutiny as of late. CDDs in particular, whose primary funding is often drawn

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81 Fla. Stat. § 190.011 (2011). CDDs may also enter into litigation, exercise eminent domain, but may not enter into privatization of water, sewer, or wastewater utilities without a public hearing. Id.; CDD Sector Study, supra note 80, at 2.


83 CDD Sector Study, supra note 80, at 3.

84 Id. (discussing the use of the Village Center CDD, which is currently being invested by the IRS for a default on $64 million in revenue bonds backed by amenities fees paid by the CDD residents). This CDD, in particular, has been scrutinized over whether they meet the qualifications of being an independent municipal unit, as several of the board members of the Village Center CDD are employees or “somehow related to” the developer. Id. CDDs often also provide infrastructure that is more typical of a special assessment project, such as roads and water projects. Id. at 2.

85 Id.

86 Id. The statutory maximum for CDD bonds is forty years. Fla. Stat. § 190.016(2) (2011). The CDD Sector Study also notes that many of the “B bond” CDDs are in their early stages of development, unlike some CDDs which are fully developed and which rely on ongoing developer “fees” to meet debt service obligations. CDD Sector Study, supra note 80, at 3. The use of A bonds and B bonds does not refer to “Series A” or “Series B” bonds, but rather a structuring of the bonds that is commonly used. Id.

from special assessments, have been the subject of angst locally and within the broader local government bond market. One researcher (who includes drawdowns from bond reserve funds as a “default”) found that of the roughly 600 CDDs in Florida, more than 160 have defaulted on their bond debt, for a total of $5 billion in defaults. Additionally, Florida’s 1,618 special districts (which can include CDDs, but are a larger category) are now being investigated per the order of Florida Governor Rick Scott. Further, there are apparent issues with the way that CDDs are disclosing their assessment collections, with CDD administrators often failing to separate out the debt service and operating funds within the CDDs. There was also a recent court decision that allowed for restructuring of a CDD’s debt that did not consider municipal bondholders “creditors,” which has led some analysts to predict that bonds issued and backed by assessments will not remain marketable. Lastly, and perhaps most alarmingly for issuers and others using special assessment backed bonds, the IRS recently found that a Florida CDD was not a “political subdivision” for purposes of receiving tax-exempt status.

special assessments, including a Miami man who “pulled a gun” at a meeting explaining a special assessment to a Miami condominium group of homeowners).

88 CDD Sector Study, supra note 80, at 2.
89 Fla. Stat. § 190.005 (2011) (allowing for the establishment of CDDs that are 1,000 acres or larger).
90 See DePaul, supra note 29. Another methodology, cited in 2010, noted that 75 CDDs had defaulted on $1.3 billion in bonds, while another 40, representing $884 million of bond debt, drew down on their reserves. Shelley Sigo, Florida CDDs in Dirt-Bond Quagmire, THE BOND BUYER, at 1, Nov. 4, 2010, available at http://www.bondbuyer.com/issues/119_461/florida_cdd_defaults-1019448-1.html. Richard Lehmann, the proprietor of the measurement standard, justifies including drawdowns on debt reserve because it “doesn’t serve the interests of bondholders and the bonds continue to trade as if they were current on their payments . . . [t]he next bond buyer, if not apprised of the situation, might buy something that will blow up on them.” Id. For a table of the twenty largest CDD bond defaults, see CDD Sector Study supra note 80, at 12 (noting a more than $219 million default of the Quarry CDD in Collier County).
94 Jennifer DePaul, IRS Rules Against Fla. CDD, THE BOND BUYER, June 5, 2013, http://www.bondbuyer.com/issues/122_108/irs-rules-florida-villages-cdd-not-a-political-subdivision-1052383-1.html (“In a precedent-setting decision that could have major ramifications for issuers, the Internal Revenue Service has ruled a
Regardless of a mixed history of default in Florida, PACE legislation was passed and one statewide agency now has judicial authorization to issue $2 billion in bonds for PACE programs. In Florida, counties, municipalities, dependent special districts, and other subdivisions of government may undertake PACE. The authorizing statute was also amended in 2012 to allow for multi-jurisdictional PACE programs, which allows local governments to enter into partnerships with one another to provide financing for PACE improvements and to create separate governmental entities which undertake these PACE programs. Further, Florida allows for the administration of these PACE programs via a for-profit or a not-for-profit entity.

Other states, such as California, have even more variations of these models. In California, local governments may impose special assessments, but the financing authority (and liability) may be delegated to other entities, severing the link between the placement of the assessment by a unit of government and the financing of the improvement by an independent entity. This use of “contractual assessments” is known by some as “conduit financing,” and is not explicitly allowed in some states, such as North Carolina, when

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Florida Community Development District is not a political subdivision that can issue tax-exempt bonds.

95 See infra notes 116–117 and accompanying text.
96 See infra notes 248–249 and accompanying text.
97 FLA. STAT. § 163.08 (2011). Dependent special districts do not include school districts, community college districts, special improvement districts, municipal service taxing districts, or benefit units. FLA. STAT. § 189.403(1) (2011). Dependent special districts are also different from “independent special districts,” which is independent of the government that has authorized the district to exist. § 189.403.
98 Act of Apr. 14, 2012, 2012 Fla. Sess. Law Serv. Ch. 2012-117. This legislation allowed for “separate legal entities” to undertake PACE programs. Id. The additional “separate legal entities” that may undertake PACE programs are provided for by statute, and include electric utilities. FLA. STAT. § 163.01 (2011).
100 § 163.01 (allowing local governments to create separate legal entities that may issue bonds and also carrying many other powers of a traditional local government).
101 FLA. STAT. § 163.08(5) (2011).
102 Id. § 163.08(6).
103 CAL. STS. & HIG. CODE § 5898.28 (West 2011).
104 North Carolina does have a form of “conduit financing” called industrial revenue bonds. See N.C. GEN. STAT. ch 159C (2011). The purposes that these bonds may be issued for are constricted and also require approval by the Secretary of Commerce. Id. §§ 159C-3(15a), 159C-7. Further, the bonds are sold with exclusively the company’s ability to repay as the security for the debt. See id. § 159C-17. An argument may be made that North Carolina’s lack of a specific prohibition against contractual assessments may allow room to interpret statutory authority to undertake a contractual assessment.
pledging the assessment authority of governments for PACE programs.

III. FOR WHAT PURPOSES MAY A SPECIAL ASSESSMENT BE LEVIED?

Historic assessments in North Carolina were allowed for very narrow, defined purposes.105 North Carolina expanded its permitted uses of special assessments via its new form of “critical infrastructure” assessments,106 with PACE being integrated into the new form of special assessment shortly thereafter.107 In order to address a potential constitutional issue with North Carolina’s legislation, specifically whether a distributed energy program affixed to a private property satisfies the “public purpose” requirement for use of the taxing authority,108 the General Assembly added language to emphasize the public benefits of distributed energy systems in the authorizing statute.109

Special assessments in Georgia are allowed for a wider array of purposes than the historic North Carolina form.110 Georgia’s legislation to enact PACE differs significantly from the legislation used in North Carolina: Georgia did not create PACE as part of a larger statutory scheme of additional uses for special assessment, but instead added “the provision of financing to property owners . . . to

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105 Counties are allowed to impose special assessments to fund construction and improvement of water systems, sewer systems, beach erosion controls, residential streets, and street lights under the historic authority. N.C. GEN. STAT. § 153A art. 9 (2011). Municipalities are allowed to impose special assessments to fund construction and improvement of similar items, excluding watershed improvement projects, but including sidewalks. Id. § 160A art. 10 (2011).

106 Act of Aug. 3, 2008, 2008 N.C. Sess. Laws 642, 645 (providing for original “critical infrastructure” special assessments and an increased number of uses of special assessments); see generally MILLONZI, supra note 37 (describing the features of the new form of special assessment). For a chart showing the different allowed uses of historic and critical infrastructure, see MILLONZI, supra note 37, at 6–7.

