Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

One Market
Spear Street Tower, Suite 3300
San Francisco, CA 94105-1126
PHONE 415.947.2000
FAX 415.947.2099
www.wsgr.com

To: Claudia Eyzaguirre & Adam Browning, Vote Solar

From: Sheridan Pauker, Wilson Sonsini Goodrich & Rosati

Date: August 22, 2008

Re: **Authority to Implement Policies Similar to Berkeley-FIRST in Key States**

I. Research Methodology and Key Highlights

We are pleased to present the results of our research on mechanisms for implementing a program similar to "Berkeley FIRST" in key states identified by Vote Solar. Our team researched the authority of local governments or specially-established districts in such states to tax or collect assessments against private real property as a means of repaying loans made to individuals for the financing of home solar or energy efficiency improvements.

Specifically, for each key state, we examined: 1) the legal authority for such special taxing or assessment mechanisms; 2) the method of establishing such programs; 3) whether assessments made pursuant to such programs can be used to finance improvements to private residences, such as solar and energy efficiency improvements; and 4) whether individuals can "opt-in" to such programs, even if not residing in geographically-contiguous areas. Note that our research did not fully tackle the secondary question of whether in states in which such taxing authority exists, local governments have the authority to issue bonds to fund private home solar and energy efficiency improvements. Where bond-related information was gathered for the priority states, however, we've provided this information. Also note that for some states, we were unable to identify specific taxing authority, but have provided all of the relevant information we obtained. Where we learned of local organizations that could be allies in Vote Solar's efforts to establish such programs, contact information was included.

Among the key states we examined, the most fruitful for establishment of Berkeley FIRST-type policies is Colorado, where the state legislature passed a bill in May of 2008 to authorize the creation of special improvement districts that could provide similar renewable energy financing. In addition, such authority potentially could be established under existing law in Michigan. For the states of Arizona, Florida, Hawai'i, Nevada, New Jersey, New Mexico, New York, Oregon, Texas, and Washington, we conclude that such financing mechanisms could be established by amendment to existing state law. Specific detail on the key states is provided below.

It's been a pleasure to contribute to Vote Solar's efforts in this project. I want to thank our team of summer associates, Steve Fisher, Seth Helfgott, Mary Russell, Matt Sieving, and Henry Stern, for their research assistance and contributions to this memo. Please let me know if I can be of any further assistance.

II. Tax/Assessment Authority for Vote Solar Priority States

(a) Arizona

(i) Source of Authority

In Arizona, Special Taxing Districts may be created to finance the construction or operation of certain infrastructure or public works projects via taxation of the subset of the general population served by those projects. General obligation bonds used to raise funds for such projects are secured by taxes levied against the real property located within the Special Taxing District benefited thereby.[1]

Special Taxing Districts are statutorily authorized for an enumerated list of purposes.[2] This list does not currently provide for the creation of a District to facilitate the construction of distributed solar generation. Although Arizona's Special Taxing District statutes do contain some references to power generation, these are limited to Districts created for agricultural development and are specifically targeted towards providing power for irrigation.[3] Vote Solar could propose an amendment to the existing Special Taxing District statutes to provide similar authorization for the development of solar generation.

(ii) Method of Establishment

[1] *See, e.g.*, ARIZ. REV. STAT. ANN. § 48-631.
[2] ARIZ. REV. STAT. ANN. § 48-101 et seq.
[3] *See, e.g.*, ARIZ. REV. STAT. ANN. § 48-1502.

Special Taxing Districts are proposed by local government board resolution or via petition, depending on Special Taxing District's authorized purpose,[4] and adopted by vote of the residents of the area affected. The requirements for public citizen proposals vary by the District's purpose: Power Districts for irrigation require a petition by five or more landowners desiring the District's organization, while Hospital, Sanitary and Fire Districts need only be proposed by a single adult.[5]

For all but a subset of proposed Districts, once a petition has been made, the county board of supervisors "has the absolute authority to deny the formation . . . of a special district in that county, if sufficient grounds exist for such formation denial."[6] In Districts for which the board's denial authority is not absolute, if the board determines that the proposed District is "necessary and feasible," it must hold a hearing on the proposed District, after which the proposal is put to a majority vote before all qualified voters who own land within the proposed District's boundaries.[7]

(iii) Private Beneficiaries

Arizona appears to contemplate that some Special Taxing Districts will have private beneficiaries, although there is no explicit statutory authorization to that effect. The authorizing statutes for Municipal Improvement Districts, for instance, allow municipalities to assess liens against only the properties benefiting from the District's work, implying that Districts may operate such that only a subset of the properties within the municipality actually benefit from their work.[8] The Arizona courts have not litigated this issue, however, so it is unclear if private beneficiaries are permitted or disallowed by the statutes.

