

BILL ANALYSIS

Senate Research Center
83R5580 PAM-F

S.B. 385
By: Carona
Intergovernmental Relations
2/19/2013
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In 2009, the Texas Legislature passed H.B. 1937, which authorized contractual assessments for energy efficiency improvements to residential, commercial, industrial, or other real property, a program referred to as PACE (property assessed clean energy). This statute, found in Chapter 376 of the Local Government Code, authorizes governing bodies of municipalities to determine designated districts within the municipality where officials and property owners can enter into contracts to assess properties for energy efficiency public improvements and arrange financing through the local government.

However, current law does not include certain constitutional language necessary to enable the use of municipal funds for this purpose, which has prevented local governments from providing the requisite financing mechanism to utilize PACE. Furthermore, current law is not set up to provide guidance for securing private financing or for establishing a financing mechanism suitable for private lenders.

S.B. 385 authorizes local governments, municipalities, and counties to provide a financial payment structure enabling commercial and industrial property owners to improve their existing lots with energy or water efficient retrofits. Under this language, a property owner is required to obtain an energy audit to verify the projected energy savings to be achieved by the retrofit and then secure financing through a private institution. The loan provided by the lender is collateralized through an assessment on property taxes each year. S.B. 385 further authorizes a participating local government to impose fees to offset the costs of administering the PACE program, which can be assessed as a program application fee paid by the property owner requesting to participate in PACE or as a component of the interest rate on the assessment in the contract between the local government and the property owner. S.B. 385 makes other technical and explanatory changes in order to clarify current law.

As proposed, S.B. 385 amends current law relating to authorizing assessments for water and energy improvements in districts designated by municipalities and counties.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Transfers Chapter 376, Local Government Code, to Subtitle C, Title 12, Local Government Code, redesignates it as Chapter 399, Local Government Code, and amends it as follows:

CHAPTER 399. New heading: MUNICIPAL AND COUNTY WATER AND ENERGY
IMPROVEMENT DISTRICTS
Redesignates existing Chapter 376 as Chapter 399.

Sec. 399.001. SHORT TITLE. Redesignates existing Section 376.001 as Section 399.001. Authorizes this chapter to be cited as the Property Assessed Clean Energy Act.

Sec. 399.002. DEFINITIONS. Defines "district," "local government," "program," "qualified improvement," "qualified project," "real property," "renewable energy system," and "renewable energy technology" in this chapter.

Sec. 399.003. EXERCISE OF POWERS. Authorizes the governing body of a local government that establishes a program in accordance with the requirements provided by Section 399.008 to exercise powers granted under this chapter.

Sec. 399.004 New heading: AUTHORIZED ASSESSMENTS. Redesignates existing Section 376.001 as Section 399.004. (a) Creates this subsection from existing text. Authorizes an assessment under this chapter to be imposed to repay the financing of qualified projects on real property located in a district designated under this chapter. Deletes existing text authorizing an assessment under this chapter to finance energy efficiency public improvements to developed lots for which the costs and time delays of creating an entity under law to assess the lot would be prohibitively large relative to the cost of the energy efficiency public improvement to be financed and the installation of distributed generation renewable energy sources or energy efficiency improvements that are permanently fixed to residential, commercial, industrial, or other real property.

(b) Redesignates existing Section 376.002 as Section 399.004(b). Prohibits an assessment under this chapter from being imposed to repay the financing of, rather than from being used to finance, facilities for undeveloped lots or lots undergoing development at the time of the assessment or the purchase or installation of products or devices, rather than appliances, not permanently fixed to real property.

Sec. 399.005. New heading: WRITTEN CONTRACT FOR ASSESSMENT REQUIRED. Redesignates existing Section 376.003 as Section 399.005. Authorizes a local government to impose an assessment under this chapter only under a written contract with the record owner of the real property to be assessed, rather than authorizing a municipality to impose an assessment under this chapter only with the consent of the owner of the assessed property at the time of the assessment.