107 Act of Aug. 26, 2009, 2009 N.C. Sess. Laws 1400, 1400 (providing for these critical infrastructure special assessments to be used for distributed generation renewable energy sources, including those “permanently fixed to residential, commercial, industrial, or other real property”).

108 See Millonzi, supra note 18 (“We will not know for sure if local energy financing programs satisfy the constitutional requirement unless and until a program is legally challenged.”).


110 See, e.g., supra notes 57–69 and accompanying text.
install an improvement to such property that produces energy from renewable resources” to its list of approved projects for a DDA.\textsuperscript{111}

Florida municipalities and counties\textsuperscript{112} enjoy a broad range of purposes for which they may impose special assessments, including traditional construction projects such as streets and sidewalks,\textsuperscript{113} and non-traditional functions, such as fire protection,\textsuperscript{114} emergency medical services, garbage disposal, and others.\textsuperscript{115} Florida’s PACE enabling statute also allows for a number of unique purposes that are different from its counterparts in North Carolina and Georgia.\textsuperscript{116} The legislation was passed in 2010, and included the ability of local governments and sub-units of government to provide bond financing for residents to implement hurricane protections on their homes.\textsuperscript{117}

\textsuperscript{112} Fla. STAT. § 125.01(1)(c) (2011) (providing counties with ability to impose special assessments as well as to issue debt based on these assessments); Collier Cnty. v. State, 733 So. 2d 1012, 1014 (Fla. 1999) (noting that while counties may not impose taxes besides ad valorem taxes, they may impose special assessments).
\textsuperscript{113} Fla. STAT. § 170.01 (2011) (providing for a wide range of special assessments that may be levied, but requiring majority votes if levied for off-street parking facilities, parking garages, and mass transit systems).
\textsuperscript{114} Id. § 197.3632 (2011); Escambia Cnty. v. Bell, 717 So. 2d 85, 86 (Fla. Dist. Ct. App. 1998) (upholding a county’s imposition of a special assessment for fire protection).
\textsuperscript{115} Fla. STAT. § 170.201 (2011). The statute also allows for municipalities to fund security and crime prevention for municipalities with less than 100 people and requires that if such assessments are levied in an area where taxes are already funding these services, the taxes must be reduced by the same amount as the assessment. Id.
\textsuperscript{117} Shelly Sigo, Local Energy Bonds Get Nod, THE BOND BUYER, at 7, June 3, 2010, available at http://www.bondbuyer.com/issues/119_354/-1012995-1.html (noting additionally that Florida’s financings are expected to be structured similarly to
Florida’s PACE legislation also includes language designed to indicate that PACE is meant for a public purpose, which has been affirmed by Florida’s courts via a judgment that authorized a $2 billion bonding authority to implement PACE programs.

IV. CAN ASSESSMENTS (PACE AND NON-PACE) BE USED AS BACKING FOR PUBLIC DEBT?

As noted above, North Carolina’s overarching public finance strategy is often considered “conservative.” For example, local governments may pledge special assessments toward repayment of only two types of sparsely used forms of debt—special obligation bonds and project development bonds. Special obligation bonds are limited use devices by nature and nomenclature, and may only be used for the purposes of funding water, wastewater, solid waste, and municipal service district projects. Project development financing (commonly known as tax increment financing in other states) bonds allow for repayment streams from incremental increases in property tax revenues, but also allow for the pledging of special assessments as an additional security.

A local government in North Carolina may not, however, issue traditional revenue bonds to fund project costs of a historic special assessment. The “critical infrastructure” special assessment authority, however, broadens the ability to issue debt secured by special assessments to include general obligation bonds and revenue drawn-down bonds, meaning that once there are enough participants, the bonds can be sold to investors.

Another major difference between North Carolina and the other states explored in this white paper is the existence of a statewide oversight agency for all issued local government debt, the Local Government Commission ("LGC"). Except for a few minor exceptions, local governments in North Carolina may issue no debt unless the LGC approves them. The LGC employs a fairly rigorous process to ensure that the issuing government will be able to meet the debt obligations incurred with an eye toward preventing defaults. Even if statutorily possible, authorization of assessment-backed debt in North Carolina as well. For example, general obligation or revenue bonds may be used to accomplish the same ends of other states’ special assessment backed debt, acting as a sort of “synthetic assessment-backed bond.”

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124 N.C. GEN. STAT. §§ 153A-210.4 (counties), 160A-239.4 (cities) (2011) (providing cities and counties the ability to issue revenue bonds, general obligation bonds, project development financing debt instruments, and general revenues as financing sources for a project authorized under the critical infrastructure special assessment authority). If the issuing government uses only special assessment revenues as security for the bonds, the local government will not have to use other revenue sources to make debt payments. See MILLONZI, supra note 37, at 15. There are other methods of issuing debt to be repaid from assessments beyond pure special assessment backed debt in North Carolina as well. For example, general obligation or revenue bonds may be used to accomplish the same ends of other states’ special assessment backed debt, acting as a sort of “synthetic assessment-backed bond.” See N.C. GEN. STAT. § 159 art. 4 (2011). A similar method has been used for some PACE programs such as the program in Boulder, Colorado. NAT’L RENEWABLE ENERGY LAB., PROPERTY-ASSESSED CLEAN ENERGY (PACE) FINANCING OF RENEWABLES AND EFFICIENCY (July 2010), available at http://www.nrel.gov/docs/fy10osti/47097.pdf. Boulder used what are known as “Moral Obligation Bonds,” which do not pledge the full faith and credit of the county, but instead a “moral obligation” to repay the debt. See CLINNÓN, supra note 2, at 5. General obligation bonds, in particular, require a voter referendum and that a two-thirds majority of voters in the taxing unit approve issuance of the bonds, and provide for a pledging of the taxing authority of the local government unit for a very wide variety of purposes. N.C. GEN. STAT. §§ 159-46, 159-48, 159-61 (2011). In practice, a local government could simply issue general obligation debt with the intention of only using the revenue from special assessments to retire all of the debt. The obvious drawback of using a general obligation bond approach is that it incurs the extra financial (and political) costs of holding a referendum and is likely to be a tough “sell” in many areas. Further, PACE is not authorized within the enumerated purposes for which a general obligation bond may be used (without also using a critical infrastructure special assessment) in North Carolina, making the option of using solely a general obligation bond a non-feasible one in the state. Id. § 159-48.

125 Id. § 159-3 (establishing the Local Government Commission as a division of the Department of the State Treasurer).

126 Id. § 159-51 (noting that a conference may also be required between members of the Local Government Commission and the governing board seeking to issue bonds).

127 Id. § 159-52 (a). The Local Government Commission considers:

(1) Whether the project to be financed from the proceeds of the bond issue is necessary or expedient.
backed bonds (including PACE backed bonds) would require approval from the LGC, which adds another discerning eye towards PACE backed debt than may be necessary in other states.\textsuperscript{128}

Georgia municipalities, however, may issue revenue bonds that are secured solely or partially by special assessments,\textsuperscript{129} unlike the historic form of assessment in North Carolina.\textsuperscript{130} Further, the municipality’s governing body may deem that an “improvement” is necessary and bring it to fruition if a majority of the affected residents do not object; however, if a majority object, the governing body may not impose assessments upon the affected street.\textsuperscript{131} Bonds issued for these special assessment street improvements may also be between two and ten years in length, as decided by the issuing

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\footnote{(2) The nature and amount of the outstanding debt of the issuing unit.  
(3) The unit’s debt management procedures and policies.  
(4) The unit’s tax and special assessments collection record.  
(5) The unit’s compliance with the Local Government Budget and Fiscal Control Act.  
(6) Whether the unit is in default in any of its debt service obligations.  
(7) The unit’s present tax rates, and the increase in tax rate, if any, necessary to service the proposed debt.  
(8) The unit’s appraised and assessed value of property subject to taxation.  
(9) The ability of the unit to sustain the additional taxes necessary to service the debt.  
(10) The ability of the Commission to market the proposed bonds at reasonable interest rates.  
(11) If the proposed issue is for a utility or public service enterprise, the probable net revenues of the project to be financed and the extent to which the revenues of the utility or enterprise, after addition of the revenues of the project to be financed, will be sufficient to service the proposed debt.  
(12) Whether the amount of the proposed debt will be adequate to accomplish the purpose for which it is to be incurred.  
(13) If the proposed bond issue is for a water system as described in G.S. 159-48(b)(21), whether a unit has prepared a local water supply plan in compliance with G.S. 143-355. \textit{Id.}}

\textsuperscript{128} See infra notes 129–138 and accompanying text.