(iv) Existence of Opt-in Feature

The majority of authorized Special Taxing Districts must be created with contiguous boundaries, except in narrow exceptions. The authorizing statute for Fire, Sanitary and Hospital Districts, for example, specifically requires that the boundary of the Districts be contiguous.[9] Similarly, the boundaries of Irrigation and Water Control Districts must be contiguous and may only be enlarged to include lands adjacent to the existing District lands.[10]

---

[4] County Television Improvement Districts are proposed via resolution by the county board of supervisors, ARIZ. REV. STAT. ANN. § 48-1102; Power Districts organized for irrigation purposes are proposed via a petition by five or more owners of agricultural lands subject to cultivation, ARIZ. REV. STAT. ANN. § 48-1501.
[5] ARIZ. REV. STAT. ANN. § 48-1502; *id.* at § 48-261.
[6] ARIZ. REV. STAT. ANN. § 48-271. Districts for which the board's authority is curtailed include Municipal Improvement Districts, Power Districts (for irrigation purposes), Electrical Districts, Agricultural Improvement Districts, Drainage and Flood Protection Districts, Irrigation and Water Conservation Districts, and Multi-County Water Conservation Districts.
[7] ARIZ. REV. STAT. ANN. §§ 48-2605 – 2611.
[8] ARIZ. REV. STAT. ANN. § 48-631.
[9] ARIZ. REV. STAT. ANN. § 48-261.
[10] ARIZ. REV. STAT. ANN. § 48-2941.

In contrast, Community Facilities Districts appear to allow non-contiguous boundaries, as the authorizing statutes do not specifically require their boundaries to be contiguous. Rather, the statute provides for changes to the boundaries of a Community Facilities District via resolution by the District's governing board without reference to the geographic location.[11] Similarly, Power Districts organized for the purposes of irrigation appear to allow individual land owners to opt-in to the district via petition, as the statute does not contain a requirement that the lands to be added be adjacent to the existing boundaries or otherwise reference a contiguous area.[12] Once a petition for organization is filed, "[a]ny person whose lands are susceptible to cultivation by the same system of works may . . . have his lands included within the proposed district."[13]

(v) Bond Authority

Most of the authorized Districts allow for the issuance of some form of bond, and many provide for the levy of taxes as well. The procedural requirements for issuing bonds vary by the Districts' purpose and the type of bonds contemplated. Generally, Districts require a majority approval at a vote of the owners of lands within the District to issue general obligation bonds, but the Districts' governing boards may of their own volition issue Revenue Bonds.[14] General obligation bonds are secured by taxes levied against the real property located within the District benefited thereby.[15]

In some cases, Districts may also levy taxes on the property within the District independently of any bond issuance. Irrigation Water Districts, for example, provide that the District may levy taxes on the properties contained within the District proportional to each property's acreage.[16]

(vi) Miscellaneous

The Arizona legislature generally appears to favor increased renewable electricity generation within the state, and is amenable to tasking local and municipal governments with implementing this policy. Municipalities are directed to generate long-range general plans that include consideration of access to solar energy for all categories of land use, and cities of over 50,000 persons are required to identify policies that "provide for greater uses of renewable energy sources."[17]

(b) Colorado

(i) Source of Authority

[11] ARIZ. REV. STAT. ANN. 48-714.
[12] ARIZ. REV. STAT. ANN. § 48-1517.
[13] *Id.*
[14] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 48-2442, 48-2464.
[15] *See, e.g.*, ARIZ. REV. STAT. ANN. § 48-631.
[16] ARIZ. REV. STAT. ANN. § 48-3473.
[17] ARIZ. REV. STAT. ANN. §9-461.05.

On May 27, 2008, Colorado Governor Bill Ritter, Jr. signed into law House-Bill 1350,[18] which granted counties and other local governments the ability to provide below-market financing for the installation of renewable energy systems. While similar to the Berkeley FIRST plan,[19] House Bill 1350 provides financing for a variety of renewable energy systems and is not limited to solar products. Specifically, House Bill 1350 allows for the creation of "opt-in" special energy districts known as Local Improvement Districts ("LIDs"). Property owners that choose to opt-in will agree to repay the cost of the installations or improvements over a 15 or 20 year period. The assessment levied becomes part of the property's annual tax bill and will remain with the property, not the owner, thus eliminating the concern that the property's resale price will not cover the cost of the energy improvements.[20] Failure to repay monies owed creates a lien on the property.