Sec. 399.006. ESTABLISHMENT OF PROGRAM. (a) Authorizes the governing body of a local government to determine that it is convenient and advantageous to establish a program under this chapter.

(b) Authorizes an authorized official of the local government that establishes a program to enter into a written contract with a record owner of real property in a district designated under this chapter to impose an assessment to repay the owner's financing of a qualified project on the owner's property. Authorizes the financing to be repaid through assessments to be provided by a third party or, if authorized by the program, by the local government.

(c) Requires the authorized official of the local government that enters into a written contract with a property owner under Subsection (b), if the program provides for third-party financing, to also enter into a written contract with the party that provides financing for a qualified project under the program to service the debt through assessments.

(d) Requires that the written contract described by Subsection (b), if the program provides for local government financing, be a contract to finance the qualified project through assessments.

(e) Authorizes an assessment imposed under this chapter to include the cost of program application and administrative fees. Authorizes the financing for which assessments are imposed to include the cost of materials and labor necessary for installation or modification of a qualified improvement or installation or improvement of a renewable energy system; permit fees; inspection fees; lender's fees; water or energy review and verification review fees; and any other fees or

costs that may be incurred by the property owner incident to the installation, modification, or improvement on a specific or pro rata basis, as determined by the local government.

Sec. 399.007. New heading: DESIGNATION OF DISTRICT. Redesignates existing Section 376.004 as Section 399.007. (a) Creates this subsection from existing text. Authorizes the governing body of a local government to determine that it is convenient and advantageous to designate an area of the local government as a district within which authorized local government officials and record property owners of real property are authorized to enter into written contracts to impose assessments to repay the financing by owners of qualified projects on the owners' property and, if authorized by the local government program, finance the qualified project, rather than authorizing the governing body of a municipality to determine that it is convenient, advantageous, and in the public interest to designate an area of the municipality within which authorized municipal officials and property owners are authorized to enter into contracts to assess properties to finance the installation of distributed generation renewable energy sources or energy efficiency improvements that are permanently fixed to real property.

Deletes text of existing Subsection (a) authorizing the governing body of a municipality to determine that it is convenient and advantageous to designate an area of the municipality within which authorized municipal officials and property owners may enter into contracts to assess properties for energy efficiency public improvements described by Section 376.001(1) (relating to energy efficiency public improvements to developed lots) and make financing arrangements under this chapter.

(b) Creates this subsection from existing text. Provides that an area designated as a district by the governing body of a local government, rather than a municipality, under this section:

(1) is authorized to include the entire local government; and

(2) is required to be located wholly within the local government's jurisdiction. Makes a conforming change.

(c) Authorizes the municipality's extraterritorial jurisdiction, for purposes of determining a municipality's jurisdiction under Subsection (b)(2), to be included.

(d) Authorizes a local government to designate more than one district. Authorizes the districts, if multiple districts are designated, to be separate, overlapping, or coterminous.

Sec. 399.008. New heading: PROCEDURE FOR ESTABLISHMENT OF PROGRAM. Redesignates existing Section 376.005 as Section 399.008. (a) Requires the governing body of a local government, to establish a program under this chapter, to take the following actions in the following order:

(1) adopt a resolution of intent that includes:

(A) a finding that, if appropriate, financing qualified projects through contractual assessments is a valid public purpose;

(B) a statement that the local government intends to make contractual assessments to repay financing for qualified projects available to property owners;

(C) a description of the types of qualified projects that may be subject to contractual assessments;

(D) a description of the boundaries of the district;

(E) a description of any proposed arrangements for third-party financing to be available or any local government financing to be provided for qualified projects;

(F) a description of local government debt servicing procedures if third-party financing will be provided and assessments will be collected to service a third-party debt;

(G) a reference to the report on the proposed program prepared as provided by Section 399.009 and a statement identifying the location where the report is available for public inspection;