\textsuperscript{129} See, e.g., GA. CODE. ANN. § 36-39-25 (2011). These bonds are known as “street-improvement bonds,” and do not create liability for the municipal corporation unless authority is granted to make the bonds liabilities of the municipal corporation. \textit{Id.}

\textsuperscript{130} See supra note 123 and accompanying text.

\textsuperscript{131} GA. CODE. ANN. § 36-39-3(a) (2011). The majority of owners of lineal feet fronting the land liable to assessment may also petition the governing body for an improvement funded by the assessment, which the governing body may choose to undertake after consulting “their own best judgment.” § 36-39-3(b). This contrasts with North Carolina’s historic form of assessment, which simply allows cities and counties to impose assessments without additional provisions allowing citizens to reject the assessment. N.C. GEN. STAT. §§ 153A-185 (county provision), 160A-216 (city provision) (2011).
municipality.\textsuperscript{132} Further, all debt issued by a county, city, or other unit of government\textsuperscript{133} is not allowed to exceed ten percent of the total property values within the issuing unit of government.\textsuperscript{134} Similarly, PACE in Georgia also allows for the use of debt by its DDAs to finance PACE improvements.\textsuperscript{135}

As discussed above,\textsuperscript{136} Florida has utilized special assessment backed debt extensively and clearly allows debt proceeds to fund PACE improvements.\textsuperscript{137} Debt may be provided in various forms, including revenue bonds and special assessment bonds.\textsuperscript{138} Only one debt authorization for PACE improvements has been granted a judgment at the time this paper was being drafted, although this was the aforementioned $2 billion authorization designed to implement a statewide PACE funding program.\textsuperscript{139}

V. PRIORITIES OF LIENS: WHO GETS PAID FIRST?

Generally, the three states have similar provisions regarding the lien status of special assessments against mortgage holders—special assessments are granted a lien that is higher in the collection order than privately financed mortgages and other non-tax liens. However, there is variance between states with respect to the special assessment’s lien status against other governmental taxes. This issue is at the heart of the dispute between the FHFA and PACE advocates,\textsuperscript{140} as the FHFA is concerned that the senior lien status of PACE assessments will incur additional costs upon a property owner’s failure to pay these special assessments to Fannie Mae and Freddie Mac, the principal lenders that the FHFA regulates.\textsuperscript{141}

North Carolina’s historic special assessment authority and the newer “critical infrastructure” variety of special assessment are both junior tax liens (meaning they will be collected later in case of a

\textsuperscript{132}GA. CONST. art. IX, § 2, ¶ VI; GA. CODE ANN. § 36-39-25 (2011).
\textsuperscript{133} See infra notes 58–65 and accompanying text.
\textsuperscript{134}GA. CONST. art. IX, § 5, ¶ I.
\textsuperscript{135}See supra notes 74–75 and accompanying text.
\textsuperscript{136}See supra notes 82–93 and accompanying text.
\textsuperscript{137}FLA. STAT. § 163.08(7) (2011) (“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.”).
\textsuperscript{138}Id. § 215.84 (2011). Revenue bonds may be secured via the revenues from the project, special assessments, or any other pledged source, including the full faith and credit of the taxing authority if there is an approval by a majority of the qualified. Id. §§ 159.03, 159.16 (2011).
\textsuperscript{139}See infra notes 258–263.
\textsuperscript{140}See infra notes 228–230 and accompanying text.
default) to all other public tax liens, excepting other special assessments (which are given an equal priority). These liens are also considered senior to traditional liens held by other parties, such as mortgagors and mechanics’ liens. Likewise, Georgia considers the tax liens placed on special assessments to be superior to other liens on property, such as a mortgagor’s lien, and co-equal with other “taxes” levied by the unit of government: state taxes are given the highest lien priority, then counties, then school and special taxation districts of the state, and then municipalities.

Florida’s municipal special assessments, like Georgia’s, are given an equal lien status as other public taxes, but remain superior to mortgage liens. The Florida PACE statute also has interesting provisions regarding the liens placed on the assessed property. These voluntary assessments constitute “a lien of equal dignity to county taxes and assessments from the date of recordation.” Further, the local government is required to determine that all other property taxes and assessments levied on the property in question have been paid and were not delinquent for the preceding three years. Additionally, Florida’s PACE statute requires that notice (but not approval) be provided to any mortgage holders of the property before undertaking a PACE assessment.

VI. TRANSFERABILITY OF ASSESSMENTS: DOES THE ASSESSMENT RUN WITH THE PROPERTY?

Another feature to consider is whether special assessments transfer to subsequent purchasers of the benefitted property and if this differs between states. As in most states, in North Carolina,

142 See N.C. GEN. STAT. § 105-356 (2011) (providing general priority of liens for real and personal property); id. § 153A-200 (providing, for historic special assessments, that counties may foreclose assessment liens, that the county special assessment liens are inferior to state and federal tax liens, but also superior to other liens, such as a mortgage lien); id. § 160A-233 (municipal provision).
143 See id.
144 GA. CODE ANN. §§ 48-2-56, 48-5-28 (2011). These liens, within a municipality, are declared liens against the lots and tracts of land assessed and continue until the assessment and all associated interest payments are fully paid. Id. § 36-39-20. Counties have similar provisions for assessment against the costs of repairing or reopening public infrastructure as a result of private development. Id. § 36-1-18.
145 See id. § 48-2-56.
146 FLA. STAT. § 170.09 (2011).
147 Id. § 163.08(8).
148 Id. § 163.08(9).
149 Id. § 163.08(13). Property owners must give thirty days notice before entering into the financing agreement, which includes the maximum principal amount to be financed and the maximum annual assessment that is necessary to repay the principal. Id.
special assessments are placed upon *properties* by definition, not on individual owners of property,\(^{150}\) which means, in principle, the assessment would run with the land, irrespective of sale. North Carolina statutes provide an exception for judicial sales, however; if there is a judicial sale of a property, the sale proceeds will be applied to taxes and special assessments on the property, with the remaining portion then distributed to creditors.\(^{151}\)

Georgia also assesses *properties* rather than assessing an individual who owns the property.\(^{152}\) Georgia also requires, for both of its forms of tax sales (discussed *infra*) that special assessments are paid when a property is sold due to delinquency on special assessments.\(^{153}\) Georgia’s PACE legislation describes improvements that benefit *property*, rather than individual owners,\(^ {154}\) although the authorities granted to DDAs to conduct PACE assessments do not include language with similar linkages.\(^{155}\)

Florida municipalities and counties also follow the convention, and impose special assessments on *properties*, rather than individual taxpayers.\(^{156}\) Florida also requires similar payments of taxes and assessments upon a judicial sale (or the purchase of a tax certificate), which is discussed further *infra*. Unlike other states,

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\(^{150}\) N.C. GEN. STAT. § 153A-185 (2011) (“A county may make special assessments against benefitted property within the county . . . .”) (emphasis added); id. § 160A-216 (“Any city is authorized to make special assessments against benefitted property within its corporate limits . . . .”) (emphasis added). This also extends to the critical infrastructure special assessments. See id. §§ 153A-210.1 (counties), 160A-239.1 (municipalities).

\(^{151}\) Id. § 105-385.