(ii) Method of Establishment

Section 5 of House Bill 1350 authorizes the Board of County Commissioners to create LID districts.[21] Section 22 of House Bill 1350 permits governing bodies of municipalities to create such districts if the municipality's home rule charter permits it to act in such a manner.[22]

(iii) Private Beneficiaries

Section 4 of House Bill 1350 would permit private renewable energy systems and energy efficiency installations to be the beneficiaries of the program.[23]

(iv) Existence of Opt-in Feature

LIDs authorized by House Bill 1350 feature a voluntary "opt-in" component. Only property owners that elect to utilize the funding available through LID-based financing are responsible for repayments necessary to cover the costs of the renewable energy installations and energy efficiency improvements. No property owner will unwillingly be a member of a renewable energy LID, and properties in a LID need not be contiguous.[24]

---

[18] Colo. H.R. 1350, 66th Leg., (Colo. 2008) *available at* http://www.leg.state.co.us/clics/clics2008a/csl.nsf/fsbillcont/E62A0C34C01772C9872573D000830B58?Open&file=1350_01.pdf

[19] The creators of House Bill 1350 were in contact with the City of Berkeley during this process. Richard Valenty, *Energy Bills, Boulder Flavor Going Solar*,, COLORADO DAILY, May 27, 2008, *available at* http://www.coloradodaily.com/news/2008/may/27/solar-new-incentives-to-build-energy-bills-gov/.

[20] COLO. REV. STAT. § 29-3-103 (2008).

[21] COLO. REV. STAT. § 30-11-107 (2008).

[22] COLO. REV. STAT. § 31-25-502 (2008).

[23] COLO. REV. STAT. § 29-3-103 (2008).

[24] Colo. H.R. 1350, 66th Leg., (Colo. 2008). Should the property rights of a renewable energy LID parcel be transferred, the property's new owner remains responsible for the assessments on the property.

(v) Bond Authority

Section 4 of House Bill 1350 permits county, city, and town governments to utilize some or all of the federal-authority to issue bonds for private renewable energy systems and energy efficiency installations, as defined by House Bill 1350.[25]

(vi) Miscellaneous

Sections 5 and 19 of House Bill 1350 authorize local governments to dedicate funds from their annual budgets in support of renewable energy programs as defined by House Bill 1350. Such monies would be used to fund oversight of House Bill 1350 programs and provide bridge financing as needed to the renewable energy programs.[26]

(vii) Recommendations for State Action

Colorado has made excellent headway on the issue of public bonds financing private renewable energy improvements. Several governments, most notably Boulder (Boulder County) and Denver (Denver County), were involved in House Bill 1350's creation and will likely be at the forefront of House Bill 1350's implementation in Colorado.[27] Vote Solar can now urge other Colorado local governments to establish LIDs.

(c) District of Columbia

The District of Columbia's Single Family Residential Rehabilitation Program ("SFRRP") provides loans to low-income homeowners for home repairs.[28] The SFRRP is funded by the Department of Housing and Community Development. The homeowner repays the city government on a bill that is separate from the tax bill. These loans are limited to home improvements that repair roofs, address building code violations, remove threats to health and safety, and remove barriers to accessibility for the handicapped. They do not, as yet, cover solar installations, and the loans are limited based on household income. Vote Solar could advocate for a similar program that would provide homeowners with loans to install solar or energy efficiency improvements using a similar mechanism.

(d) Florida

[25] *Id.* Federal law currently permits state and local governments to issue lower-cost bonds to finance renewable energy and/or efficiency programs. House Bill 1350 adds the renewable energy language into Colorado law, which previously had never specifically authorized the use of bonds to fund private activity renewable energy and efficiency projects. Renewable Energy and Job Creation Act of 2008, Colo. H.R. 6049, 110th Cong. (2008).

[26] COLO. REV. STAT. §§ 30-11-107, 31-15-711 (1) (2008).

[27] Valenty, *supra* note 18.

[28] District of Columbia Housing and Community Development, *Fact Sheet on the Single Family Residential Rehabilitation Program*, *available at* http://dhcd.dc.gov/dhcd/cwp/view,a,11,q,635127.asp.

(i) Source of Authority

The Florida State Legislature has provided for several funding mechanisms that enable communities to finance capital-intensive projects or services that benefit entire communities or subsets thereof. Most prevalent is the special district – a form of local government that is authorized under Chapter 189 of the Florida Statutes to serve as "an alternative method to manage, own, operate, construct, and finance basic capital infrastructure, facilities and services."[29]

Once created, special districts generally have authority to levy ad valorem taxes or special assessments and to issue bonds. First, under the Florida State Constitution, special districts may be authorized by law to levy ad valorem taxes or other taxes, which may then become liens against a homestead.[30] Further, the Florida State Legislature has authorized "local governments" to impose special or non-ad valorem assessments against property owners for special benefits, where "local government" is defined to include special districts.[31] Like ad valorem taxes, special or non-ad valorem assessments may also become liens against a homestead if unpaid by a property owner.[32]