(H) a statement of the time and place for a public hearing on the proposed program; and

(I) a statement identifying the appropriate local official and the appropriate assessor-collector for purposes of consulting regarding collecting the proposed contractual assessments with property taxes imposed on the assessed property;

(2) hold a public hearing at which the public may comment on the proposed program including the report required by Section 399.009; and

(3) adopt a resolution establishing the program and the terms of the program, including:

(A) each item included in the report under Section 399.009; and

(B) a description of each aspect of the program that may be amended only after another public hearing is held

Deletes existing text requiring the governing body of a municipality, to make a determination under Section 376.004 (Designation of Area for Assessment), to adopt a resolution indicating the governing body's intention to designate an area for assessment. Deletes existing Subsection (b) setting forth the information required to be included in the resolution of intention. Deletes existing Subsection (c) requiring that the resolution of intention state that it is in the public interest to finance the installation of distributed generation renewable energy sources or energy efficiency improvements that are permanently fixed to real property if contractual assessments are to be used. Deletes existing Subsection (d) requiring that the resolution direct an appropriate municipal official to fulfill certain tasks.

(b) Authorizes the resolution, for purposes of Subsection (a)(3)(A), to incorporate the report or the amended version of the report, as appropriate, by reference.

(c) Authorizes the governing body of a local government, subject to the terms of the resolution establishing the program as referenced by Subsection (a)(3)(B), to amend a program by resolution.

(d) Authorizes a local government to hire and set the compensation of a program administrator or contract for professional services necessary to administer a program.

(e) Authorizes a local government to impose fees to offset the costs of administering a program. Authorizes the fees authorized by this subsection to be assessed as:

(1) a program application fee paid by the property owner requesting to participate in the program;

(2) a component of the interest rate on the assessment in the written contract between the local government and the property owner; or

(3) a combination of Subdivisions (1) and (2).

Sec. 399.009. REPORT REGARDING ASSESSMENT. Redesignates existing Section 376.006 as Section 399.009. (a) Creates this subsection from existing text. Requires that a report for a proposed program required by Section 399.008 include:

(1) a map showing the boundaries of the proposed district;

(2) a form, rather than a draft, contract between the local government and the property owner specifying the terms of:

(A) assessment under the program; and

(B) financing provided by a third party or the local government, as appropriate;

(3) if the proposed program provides for third-party financing, a form contract between the local government and the third party regarding the servicing of the debt through assessments;

(4) a description of types of qualified projects that may be subject to contractual assessments;

(5) a statement identifying a local government official authorized to enter into written contracts on behalf of the local government;

(6) a plan for ensuring sufficient capital for third-party financing and, if appropriate, raising capital for local government financing for qualified projects;

(7) if bonds will be issued to provide capital to finance qualified projects as part of the program as provided by Section 399.015:

(A) a maximum aggregate annual dollar amount for financing through contractual assessments to be provided by the local government under the program;

(B) a method for ranking requests from property owners for financing through contractual assessments in priority order if requests appear likely to exceed the authorization amount; and

(C) a method for determining the interest rate and period during which contracting owners would pay an assessment and the maximum amount of an assessment;

(8) a method for ensuring that the period of the contractual assessment does not exceed the useful life of the qualified project that is the basis for the assessment;

(9) a description of the application process and eligibility requirements for financing qualified projects to be repaid through contractual assessments under the program;

(10) a method as prescribed by Subsection (b) for ensuring that property owners requesting to participate in the program demonstrate the financial ability to fulfill financial obligations to be repaid through contractual assessments;

- (11) a statement explaining the manner in which property will be assessed and assessments will be collected;
- (12) a statement explaining the lender notice requirement provided by Section 399.010;
- (13) a statement explaining the water and energy review requirement provided by Section 399.011;
- (14) a description of marketing and participant education services to be provided for the program;
- (15) a description of quality assurance and antifraud measures to be instituted for the program; and
- (16) the results of the consultations with the appropriate assessor-collector concerning incorporating the proposed contractual assessments into the assessments of property taxes.