\(^{152}\) See, e.g., GA. CODE ANN. § 48-5-23(a)(1) (2011) (“The governing authority of each county and of each municipal corporation is authorized to provide by appropriate resolution or ordinance for the collection of payment of ad valorem taxes, fees, or special assessments on tangible property . . . .”).

\(^{153}\) Id. § 48-4-42.

\(^{154}\) Id. §§ 36-42-3, 36-62-2 (providing authority to provide property owners with financing to install or modify improvements to their property in order to reduce the energy or water consumption on the property as well as to produce energy from renewable sources).

\(^{155}\) See generally id. tit. 36, chs. 42, 62 (providing authorities to levy special assessments, but not describing with specificity a linkage between the assessment and the benefitted property).

\(^{156}\) FLA. STAT. § 170.01 (2011) (“Any municipality of this state may . . . [levy] and [collect] special assessments on the abutting, adjoining, contiguous, or other specially benefited property.”) (emphasis added); id. § 125.01(6a) (providing counties with the ability to impose special assessments on residents or property in an unincorporated area). The county provision is of note, as it provides for the possible interpretation of imposing a special assessment on a county resident, rather than the property, although this may not be used in practice.

\(^{157}\) See *infra* notes 182–189 and accompanying text.
Florida’s enabling PACE statute provides for transfer of the assessment to future property owners, but also requires that the prospective property owner be notified before a contract for sale and purchase is executed.\(^\text{158}\)

PACE advocates correctly state the transferability principle of assessments, at least for the three states considered in this white paper—assessments can travel with the benefitted property except in cases of sale for delinquent payments that require settlement of assessments and taxes. In practice, even if an assessment could legally travel with the property, there is a strong possibility that a purchaser or mortgage holder might require payment of the entire assessment, or that a purchaser would negotiate a lower sale price based on the outstanding assessment obligations.\(^\text{159}\)

The practice of assessments surviving property transfers appears to be linked more to the culture of assessments, rather than the statutory structure of assessments in a given state. In states where assessments are very common, property purchasers may expect that properties will carry assessments when they purchase them, making a transfer of assessments palatable. In states such as North Carolina, where the use of assessments is relatively uncommon, it is likely that this “benefit” of PACE transferability is unlikely to occur, based on what future buyers (and their mortgage issuers) are likely to demand at sale.

VII. ACCELERATION OF ASSESSMENTS AND MORTGAGES: AFTER DEFAULT, WHAT IS DUE?

Both historic and critical infrastructure special assessments in North Carolina have acceleration provisions,\(^\text{160}\) meaning that once one installment of the special assessment is unpaid, all remaining installments become due and payable unless waived by the affected holder of the assessment lien. Further, assessments unpaid within thirty days of notice will be begin to accrue interest, which may not exceed eight percent.\(^\text{161}\)

Assessments in Georgia also have acceleration provisions: if, within fifteen days after any installment of a special assessment is not paid, the treasurer of a municipality is to issue an execution against


\(^{159}\) See Cox, supra note 3, at 96–97.


\(^{161}\) Id.
the land assessed for the total amount of the assessment.\textsuperscript{162} Georgia’s PACE legislation does not include provisions to address acceleration of assessments that are unpaid,\textsuperscript{163} meaning if a payment of the assessment was missed by the property owner, the entire due amount would also accelerate upon that missed payment.

Also like North Carolina\textsuperscript{164} and Georgia,\textsuperscript{165} Florida municipalities, and some functions of county government, employ an acceleration provision that makes the entirety of the due assessment payable upon failure to pay a single assessment.\textsuperscript{166} However, Florida’s PACE statute, unlike North Carolina and Georgia, contains a non-acceleration provision,\textsuperscript{167} which means that if one of the assessment payments is missed, the entirety of the assessment is \textit{not} levied against the property holder.\textsuperscript{168} This provision also serves the function of not allowing mortgage holders to declare a default on the mortgage or to accelerate the lien if a property owner enters into a PACE financing agreement.\textsuperscript{169} Use of non-acceleration provisions have been cited as a “best practice” for PACE assessments, as they provide a level of protection to the mortgage holder, who would otherwise have to pay the entirety of the PACE assessment to prevent foreclosure.\textsuperscript{170}

**VII. WHO MAY FORECLOSE ON A PROPERTY WHEN ASSESSMENTS ARE NOT PAID?**

North Carolina only allows tax foreclosure proceedings to occur if a taxing unit is initiating the proceedings, although tax liens were at one time sold to private parties who could purchase tax liens from taxing units (known commonly today as the sale of “tax

\textsuperscript{162} GA. CODE ANN. § 36-39-21 (2011) (noting that the real estate should be sold “at public outcry to the highest bidder”).


\textsuperscript{164} See supra note 160 and accompanying text.

\textsuperscript{165} See supra note 162 and accompanying text.

\textsuperscript{166} GA. CODE ANN. §§ 153.73(11) (2011) (providing an acceleration provision for assessments levied in county water and sewer districts); \textit{id.} § 170.10 (2011) (providing an acceleration provision for assessments in municipalities). Florida’s statutes do not include an explicit acceleration provision for counties that levy special assessments beyond the water and sewer district listed above.

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} BLACK’S LAW DICTIONARY 13 (9th ed. 2009).

\textsuperscript{169} FLA. STAT. § 163.08(13) (2011).

The North Carolina Machinery Act provides two different tax foreclosure procedures—a mortgage style procedure\textsuperscript{172} and an expedited, \textit{in rem} procedure that allows the taxing unit to docket a judgment against the property in state court and move to sale three months after judgment.\textsuperscript{173} These procedures both are often used for property tax liens, but may also be used for special assessments.\textsuperscript{174}

Georgia also does not utilize tax lien certificates, but instead allows for local governments to proceed with a judicial \textit{in rem} tax foreclosure,\textsuperscript{175} which may occur after a tax lien has become payable and past due.\textsuperscript{176} This form of tax foreclosure was enacted by the Georgia General Assembly because the traditional, non-judicial tax foreclosure process was “inefficient, lengthy, and commonly result[s] in title to real property which is neither marketable nor insurable.”\textsuperscript{177} The tax commissioner must wait a year to commence a tax foreclosure from the date when the taxes became delinquent, and must provide notice to the delinquent taxpayer.\textsuperscript{178} Georgia also retains a traditional, non-judicial tax foreclosure process, called a tax execution, which allows a tax collector to issue an execution against delinquent taxpayers.\textsuperscript{179} The tax collector then places the execution in the hands of a law enforcement officer, who may conduct a sale of the property to recoup the unpaid taxes.\textsuperscript{180} Both provisions are applicable to special assessments.\textsuperscript{181}

Florida has a somewhat unique form of collecting delinquent assessments that is unlike other states considered in this white paper. Governments may use what are known as “tax certificates,” which represent unpaid delinquent real property taxes, special assessments, and the related interests, costs, and charges associated with these unpaid obligations.\textsuperscript{182} Tax collectors from the respective governments

\begin{thebibliography}{9}
\item 171\textsuperscript{183} 1983 N.C. Sess. Laws. 1003, 1003.
\item 172\textsuperscript{184} See N.C. GEN. STAT. § 105-374 (2011).
\item 173\textsuperscript{185} Id. § 105-375.
\item 174\textsuperscript{186} Id. § 105-374(g). See also id. §§ 153A-200(c) (counties); 160A-233(c) (municipalities). For further reading on property tax collection mechanisms in North Carolina, see generally CHRISTOPHER B. McLAUGHLIN, FUNDAMENTALS OF PROPERTY TAX COLLECTION LAW IN NORTH CAROLINA (2011) (providing a summary of tax liens provisions, collection mechanisms, foreclosure and other topics).
\item 175\textsuperscript{187} GA. CODE ANN. § 48-4-76(a) (2011).
\item 176\textsuperscript{188} Id. § 48-4-78.
\item 177\textsuperscript{189} Id. § 48-4-75.
\item 178\textsuperscript{190} Id. § 48-4-78.
\item 179\textsuperscript{191} Id. § 48-5-161.
\item 180\textsuperscript{192} Id.
\item 181\textsuperscript{193} See id. § 48-4-42.
\item 182\textsuperscript{194} FLA. STAT. § 197.102(1)(f) (2011).
\end{thebibliography}
may offer these tax certificates for sale. The holder of the tax certificate may then pay the taxes, interests, costs, and charges on the parcel listed in the tax certificate. The tax certificate holder then may obtain a tax deed two years after April 1 of the year that the tax certificate has issued. This tax deed allows the holder to obtain immediate possession of the land described in the tax deed, which are not encumbered by any other right or restriction besides those held by the governmental units (such as special assessments). Owners are notified before a tax deed is issued, and owners are allowed to pay their back taxes to avoid the issuing of the tax deed.