(ii) Method of Establishment

Special districts are classified as either dependent or independent, a distinction that is based on the control (or lack thereof) over the special district by a county or municipal governing body.[33] A dependent special district is typically created by the governing body of a single county or municipality, which then either appoints or serves as the governing body of the special district.[34] By contrast, an independent special district

[29] FLA. STAT. § 189.402(5). Although the Florida Constitution has never specifically authorized the creation of special districts, courts have not interpreted this silence as limiting the Legislature's authority to create special districts. *See*, David M. Hudson, *Special Taxing Districts in Florida*, 10 FLA. ST. U. L. REV. 49, 56, 1982.
In addition to special districts, county governments are also authorized under Chapter 125.01(q) of the Florida Statutes to create municipal service benefit units (MSBU) or municipal services taxing units (MSTU) to provide specific municipal services or benefits for defined areas within the unincorporated area of a county. Fl. Stat. § 125.01(q). Specific services that may be funded through MSBU or MSTU include fire protection, law enforcement, and "other essential facilities and municipal services."

[30] FL. CONST. art. VII, § 9(a).

[31] FLA. STAT. §§ 197.3632(3) and (1)(b).

[32] *See, Stein v. City of Miami Beach*, 250 So. 2d 289 (Fla. 3d DCA 1971).

[33] FLA. STAT. § 189.403(2)-(3).

[34] FLA. STAT. §§ 189.403(2)-(3) (authorizing counties and municipalities to create special districts). Dependent special districts may also be created by special acts of the Florida State Legislature or rule issuances by the Florida Governor or Cabinet. *See*, Florida Division of Housing and Community Development, Florida Special District Handbook, Section 1-4, *available at* http://www.floridaspecialdistricts.org/.

is usually created by an act of the Florida State Legislature, and the local county or municipality may have limited governing authority.[35]

A residential solar district would ideally be established and administered by a county or municipal ordinance as a dependent special district – a "residential solar district" – as opposed to an independent special district which would require an act of the State Legislature or rule issuance by the Governor and/or Cabinet. The residential solar district would fund the upfront cost of residential solar installations for participating property owners who would then be charged a periodic special assessment based on the value of the solar installation.

(iii) Private Beneficiaries

Although counties and municipalities have broad authority under Florida Statutes to create special districts, this authority is limited by a general rule that requires a special district to serve a public purpose.[36] Whether a special district serves a public purpose is a matter that has been frequently settled in the Florida courts, which have typically deferred to the Legislature.[37] Florida courts have held that special districts established to finance waterways, seawalls and public recreation areas served a public purpose but have not examined whether improvements on private residential property would be considered to serve a public purpose.[38]

Since World War II, special districts in Florida have increasingly been used to fund less traditional projects such as supporting the arts, community beautification, sports authorities and economic development. Space Florida, for example, promotes the Florida space industry, and the Tampa Sports Authority, was created for the purpose of "planning, developing, and maintaining a comprehensive complex of sports and recreational facilities for the Tampa Bay Area."[39] Accordingly, Vote Solar could argue that a special district created for the purpose of financing residential solar installations serves a public purpose by reducing the use of polluting non-renewable sources of energy.

(iv) Existence of Opt-in Feature

A special district typically contemplates a benefit that is shared among property owners within a contiguous geographic area, and the boundaries of a special district are established to include all property

[35] FLA. STAT. §§ 189.403(3), 189.404(4). Counties and municipalities may create independent special districts in limited circumstances. For example, both counties and municipalities may create special community development districts pursuant to Chapter 190 of the Florida Statutes. FLA. STAT. § 189.404(4)(a)-(b).
[36] *See* Hudson, *supra*, note 29, at 58.
[37] *Id*. at 56-7 (citing three separate Florida court decisions regarding whether a special district served a private as opposed to a public purpose and noting that, as of 1982, only one special district, created for the purpose of removing stumps from agricultural lands, has been judicially determined to not serve a public purpose.)
[38] *See, e.g*., *Hunter v. Owens*, 86 So. 839 (Fla. 1920; *State ex rel. Davis v. Ryan*, 151 So. 416 (Fla. 1933); *State v. Sunrise Lakes Phase II Special Recreation Dist*., 383 So. 2d 1017 (5th Cir. 1926).
[39] *See*, www.tampasportsauthority.com/tsa/facts.htm.

owners benefiting from the special district.[40] However, nothing precludes the formation of a non-contiguous special district comprised only of those property owners that seek the benefits of the special district. In fact, the geographic boundaries of Space Florida – an independent special district created by the Florida Legislature to "foster the growth and development of a sustainable and world-leading aerospace industry"[41] – may be expanded or contracted upon written consent by owners of all land to be included or excluded.[42] This type of "opt-in" feature could be also applied to a residential solar district, whereby property owners would only be included in the residential solar district if they provided written consent.