Deletes existing text requiring an appropriate municipal official designated in the resolution to prepare a report containing a map showing the boundaries of the area within which contractual assessments are proposed to be offered; a draft contract specifying the terms that would be agreed to by the municipality and a property owner within the contractual assessment area; a statement of municipal policies concerning contractual assessments including identification of types of energy efficiency public improvements, distributed generation renewable energy sources, or energy efficiency improvements that may be financed through the use of contractual assessments; identification of a municipal official authorized to enter into contractual assessments on behalf of the municipality; a maximum aggregate dollar amount of contractual assessments; a method for ensuring that property owners requesting financing demonstrate the financial ability to fulfill financial obligations under the contractual assessments; a plan for raising a capital amount required to pay for work performed in accordance with contractual assessments that may include amounts to be advanced by the municipality through funds available to it from any source and the sale of bonds or other financing, shall include a statement of or method for determining the interest rate and period during which contracting property owners would pay any assessment and shall provide for the apportionment of all or any portion of the costs incidental to financing, administration, and collection of the contractual assessment program among the consenting property owners and the municipality; and the results of the consultations with the appropriate appraisal districts concerning incorporating the proposed contractual assessments into the assessments of property taxes.

(b) Requires that the method for ensuring a demonstration of financial ability under Subsection (a)(10) be based on appropriate underwriting factors, including:

(1) providing for verification that:

(A) the property owner requesting to participate under the program is the legal owner of the benefitted property, is current on mortgage and property tax payments, and is not insolvent or in bankruptcy proceedings; and

(B) the title of the benefitted property is not in dispute; and

(2) requiring an appropriate ratio of the amount of the assessment to the assessed value of the property.

(c) Requires the local government to make the report available for public inspection on the local government's Internet website and at the office of the official designated to enter into written contracts on behalf of the local government under the program.

Sec. 399.010. NOTICE TO MORTGAGE HOLDER REQUIRED FOR PARTICIPATION. (a) Defines "commercial or industrial property" in this section.

(b) Requires that before a local government is authorized to enter into a written contract with a record owner of real property to impose an assessment to repay the financing of a qualified project under this chapter:

(1) the holder of any mortgage lien on the property be given written notice of the owner's intention to participate in a program under this chapter on or before the 30th day before the date the written contract for assessment between the owner and the local government is executed; and

(2) if the property is commercial or industrial property, a written consent from the holder of the mortgage lien on the property be obtained.

Sec. 399.011. REVIEW REQUIRED. (a) Requires that a program established under this chapter require a baseline water or energy review to be conducted for each proposed qualified project to establish future water or energy savings.

(b) Requires a local government, after a qualified project is completed, to obtain verification that the qualified project was properly completed and is operating as intended.

(c) Requires that a baseline water or energy review or verification review under this section for commercial or industrial property, as defined by Section 399.110, be conducted by an independent third party.

Sec. 399.012. New heading: DIRECT ACQUISITION BY OWNER. Redesignates existing Section 376.007 as Section 399.012. Authorizes the proposed arrangements for financing a qualified project to authorize a property owner to purchase directly the related equipment and materials for the installation or modification of a qualified improvement or the installation or modification of a renewable energy system and contract directly, including through lease, power purchase agreement, or other service contract, for the installation or modification of a qualified improvement or the installation or modification of a renewable energy system. Deletes existing text authorizing, on the written consent of an authorized municipal official, the proposed arrangements for financing the program pertaining to the installation of distributed generation renewable energy sources or energy efficiency improvements that are permanently fixed to real property to authorize a property owner to purchase directly the related equipment and materials for the installation of the distributed generation renewable energy sources of energy efficiency improvements and contract directly for the installation of the distributed generation renewable energy sources or energy efficiency improvements.