This form of collection has implications for special assessments, as tax certificate investors may seek to obtain these tax certificates and push mortgagors to assume the tax obligations to avoid loss of the real property to a tax deed holder. Most importantly, the Florida system improves the reliability of consistent revenues to local governments during potential delinquencies, as more potential parties may pay the delinquent debt than in a traditional foreclosure process. The tax certificate process also would likely provide bond lenders with more confidence that the assessments will be paid, either by the original property owner or by a tax certificate holder seeking to obtain a tax deed.

IX. WHAT IS THE MAXIMUM LENGTH OF A SPECIAL ASSESSMENT?

Historic North Carolina special assessments are limited to ten annual installments, which could create problems for a PACE regimes, which tend to stretch out over a larger period of time. The newer “critical infrastructure assessment” increases the potential length of the assessment, providing a provision that allows for up to

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183 Id. § 197.432(1).
184 Id.
185 Id. § 197.502.
186 Id. § 197.562.
187 Id. §§ 197.552.
188 Id. § 197.522.
189 See, e.g., Creating Wealth Without Risk™: “Maximum Returns & Minimum Risk with Tax Liens & Tax Deeds” Tax Lien Certificates and Tax Deed Sales in Florida, PROFESSORPROFITS.COM (last visited June 14, 2012), http://www.professorprofits.com/states/state.php?name=Florida (“Florida tax lien certificates are very attractive since the maximum interest rate being offered to on [sic] all Florida tax lien certificates is 18% per annum and a 5% minimum with a two year right of redemption.”).
191 See Cox, supra note 3, at 92 (noting that some PACE programs offer financing terms of twenty years).
thirty annual installments,\textsuperscript{192} which is more practicable term for PACE programs.

Georgia allows for differing lengths of special assessments, depending on the levying unit of government and the purposes for which the assessment is levied.\textsuperscript{193} Municipalities, for example, who provide street improvements may levy assessments payable in two to ten annual installments as determined by the local government.\textsuperscript{194} DDAs, the form of government that is authorized to undertake PACE,\textsuperscript{195} are allowed to issue revenue bonds up to forty years in length,\textsuperscript{196} and generally the length of the assessment is left as a local option with the DDA.\textsuperscript{197}

Florida’s statutes also contain a number of different special assessment term lengths, depending on the purpose for which the assessment is levied. Florida municipalities\textsuperscript{198} and CDDs\textsuperscript{199} may both impose assessments that are no greater than thirty annual installments. Counties levying assessments for water and sewer improvements may levy annual assessments for up to twenty years.\textsuperscript{200} Florida’s enabling PACE statute does not include additional limits on the term of financing the retirement of PACE assessments,\textsuperscript{201} leaving the length of the districts to the unit of government.\textsuperscript{202} Different bonds also have different maximum maturity lengths—general obligation bonds issued by counties and CDDs may be up to forty years in length,\textsuperscript{203} with revenue bonds also receiving a longer potential length than the assessment in counties as well.\textsuperscript{204}

\textbf{X. ADDITIONAL STATUTORY FEATURES OF PACE IN THE THREE STATES}

Neither PACE nor critical infrastructure assessments have been used in North Carolina to this point, and the statutes

\begin{itemize}
  \item \textsuperscript{192} N.C. GEN. STAT. §§ 153A-210.5 (counties), 160A-239.5 (municipalities) (2011).
  \item \textsuperscript{193} GA. CODE ANN. § 48-2-56 (2011) (providing that BIDs may last between five and ten years unless renewed by ordinance).
  \item \textsuperscript{194} Id. § 36-39-16.
  \item \textsuperscript{195} See supra notes 74–75 and accompanying text.
  \item \textsuperscript{196} GA. CODE ANN. § 36-42-9 (2011).
  \item \textsuperscript{197} See DSIRE Summaries, supra note 10.
  \item \textsuperscript{198} FLA. STAT. § 170.09 (2011).
  \item \textsuperscript{199} Id. § 190.022.
  \item \textsuperscript{200} Id. § 153.73.
  \item \textsuperscript{201} Id. § 163.08.
  \item \textsuperscript{202} See DSIRE Summaries, supra note 10.
  \item \textsuperscript{203} FLA. STAT. §§ 132.55(4), 190.016(2) (2011).
  \item \textsuperscript{204} Id. § 125.013.
\end{itemize}
authorizing it has additional grey areas. 205 Most important for those who wish to implement PACE in North Carolina is that this new form of “critical infrastructure” special assessment comes with a sunset provision: the authority to impose these special assessments expires on July 1, 2015. 206

In Florida, a property may not assume a PACE assessment greater than twenty percent of the total value of the property. 207 Florida also requires that any other assessments on the subject property are paid and that they have not been delinquent for at least three years, that there are no involuntary liens (such as construction liens), that there is no notice of default or other indicia of “property-based debt delinquency” recorded during the preceding three years, and that the property owner is current on all mortgage debt on the property. 208 Property owners wishing to undertake PACE must also provide notice to any mortgage holder that they intend to enter into a PACE financing agreement, accompanied with the principal amount to be financed, and must also provide a verified copy of this notice to the local government. 209

Beyond PACE legislation, some local governments in Florida have argued that they may enact PACE programs via “home rule.” 210 The twenty Florida counties that are “charter” counties may rely on this home rule authorization, provided that the county’s “charter” (similar to a state or federal constitution) includes authorization of a

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205 For example, the structure of North Carolina’s critical infrastructure assessment may create a requirement that at least some of the PACE program’s funding come from federal grants. See Millonzi, supra note 18 (noting that some might argue that the statute may require that all of the funding come from federal grants). This is a matter of statutory interpretation at its core. The PACE authorizing statute first allows for the creation of revolving loans and loan loss reserve funds, and then states that a county or municipality “may establish other local government energy efficiency and distributed generation renewable energy source finance programs funded through federal grants.” N.C. GEN. STAT. §§ 153A-455(b), 160A-459.1(b) (2011) (emphasis added). The statute then says that a municipality or county “may use State and federal grants and loans and its general revenue for this financing.” Id. The ability to use special assessments for PACE programs is derived from the latter sentence, and, as written, implies a requirement that the program is either entirely funded through federal grants or that at least a portion of the funding for PACE programs is provided via federal grants.


207 Fla. STAT. § 163.08(12)(a) (2011).

208 Id. § 163.08(9).

209 Id. § 163.08(13).

210 PAUL D’ARELLI ET AL., OPTIONS FOR CLEAN ENERGY FINANCING PROGRAMS: SCALABLE SOLUTIONS FOR FLORIDA’S LOCAL GOVERNMENTS 33 (2010) (noting that Leon County, FL enacted its Leon Energy Assistance Program in July 2010, citing Fla. STAT. § 125.01 (2011), to establish the dependent special district).
clean energy-financing program. 211 “Non-charter” counties also have the power of self-governance, however, and there are several provisions that may provide authorization of a clean energy-financing program, irrespective of the authorizing PACE legislation. 212 Municipalities may also enjoy a similar ability to enact PACE irrespective of the authorizing PACE statute as well. 213

XI. DIFFERENT BREEDS OF FINANCING: NON-PROPERTY ASSESSED CLEAN ENERGY PROGRAMS

The phrase “PACE” has become ingrained when discussing modern energy finance programs. For example, some programs now describe traditional loan and second mortgage programs as “PACE loans,” despite the abandonment of the underlying special assessment financing mechanism. 214 This equivocation makes an underlying trend: many communities and property owners have courted PACE, but have moved on to other energy financing alternatives. There are many other options that property owners might use to finance REEE improvements, including “on-bill” financing, “off-bill” (or direct) financing, use of revolving loan funds, and taking a second mortgage on a property to finance REEE improvements.