(v) Bond Authority

Under Article 10, Section 12 of the Florida State Constitution, a special district may issue bonds payable from taxes or other assessments.[43] Typically a special district must gain majority approval from those owning property within the special district before issuing a bond.[44] Debt service on the bonds is provided by collecting either taxes, assessments, or, in limited cases, user fees.[45] Because taxes may not be levied without an act of the Legislature, whether the charge is considered a tax as opposed to an assessment or user fee is an important distinction.

(e) Hawai'i

(i) Source of Authority

Article VIII, Section 1 of the Hawai'i Constitution provides authority to the state legislature to create political subdivisions which may be delegated the authority to levy taxes.[46] In addition, under the Hawai'i Revised Statutes, counties[47] may create "special improvement districts" or "community facilities districts" as well as issue bonds and collect special taxes on property located within the district.[48]

(ii) Method of Establishment

Special improvement districts are established by county governments, and each county in Hawai'i – Honolulu, Hawai'i, Kauai and Maui[49] – has adopted its own rules and procedures for establishing special

[40] The boundaries of the special district are created in the enabling ordinance and can only be changed by an additional ordinance. FLA. STAT. §189.4041(b).
[41] FLA. STAT § 331.302(1).
[42] FLA. STAT § 331.329.
[43] FLA. CONST. art VII, §12.
[44] *See* Florida Division of Housing and Community Development, *supra* note 34.
[45] FLA. CONST. art. VII, § 11; art. X, § 4.
[46] HAW. CONST. art. VIII, §§1,3.
[47] Note that Hawai'i has no municipal governments, so the primary authority for local governmental issues lies at the county level.
[48] HAW. REV. STAT. §§ 46-80, 46-80.1.
[49] An additional county, Kalawao County, has no governmental functions.

improvement districts. In Hawai'i County, for example, special improvement districts are established under Chapter 32 of the Hawai'i County Code,[50] whereas in Honolulu County, Chapter 36 of the Revised Ordinances of Honolulu 1990 governs.[51] In general, the procedure for establishing a special improvement district begins with a petition by the property owners who would benefit from the special district.[52] Alternatively, a county may government may begin the procedure on its own initiative. The petition is then followed by a public hearing and a referendum on creation of the special district.

(iii) Private Beneficiaries

In general, a special improvement district must be found in the "public interest" before being approved by a county council.[53] Although the special improvement district must serve the public interest, the actual property funded through a special district may be privately owned. For example, under the Hawai'i County Code, special improvements may be privately owned if the county council determines that they serve a public purpose.[54] Whether a special improvement district might be used to finance residential solar installation also depends on whether the county code is restrictive in the types of activities that can be financed using special improvement districts. For example, the Hawai'i County Code lists specific projects, including streets, roads, highways, and parks that may be financed using special improvement districts.[55] None of the listed projects in Hawai'i, Honolulu, or Maui[56] counties could reasonably be construed to include a residential solar installation program.[57] However, the county codes of Hawai'i and Honolulu clearly contemplate the use of special improvement districts for financing projects other than those specifically listed in the code.[58] By comparison, whether the Maui County Code contemplates special improvement district financing for projects aside from those listed in the ordinance is largely a matter of ordinance interpretation.[59] Accordingly, the formation of a special improvement district for financing a residential solar installation program in Hawai'i County or Honolulu County would not be limited by the county codes, whereas a similar

---

[50] HAW. COUNTY CODE, § 32.
[51] HONOLULU REV. ORDINANCES, Ch. 36 Special Improvement Districts (1990).
[52] *See*, Revised Ordinances of Honolulu § 36-2.1; HAW. COUNTY CODE § 32-18.
[53] *See* HAW. COUNTY CODE § 32-18(b).
[54] *Id*. at § 32-7.

[55] *See* HAW. COUNTY CODE § 32-7. ("Examples of special improvements which may be financed through a special district include, but are not limited to, the following: [roads, parks, sewerage systems, etc.]").

[56] The Kaua'i County Code was unavailable at the time of this writing.
[57] *See, e.g.*, HAW. COUNTY CODE, § 32.7; MAUI COUNTY CODE, § 14.38.010; HONOLULU COUNTY CODE, § 34-1.5; KAUA'I COUNTY CODE was unavailable from online sources.
[58] See, e.g., HAW. COUNTY CODE, § 32.7 ("Examples of special improvements which may be financed by a district include, but are not limited to, the following: [roads, water systems, etc.]); HONOLULU COUNTY CODE, § 34-1.5 ("Special improvements which may be financed by a district include, but are not limited to, the following: [roads, water systems, etc.]").
[59] *See*, MAUI COUNTY CODE, § 14.38.010 ("Any one or more of the following may be included in any proceedings pursuant to this article: [roads, water systems, etc.]"). It is reasonable to interpret this section as not excluding projects other than those listed.

initiative in Maui County would require either an interpreting the code such that special district financing is available for projects not listed by the ordinance, or, alternatively, a change to the ordinance to allow special district financing for residential solar installations.