Sec. 399.013. LIEN. Redesignates existing Section 376.008 as Section 399.013. (a) Creates this subsection from existing text. Provides that a contractual assessment under this chapter and any interest or penalties on the assessment is a first and prior lien against the real property on which the assessment is imposed until the assessment, interest, or penalty is paid and has the same priority status as a lien for any other ad valorem tax, rather than providing that an assessment imposed under this chapter and any interest on or penalties on the assessment constitutes a lien against the lot on which the assessment is imposed until the assessment, interest, or penalty is paid.

(b) Provides that the lien runs with the land, and that portion of the assessment under the assessment contract that has not yet become due is not eliminated by foreclosure of a property tax lien.

(c) Authorizes the assessment lien to be enforced by the local government in the same manner that a property tax lien against real property is authorized to be enforced by the local government to the extent the enforcement is consistent with Section 50 (Homestead; Protection from Forced Sale; Mortgages, Trust Deeds, and Liens), Article XVI, Texas Constitution.

(d) Provides that delinquent installments of the assessments incur interest and penalties in the same manner as delinquent property taxes.

(e) Authorizes a local government to recover costs and expenses, including attorney's fees, in a suit to collect a delinquent installment of an assessment in the same manner as in a suit to collect a delinquent property tax.

Sec. 399.014. COLLECTION OF ASSESSMENTS. Authorizes the governing body of a local government to contract with the governing body of another taxing unit, as defined by Section 1.04 (Definitions), Tax Code, or another entity, including a county assessor-collector, to perform the duties of the local government relating to collection of assessments imposed by the local government under this chapter.

Sec. 399.015. BONDS OR NOTES. (a) Authorizes a local government to issue bonds or notes to finance qualified projects through contractual assessments under this chapter.

(b) Prohibits bonds or notes issued under this section from being general obligations of the local government. Requires that the bonds or notes be secured by one or more of the following as provided by the governing body of the local government in the resolution or ordinance approving the bonds or notes:

(1) payments of contractual assessments on benefited property in one or more specified districts designated under this chapter;

(2) reserves established by the local government from grants, bonds, or net proceeds or other lawfully available funds;

(3) municipal bond insurance, lines of credit, public or private guaranties, standby bond purchase agreements, collateral assignments, mortgages, or any other available means of providing credit support or liquidity;

(4) tax increment revenues that are lawfully available for purposes consistent with this chapter; and

(5) any other funds lawfully available for purposes consistent with this chapter.

(c) Provides that a local government pledge of assessments, funds, or contractual rights in connection with the issuance of bonds or notes by the local government under this chapter is a first lien on the assessments, funds, or contractual rights pledged in favor of the person to whom the pledge is given, without further action by the local government. Provides that the lien is valid and binding against any other person, with or without notice.

(d) Provides that bonds or notes issued under this chapter further an essential public and governmental purpose, including:

(1) improvement of the reliability of the state electrical system;

(2) conservation of state water resources consistent with the state water plan;

(3) reduction of energy costs;

- (4) economic stimulation and development;
- (5) enhancement of property values;
- (6) enhancement of employment opportunities; and
- (7) reduction in greenhouse gas emissions.

Sec. 399.016. JOINT IMPLEMENTATION. (a) Authorizes any combination of local governments to agree to jointly implement or administer a program under this chapter.

(b) Provides that if two or more local governments implement a program jointly, a single public hearing held jointly by the cooperating local governments is sufficient to satisfy the requirement of Section 399.008(a)(2).

(c) Authorizes one or more local governments to contract with a third party, including another local government, to administer a program.

SECTION 2. Provides that the changes in law made by this Act apply only to a program established under Chapter 399, Local Government Code, as transferred, redesignated, and amended by this Act, on or after the effective date of this Act. Provides that a program established under Chapter 376, Local Government Code, before the effective date of this Act, is governed by the law in effect on the date the program was established, and the former law is continued in effect for that purpose.

SECTION 3. Effective date: upon passage or September 1, 2013.