On-bill financing typically involves a utility company paying (with their funds or possibly with funds from another source) the up-front costs of installing an energy generation or conservation system on a home, and then charging the bill of the property owner for an extended period of time. 215 Off-bill is a similar structure that imposes a payback in a similar fashion, but uses a separate bill than the traditional power bill for repayment. 216 These programs have been used for over twenty years, 217 and if designed in certain ways, offer some of the benefits of a PACE program, including the ability to “run with the property,” as the utility charge continues to be assessed against whomever owns the property, regardless of whether it is the

211 D’ARELLI ET AL., supra note 210, at 33–34.
212 Fla. Stat. § 125.01(1)(g) (2011) (allowing non-charter counties to “establish and administer programs of housing, slum clearance, community redevelopment, conservation”) (emphasis added); id. § 125.01(1)(p) (allowing non-charter counties to “enter into agreements with other governmental agencies”); id. § 125.01(1)(r) (allowing non-charter counties to levy and collect special assessments).
213 See id. § 166.021; D’ARELLI ET AL., supra note 210, at 35–36.
214 Maine provides an example of this phenomenon. See supra note 42 and accompanying text.
215 D’ARELLI, supra note 210, at 13.
216 Id.
217 Id. at 43.
There are several challenges that on-bill financing faces, and of the three states considered, only Georgia has developed very specific on-bill provisions. There is limited national adoption of these programs, perhaps due to a lack of awareness on the part of consumers or the lack of third party financing to offset the up-front costs.  

A number of energy finance programs across the country rely on more basic forms of debt financing, including the use of revolving loan funds and public-private partnerships founded on the use of unsecured loans supported by publicly funded credit enhancements such as interest rate buy downs. Revolving loan funds are large capital pools that are used to provide loans to property owners to complete REEE projects. A large number of different administrators are possible (including the use of third party private lenders), but the structure usually involves provision of lower interest rate loans with more flexible terms than those obtainable on the open capital markets. These programs have been established in over thirty states, although the ability to attract borrowers has varied considerably based upon a number of factors.  

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218 See id. at 14. Some may also argue, in a similar fashion to PACE assessed properties, that the added utility cost levied against a property will result in a reduction in the purchase price of the property to offset the increase utility charges.  

219 CATHERINE J. BELL ET. AL., ON BILL FINANCING FOR ENERGY EFFICIENCY IMPROVEMENTS: A REVIEW OF CURRENT PROGRAM CHALLENGES, OPPORTUNITIES, AND BEST PRACTICES iii (2011) (noting that challenges include upfront costs to utilities in modifying their billing systems, a perception that utilities must act as financial institutions to participate in on-bill financing, risks of non-payment of the finance charge, handling the transfer of property, finding capital, and addressing non-utility fuels). This study also notes that “no two on-bill programs are exactly alike” due to numerous factors, including differing state and regional legal and regulatory landscapes, much like special assessments. Id.

220 Id. at 2.


223 Id.

224 Id. (citing interest rates, loan terms, credit requirements, and marketing effectiveness as affecting the proliferation of revolving loan funds).
virtues and vices, revolving loan funds are simpler to implement, and are available in all three states considered in this white paper. Second mortgages (or other sources of private financing) are another option that property owners might choose to utilize rather than PACE as well. The second mortgage on a property is actually the preferred policy option in Maine, despite the reference to these loans as “PACE.” Second mortgages would also certainly be the preference of the FHFA, as they would not reduce the “priming” of a mortgage holder’s security interest in the property via what the FHFA refers to as “PACE loans.” Further, the FHFA has also argued that the senior lien position that is afforded by PACE, but which is absent with a traditional second mortgage, is a form of lending that relies primarily on collateral and this higher lien position, rather than a true ability to repay the assessment.

223 Loan Programs for Renewable Energy, DSIRE: DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY (last visited July 18, 2012), http://www.dsireusa.org/incentives/index.cfm?SearchType=Loan&EE=0&RE=1. There are several different types of financing that might be discussed further, but which are beyond the scope of this white paper. See, e.g., Solar Financing for Residential Solar Panels, ONE BLOCK OFF THE GRID (last visited June 19, 2012), http://solarfinancing.1bog.org/ (describing “solar power purchase agreements,” “solar leasing,” “home equity loans,” “solar renewable energy credits,” “peer to peer lending,” PACE, and “feed-in tariffs”). State credit unions have also begun to offer the second mortgage option, including in North Carolina. See SECU Expands its Green Initiatives with A New Green Second Mortgage!, BUS. WIRE, Sep. 25, 2009, http://www.businesswire.com/news/home/20090925005372/en/SECU-Expands-%E2%80%9CGreen%E2%80%9D-Initiatives-Green-Mortgage! (discussing the State Employees’ Credit Union’s “Green Second Mortgage” program, which allows for a $50,000, ten-year loan where seventy-five percent of the proceeds are used for energy efficiency improvements).

224 See supra note 42 and accompanying text.

225 See Enterprise Underwriting Standards, 77 Fed. Reg. 36086, 36086 (June 15, 2012) (“Under most state statutory PACE programs enacted to date, the homeowner’s obligation to repay the PACE loan becomes in substance a first lien on the property, thereby subordinating or ‘priming’ the mortgage holder’s security interest.”).

226 The assumption that this is granted a lower priority between mortgagors is dependent upon a “first in time, first in right” lien priority. See 51 AM. JUR. 2d, Liens § 70 (2012). This holds true in Florida, Georgia, and North Carolina as well. See FLA. STAT. § 713.07 (2011) (“Liens . . .shall attach at the time of recordation of the claim of lien and shall take priority as of that time.”); GA. CODE ANN. § 44-14-323 (2011) (“All liens which are not regulated and fixed as to rank by this title shall rank according to date, the oldest having priority.”); N.C. GEN. STAT. § 47-20 (2011) (“[I]nstruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration.”).

227 See Enterprise Underwriting Standards, 77 Fed. Reg. 36,086, 36103 (June 15, 2012). The FHFA noted:

The omission by PACE advocates of such common credit metrics as debt-to-income ratios and credit scores from their proposed underwriting standards suggests to FHFA that PACE programs are relying principally
paper focuses on assessment as a financing option for local governments, second mortgages and other financing options are alternative forms of financing that local governments should weigh against the benefits and drawbacks of a PACE financing scheme when considering implementation of a REEE funding program.

XII. PREVALENCE OF ASSESSMENTS IN THE THREE STATES AND PREVALENCE OF PACE

Historic, non-critical infrastructure, special assessments have been used lightly in North Carolina, historically and in the present day. According to the North Carolina State Treasurer’s office, there were over $4.1 million in municipal special assessment revenues collected in North Carolina as of 2010, and over $3.455 million in county special assessment revenues collected. This level of usage is modest compared other local government finance mechanisms in North Carolina and to some states’ use of special assessments. Only one North Carolina town, Hillsborough, used its authority to provide for issuance of special assessment backed bonds. Hillsborough received approval of its town council to issue the

on the value of the collateral and their prime lien position, rather than on the borrower’s ability to service its debt obligations out of income, as assurance of repayment. In FHFA’s judgment, this reflects collateral-based lending that could tend to increase the financial risk borne by subordinate creditors such as mortgage holders. Indeed, the promotional materials for Boulder County, Colorado’s PACE program state that “You may be a good candidate for a ClimateSmart Loan Program loan if you: Are not likely to qualify for a lower-interest loan through a private lender (e.g. home equity loan) due to less-than-excellent credit. Id.