(iv) Existence of Opt-in Feature

The Hawai'i Revised Statutes do not prevent special improvement districts from being defined as a non-contiguous collection of individual property owners. In addition, Hawai'i county governments do not generally require properties within a special improvement district to be contiguous.[60] As such, it is conceivable that a special district could be comprised entirely of property owners desiring a benefit provided by a special district, who would "opt-in" to the district.

(v) Bond Authority

Counties have legislative authority to issue and sell bonds to finance special improvement districts.[61] Bond issuance and sale procedures are further governed by individual county governments.[62]

(f) Massachusetts

Communities in Massachusetts can levy assessments for improvements (known as "betterments") that benefit individual property owners.[63] Betterments are established via local government vote. However, a key hurdle in establishing a Berkeley-FIRST-type program under this statute is the requirement that the assessment be made within six months of the completion of the project,[64] since the goal here is to repay loans over longer time frames (such as 20 years).

(g) Michigan

(i) Source of Authority

Michigan does not appear to currently have any statutory or constitutional provisions authorizing the creation of a financing program to facilitate private homeowners' adoption of distributed solar generation. While Michigan does authorize programs for lien-secured financing of infrastructure improvements, called Special Assessment Districts, such Districts are only authorized for enumerated purposes such as sidewalks, roads, and elevated structures, and the authorizing statutes are written in a way that precludes the creation of

[60] *See, e.g.*, HONOLULU REV. ORDINANCES § 36-2.5; HAW. COUNTY CODE, § 32-31; Maui County Code § 14.36.090; Kaua'i County Code is unavailbe.
[61] HAW. REV. STAT. §§ 46-80, 46-80.1; *see also* HAW. COUNTY CODE, §§ 7.1-7.10.
[62] *See also* HAW. COUNTY CODE, §§ 7.1-7.10.
[63] MASS. GEN. LAWS ch. 80, § 1.
[64] *See King v. Board of Aldermen of City of Springfield*, 142 N.E. 698 (Mass. 1924) (holding that assessment for betterments must be made within six months of the completion of the improvement).

programs modeled after the Berkeley FIRST program. Vote Solar could, however, advocate for the adoption of new statutory provisions explicitly authorizing such programs.

Alternatively, Vote Solar could attempt to persuade municipalities to initiate programs under existing statutory authorization that would, with some creative structuring, achieve functionally the same results as the Berkeley FIRST program. The Economic Development Corporations Act[65] is arguably written in such a way as to allow municipal governments to undertake programs wherein municipally-created Economic Development Corporations would construct solar arrays on citizens' houses and then sell these arrays to the homeowners under long-term "installment sales contracts."[66]

Economic Development Corporations are authorized to install "pollution control facilities" "for the purpose of controlling, eliminating, . . . or neutralizing atmospheric or water pollutants; [or for] the development, processing, or recovery of any natural resources."[67] Further, Corporations are authorized to "[s]ell and convey the project or any part of the project" at a price and time of the Corporation's choosing.[68] Such Corporations could, therefore, acquire an interest in the properties of homeowners desiring to participate in the program, construct the desired solar arrays, and then sell such arrays and the property interest back to the homeowners under long-term installment sales contracts at a price attractive to the homeowner. Lending support to the argument that this broadly-worded definition allows for the creation of such a program are the legislative findings accompanying the Act, which state that it is "necessary to encourage the development of facilities designed to produce energy from renewable resources."[69]

(ii) Method of Establishment

Economic Development Corporations are created by resolution of the governing body of the municipality in which they are to be located, after a petition for their creation is filed by three or more persons.[70] No statutory guidance is provided regarding the factors that the governing body is to consider. Legislative bodies' determinations of a proposed project's value are treated with deference by reviewing courts.[71] If, therefore Vote Solar successfully lobbied for the creation of such a program, legal challenges to the program would likely fail.