See, e.g., Special Assessments, MECKLENBURG CTY. TAX COLLECTIONS (last visited June 7, 2012), http://charmecrk.org/mecklenburg/coutny/Tax Collections/Special Assessments/Pages/default.aspx (providing a list of numerous special assessments in Mecklenburg County, North Carolina by street name).

Annual Financial Information Report, N.C. DEPT OF STATE TREASURER (last visited June 7, 2012), https://www.nctreasurer.com/slgl/Pages/Annual-Financial-Information-Report-(AFIR)-Forms.aspx (providing spreadsheets of municipal data). The figure reported on the State Treasurer’s website includes a larger figure from Durham, which reported a figure of $5.418 million in fiscal year 2010, bringing the total in North Carolina to over $9.395 million. Id. However, Durham’s figure submitted to the Department of the State Treasurer included two additional funds that appear inconsistent with the other municipalities’ reported assessment revenues; impact fees and capital facility fees. Interview with Youssef Hammad, Financial Reporting Manager, City of Durham, in Chapel Hill, N.C. (June 20, 2012).

Annual Financial Information Report, supra note 232 (providing spreadsheets of county level data).

See infra notes 258–263 and accompanying text.

special assessment backed bonds amid the pressure of a previous July 1, 2013 sunset for the authority to issue special assessment backed bonds;\textsuperscript{236} Mooresville\textsuperscript{237} also considered using the new assessment tool for non-PACE projects before ultimately pursuing other financing devices.\textsuperscript{238}

Prospectively, this trend looks to continue, as PACE has lacked any real implementation momentum in North Carolina,\textsuperscript{239} although there was an extension of a July 1, 2013 deadline to July 1, 2015 in the 2013 legislative session.\textsuperscript{240} This could be attributed in part to the FHFA order,\textsuperscript{241} but given the lack of use for critical infrastructure special assessment in other, non-PACE areas, is likely also due to the culture of non-debt financed special assessments that has prevailed in North Carolina for decades.\textsuperscript{242}

\textsuperscript{236} See id, Agenda: Board of Commissioners Monthly Workshop, TOWN OF HILLSBOROUGH (July 25, 2011), http://www.ci.hillsborough.nc.us/sites/default/files/meetings/TB_AGENDA_July_25_2011_Agenda_Packet.pdf (noting, in Agenda Item #8, the intention to move forward with creation of a special assessment district that would provide the security underlying a $9 million bond issue).

\textsuperscript{237} See Sarah Okeson, Mooresville Special Assessment Would Build Bridge Connecting Businesses, CAROLINA J. ONLINE (Feb. 24, 2010), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=6141 (noting a potential $9.5 million bridge and road construction project where bonds would be repaid through the new special assessment mechanism).

\textsuperscript{238} See supra note 235 and accompanying text.

\textsuperscript{239} But see Property Assessed Clean Energy Plan, CITY OF ASHEVILLE (Apr. 26, 2010), http://www.ashevillenc.gov/NewsandEvents/CityNews/tabid/662/articleType/ArticleView/articleId/21858/Property-Assessed-Clean-Energy-plan.aspx (seeking comment for a potential PACE program in Asheville).


\textsuperscript{241} See supra note 13 and accompanying text.

\textsuperscript{242} See Okeson, supra note 237 (noting the limited time for special assessments to run and the limitations in use for historic special assessments and contrasting with Florida’s extensive use of bond financing within its Community Development Districts). North Carolina also may be suffering from a lack of an established market in developer sponsored debt as well as an apprehension to that debt in the wake of Roanoke Rapids’ foray into project development financing, construction of the Roanoke Rapids Theatre. See Adam C. Parker, Still as Moonlight: Why Tax Increment Financing Stalled in North Carolina, 91 N.C. L. REV. 661, 661 (2013); Roger Bell, Planning Board Ok’s Theater for Electronic Gaming, THE DAILY HERALD (June 21, 2012), http://www.rrdailyherald.com/news/planning-board-oks-theater-for-electronic-gaming/article_de10382e-bbf6-11e1-a1e4-001a4bcf887a.html (noting the Roanoke Rapids Planning Board’s approval of an amendment to the city’s land use ordinance allowing for electronic gaming in the city’s entertainment district, where the theatre is located). This development has drawn significant criticism from local residents. See Titus Workman, Our View: Gambling at Theater Will Tarnish City, THE DAILY HERALD (June 21, 2012), http://www.rrdailyherald.com/opinion/our-view-gambling-at-theater-will-tarnish-city/article_bfcd18b2-bbac-11e1-8817-001a4bcf887a.html (comparing the
momentum to increase the feasibility of the critical infrastructure assessment. The LGC has also recently allowed for qualified institutional buyers to purchase special assessment backed bonds in 2010, which represented a change from their previous policy which limited placement of special assessment backed debt and which was unable to achieve investment grade ratings under tightened standards. If the critical infrastructure sunset is extended in the upcoming legislative session, PACE and other critical infrastructure projects may be more feasible, especially considering the LGC’s approval of qualified institutional buyers.

Use of special assessments has proved a popular tool in Atlanta and other Georgia municipalities. To date, however, it does not appear that a Georgia unit of government has begun a PACE program, although exploratory steps were taken by Atlanta and Decatur in 2010.

proliferation of Internet gaming facilities in Roanoke Rapids to the movie “It’s a Wonderful Life,” and the movie’s transformation of Bedford Falls into the “disreputable” Potteryville). The Local Government Commission has, however, recently allowed for “qualified institutional buyers” (as defined by Rule 144A of the Securities Act of 1933) to purchase special assessment backed bonds. See MACK A. PAUL, ET. AL, LOCAL GOVERNMENT COMMISSION ADOPTS POLICY TO FACILITATE USE OF SPECIAL ASSESSMENT DISTRICT FINANCING (Dec. 16, 2010), available at http://www.klgates.com/files/Publication/f6b267bd-62ea-4e6e-9888-016055789347/Presentation/PublicationAttachment/30db3650-923b-43ec-a95f-06c38f418371/Alert_LandUse_12162010.pdf.

243 For more information about the LGC’s decision to allow qualified institutional buyers to purchase special assessment backed debt, see Memorandum from Vance Holloman, Sec. Local Gov’t Comm’n, to Local Gov’t Comm’n (Nov. 30, 2010) (on file with author). For a more easily accessible discussion of the LGC’s change in policy, see Angela Cottrell et al, Local Government Commission Adopts Policy to Facilitate Use of Special Assessment District Financing, K&L GATES (Dec. 16, 2010), http://www.klgates.com/local-government-commission-adopts-policy-to-facilitate-use-of-special-assessment-district-financing-12-16-2010/ (describing the LGC’s change in policy by one of the advocates for allowing qualified institutional buyers to purchase the special assessment backed debt). The authors would like to thank Rebecca Joyner of Parker, Poe, Adams, and Bernstein LLP for pointing out the LGC’s change in policy on this point and for her review of this white paper.


As discussed above, special assessments have been used extensively in Florida, but there are also several PACE programs that are active in Florida, including a group that has procured a $2 billion statewide bonding authority for PACE assessments. Some have said the judicial validation of this bonding authority also served a secondary purpose, namely to validate PACE assessments as legally similar to other forms of special assessment. Three programs of note include the Clean Energy Green Corridor District, the Florida Green Energy Works Program, and the Florida PACE Funding Agency.

The Clean Energy Green Corridor District focuses on south Florida, and is administered by Ygrene Energy Fund Florida, which is a subsidiary of a leading California PACE developer. This group had undertaken several marketing efforts, and planned to begin financing property improvements in fall 2012 or early 2013.

MyGreenATL.com, which discusses the efforts undertaken by Atlanta and Decatur in beginning a PACE program).

247 See supra notes 78–93 and accompanying text.
248 See DSIRE Summaries, supra note 10; see also Kristina Klimovich and David Gabrielson, PACE Programs: Focus on Florida, PACENOW.ORG (last visited June 14, 2012), http://us2.campaign-archive2.com/?u=efc6993fa32483be8b2a0777a&id=e9697d8bf6 [hereinafter PACE Focus on Florida] (discussing three separate PACE funding programs, including the Clean Energy Green Corridor District, the Florida Green Energy Works Program, and the Florida PACE Funding Agency).
250 See Sigo, supra note 11. Bob Reid, of Bryant Miller Olive PA, serves as bond counsel for the Florida PACE Funding Agency, and said “[i]n Florida, we have a court final judgment with statewide impact which declares that the [PACE] assessments under . . . Florida statutes are legally the same as any other government assessment, and recognized as such under the Florida constitution.” Id.
251 See PACE Focus on Florida, supra note 248.
252 Id.
253 Id. The Clean Energy Green Corridor District will not require consent from existing mortgage lenders and will instead only provide notice to existing mortgage holders. Id.
Florida Green Energy Works has been organized as well, and will be focused primarily on commercial PACE.\(^{254}\) Florida Green Energy Works notes that they are the “first multi-jurisdictional commercial PACE program in Florida,” and counts several strong financial institutions among its partners.\(^{255}\) Florida Green Energy Works is different from the Clean Energy Green Corridor District, as it requires consent be provided by existing mortgage holders and allows for financing to be obtained from any lending source.\(^{256}\) Additionally, Florida Green Energy Works requires that a qualified energy auditor or a certified building energy rater perform an energy savings audit.\(^{257}\) By allowing for private financing of REEE installations, Florida Green Energy Works serves as a sort of hybrid model, and stands in contrast to other PACE models that instead rely exclusively on debt issued and assessments levied by units of government.

The Florida PACE Funding Agency employs a large-scale, approach that aims to fund improvements across the state.\(^{258}\) The $2 billion bonding authority that the Florida PACE Funding Agency has received does not extend to other groups seeking to fund PACE projects, and, uniquely, requires consent from mortgage holders before a PACE assessment is levied.\(^{259}\) Members of the governing board for the Florida PACE Funding Agency believe that the statewide approach will prove more cost-effective than their counterparts because the group may spread administrative costs among thousands of participants, rather than the smaller numbers

\(^{254}\) Id.


\(^{256}\) PACE Focus on Florida, supra note 248.

\(^{257}\) Id. The audit must include, at a minimum:

1. Recommendations for energy savings measures;
2. Estimated energy savings and a priority ranking for each measure;
3. Estimated renewable energy to be produced;
4. Estimated greenhouse gas reductions; and
5. Estimated cost savings resulting from the implementation of the recommendations and use of funds made available by the District. Id.

\(^{258}\) Id. The Bryant, Miller, & Olive law firm is acting as special counsel and bond counsel to the Florida PACE Funding Agency. Id. The law firm also helped to design Florida’s enacting PACE legislation. See also Sigo, supra note 116. The authors would like to thank Mark Lawson and Bob Reid at Bryant, Miller, & Olive for their review of this white paper.

\(^{259}\) PACE Focus on Florida, supra note 248.
found in various localized pilot projects. The larger scale approach, combined with judicial validation of bonding authority (which also arguably cements the legality of preventing mortgage holders from accelerating payments if PACE assessments are levied), have led the Florida PACE Funding Agency’s principal actors to believe that even if larger lenders affected by the FHFA order do not wish to assume mortgages on properties with PACE, other lenders will. Proponents also believe the statewide approach is advantaged by prescribing a uniform set of procedures for vendors to consult, easing the process and increasing the speed of implementation.

CONCLUSION

Special assessments, while a public finance instrument rich with tradition and use, contain significant differences between each state’s legally authorized uses and provisions. PACE legislation, while viewed as a national movement to overcome financing barriers that have plagued the deployment of renewable and energy efficient retrofits to commercial and residential real estate, creates even more differences in this local government-financing tool between states. Beyond legal barriers, there are significant differences in the issuance of debt, administration of the PACE assessment, and other items of importance to the public finance community that will affect the feasibility of implementation in any particular state. PACE is a public financing mechanism that has been sold as elegant, uniform, and simple to deploy by local governments across the nation, but because of the truly local nature of special assessments, has layers of nuance between states that might be missed from a cursory glance describing its basic components. What works in California or Florida might not be legally possible or compatible with the state local government finance culture in North Carolina or other states. Advocates, critics, policymakers, financers, and all others interested in the future of PACE would do well to consider its heart—the special assessment in each state and local government—when considering programs and the feasibility of its continued growth.

ADAM C. PARKER
JEFFREY A. HUGHES

260 See Shelly Sigo, Florida Takes the Lead on PACE Program With the Pick of Top FAs, THE BOND BUYER, Nov. 17, 2011, available at http://www.bondbuyer.com/issues/120_222/florida-pace-fa-court-1033255-1.html (noting the comments of Florida PACE Funding Agency Chairwoman Barbara Revels, who stated “I think this is why we will be successful where others have not”).
261 See supra notes 167–168 and accompanying text.
262 See Sigo, supra note 260.
263 Id.
### Possible Units of Government
- North Carolina: Cities, Counties
- Georgia: Downtown Development Authorities
- Florida: Cities, Counties, Dependent Special Districts & Inter-local agreements

### Recourse for Delinquent Payments/Collection
- North Carolina: Special assessments are junior liens (collected later in case of default) to all other public liens (such as other real and local property taxes), except they are given equal priority against other local special assessments. Special assessments are given a higher collection priority than private debt.
- Georgia: Liens against special assessments are co-equal with other property taxes when issued by the municipality or county. However, liens due to the counties of the state are given a higher lien priority than other “special tax districts” of the state, as well as municipal corporations of the state.
- Florida: “Loans” paid via special assessment on property and secured with lien equal to county taxes and assessment. However, tax certificates are sold in FL: if a holder of a tax certificate pays the assessments and taxes for two years, the holder becomes entitled to the property.

### Available Debt Financing Instruments for PACE
- North Carolina: General Revenues, General Obligation Bonds, Revenue Bonds
- Georgia: Revenue Bonds
- Florida: General Revenues, General Obligation Bonds, Revenue Bonds

### Non-Acceleration of Liens?
- North Carolina: No—if installments are not paid on or before the due date, all remaining installments shall become due and payable unless acceleration is waived.
- Georgia: The authorizing statute does not include any additional language prohibiting acceleration of liens for PACE funding.
- Florida: Yes, there is a non-acceleration provision. There is also a provision that prevents mortgage holders from accelerating mortgage payments.

### Length of PACE Term?
- North Carolina: Thirty years maximum for the special assessment used.
- Georgia: Term is locally determined.
- Florida: Term is locally determined.

### Additional Restrictions or Provisions Beyond Other Special Assessments?
- North Carolina: Authority expires on July 1, 2015. Possible requirement that some grant funds are included in the funding of PACE improvements.
- Georgia: The authorizing statutes do not impose additional restrictions beyond historic Special Assessments for DDAs.
- Florida: Property owners must have paid property taxes and not been delinquent on these taxes over the last three years. The total assessment cannot be greater than 20 percent of the assessed value of the property. Local governments may pool resources with other local governments to finance and administer programs. Notice must be provided to mortgage holder.

### Projects Underway?
- North Carolina: As of August 2013, there are no PACE projects underway. Hillsborough has adopted the first special assessment backed bond under the new special assessment authority in North Carolina.
- Georgia: There are no apparent projects underway, although discussions occurred in Atlanta and Decatur.
- Florida: The Town of Lantana and the Town of Mangonia Park partnered to create the Florida Green Finance Authority. There are also additional organizations seeking to finance PACE in Florida, including a statewide funding agency that already has $2 billion in bonding authority.