(iii) Private Beneficiaries

The Economic Development Corporations Act contains no reference to private beneficiaries, either prohibiting or authorizing their existence. A number of legal challenges to Corporations' actions benefiting

[65] MICH. COMP. LAWS §§ 125.1601-1636.
[66] MICH. COMP. LAWS §§ 125.1607(1)(a), 125.1607(1)(e).
[67] MICH. COMP. LAWS §§ 125.1603(l), 125.1603(n).
[68] MICH. COMP. LAWS § 125.1607(1)(g).
[69] MICH. COMP. LAWS § 125.1602.
[70] MICH. COMP. LAWS § 125.1604.
[71] *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981).

private companies and individuals, however, appear to have established that such Corporations may undertake actions benefiting private citizens. In the most famous of these cases, *Poletown Neighborhood Council v. Detroit*, the Michigan supreme court upheld the use of eminent domain to effectuate the transfer of property from one private citizen to another.[72]

(iv) Existence of Opt-In Feature

The Economic Development Act provides that the Corporation's governing board is to delineate the boundaries of the project area without reference to a requirement that such boundaries be contiguous.[73] While the lack of such a requirement is not, in itself, dispositive on this issue, statutes authorizing similar programs elsewhere in the Michigan code explicitly require that the boundaries of such programs be contiguous.[74] When read in contrast to these other provisions, the Economic Development Act's silence on the matter appears more significant.

(v) Bond Authority

Economic Development Corporations are authorized to issue revenue bonds.[75] Such bonds are secured by the stream of revenue generated by the projects they support. Conceivably, "revenue" in this context could refer to homeowners' payments under installment purchase agreements. There is, however, no authorization for Corporations to secure these bonds with liens against benefited properties; again, as other code provisions explicitly authorize such liens to support municipal bonds, this silence is telling. The lack of such authorization may hinder a Corporation's efforts to obtain favorable interest rates when issuing bonds in support of the contemplated program.

(h) Nevada

(i) Source of Authority

Nevada counties, cities, towns and other municipalities are authorized to create special districts as a means to finance projects that "serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants thereof and of the State of Nevada."[76] Special districts in Nevada are generally created as either a General Improvement District (GID) or a Special Improvement District (SID), depending on which statutory authority is used to create the special district. GID's are authorized and governed by Chapter 318 of the Nevada Revised Statutes (NRS), whereas SIDs are authorized and governed by Chapter 271. SID's are generally funded through special assessments on the properties that are included

[72] *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981).
[73] MICH. COMP. LAWS § 125.1612.
[74] *See, e.g.*, MICH. COMP. LAWS § 125.2688(e) (requiring that the boundaries of Renewable Energy Renaissance Zones be contiguous).
[75] MICH. COMP. LAWS § 125.1623.
[76] NEV. REV. STAT. § 318.015(1); s*ee also* NEV. REV. STAT. § 271.020(1).

within their boundaries.[77] Special assessments may be secured by assessment liens placed on the properties assessed by an SID along with any collection costs or interest arising from unpaid assessments.[78]

(ii) Method of Establishment

The procedure for establishing a GID or SID begins with either a petition from property owners requesting the district or a resolution passed by a board of county commissioners.[79] Creation of a special district generally requires an ordinance adopted by the municipal governing body, and, depending on the type of district contemplated, a public hearing may also be required in order to determine whether the special district confers a public benefit.[80]

(iii) Private Beneficiaries

The Nevada legislature provides little authority to municipalities for the creation of special districts that provide private benefits to residential property owners, and a special district created for the purpose of financing residential solar installations would be exceptionally difficult to create under the current statutes. First, GIDs created under NRS Chapter 318 may not be used for "financing the costs of developing private property."[81] Because a residential solar installation would likely be considered private property development, the General Improvement District is not a viable financing mechanism for residential solar installations.

Second, although Chapter 271 allows greater flexibility than Chapter 318 for financing projects that provide significant private benefits to individual property owners,[82] special district status under Chapter 271 is limited to a relatively short list of eligible projects.[83] Authority for a special district to provide financing for residential solar installations would therefore likely require an amendment to Chapter 271.[84]

(iv) Existence of Opt-in Feature

---

[77] *See* http http://www.accessclarkcounty.com/depts/public_works/Pages/sid.aspx
[78] NEV. REV. STAT. § 271.420.
[79] NEV. REV. STAT. §§ 318.055(1), 271.275.
[80] NEV. REV. STAT. §§ 271.290(4), 318.055(2).
[81] NEV. REV. STAT. § 318.015(2).
[82] For example, special improvement districts under Nev. Rev. Stat. Chapter 271 are frequently used to finance improvements to residential and commercial developments, projects that would likely be considered development of private property under Chapter 318. See http://www.accessclarkcounty.com/depts/public_works/Pages/sid.aspx.
[83] *See* NEV. REV. STAT. § 271.265. Examples of eligible projects include sanitary sewer projects, street beautification, off-street parking and park projects. *Id*.
[84] The list of acceptable projects includes "electrical projects," however the definition of electrical project is limited to "facilities for the transmission and distribution of electrical power, either above or beneath the surface of the ground, including lines, poles, conduits, house connections, transformers and related appliances, and all appurtenances and incidentals necessary, useful or desirable for any such facilities (or any combination thereof), including real and other property therefore." NEV. REV. STAT. § 271.097. Because its purpose would be primarily for *generating* electricity, a residential solar installation would not be considered an "electrical project."

The boundaries of a SID and a GID may consist of non-contiguous areas within a municipality.[85] In addition, a residential property owner may essentially opt out of a commercial area vitalization project – a special type of SID created for the beautification and improvement of a business or commercial zone – if the residential property owner can establish that it receives no benefit from the special district.[86] Accordingly, there is considerable statutory support for a special district that includes only those property owners that desire to receive the benefits of the special district.

(v) Bond Authority

Special districts have broad statutory authority to borrow money and incur or assume indebtedness. Under Chapter 318, a GID may issue short-term notes, warrants, and interim indebtedness as well as issue general, revenue or special assessment bonds.[87] Similarly, a SID may issue bonds in an amount not exceeding the unpaid assessments levied to pay the cost of any project.[88]

(i) New Jersey

(i) Source of Authority

Municipal governing bodies in New Jersey derive the authority to create "special benefit assessments" districts to finance local or general improvements exclusively from New Jersey state statute.[89] Unfortunately, the list of local improvements municipalities may undertake is exhaustive and does not include energy conservation projects, home solar installations or any comparable improvement. The list includes alleys, sidewalks, bridges, sewers, and most notably, "service connections [to]...power works owned by a municipality or otherwise, including all such works as may be necessary for supplying...power to real estate for whose benefit such services are provided." While rooftop solar panels could reasonably be considered "necessary" for supplying power, the examples given of service connections—"mains, conduits or cables"—do not appear expansive enough to include such a power source. Vote Solar could advocate an amendment to provide that solar and energy conservation projects are permissible improvements to be undertaken via special benefit assessment.

(ii) Method of Establishment

The properties to be assessed, and the assessment funds to be used for the improvements must be authorized, described and appropriated by local ordinance with notice and hearing procedures for the affected

[85] NEV. REV. STAT. §§ 271.130, 318.055(3).
[86] NEV. REV. STAT. § 271.392.
[87] NEV. REV. STAT. § 318.275.
[88] NEV. REV. STAT. § 271.475.
[89] N.J. STAT. ANN. § 40:56-1. Without legislative authorization, municipalities are not permitted under the New Jersey Constitution to make special assessments. *Union Bldg. Co. v. City of Newark,* 133 N.J.L. 415, 422 (1945).

property owners.[90] Special assessment ordinances are approved along with approval for issuance of a bond.[91] A variety of procedural options are available to municipalities seeking to adopt such ordinances, but unlike some states, a majority vote of the affected property owners is not required by state law.[92] However, individual municipalities may feature stricter approval procedures in excess of state law if duly enacted through local ordinance.[93]

Finally, individual landowners may make case-by-case appeals for actual special assessments.[94] The methods of assessment that may achieve a "fair and just" result is explored in greater detail by the New Jersey Supreme Court in McNally v. Teaneck.[95]

(iii) Private Beneficiaries

New Jersey statute does allow local improvements that confer special benefits on particular properties.[96] However, the amount assessed against any property cannot exceed the benefit conferred by the improvement.[97] Given that New Jersey law enumerates permissible improvements that are more clearly public in nature, an amendment would be required to clarify the extension of such improvements to private residential solar and energy efficiency projects.

(iv) Existence of Opt-in Feature

There is no explicit requirement that special benefits assessments be levied on homeowners within one contiguous geographic area. According to New Jersey state law, "a local improvement is one, the cost of which, or a portion thereof, may be assessed upon the lands in the vicinity thereof benefited thereby."[98] The permissible local improvements specified by statute, such as sewers and sidewalks, tend to confer benefits to several property owners at once, all of whom would be in the "vicinity" of the improvement. Whether or not solar and energy efficiency qualify as local improvement depends largely on a court's interpretation of the legislature's intent in utilizing the term "vicinity" and "benefit" in the context of solar and energy efficiency.

---

[90] N.J. STAT. ANN. § 40:56-21 et seq.
[91] 34 New Jersey Practice Guide § 13.14.
[92] N.J. STAT. ANN. § 40:49-6
[93] Affected landowners may also submit a petition of objections during the public hearings. If, despite these objections, the ordinance passes, affected landowners may also seek judicial review. But this method of blocking a municipal financing initiative is difficult. In one of the only recent decisions addressing local improvement ordinances, a New Jersey state court held that absent a major constitutional issue, a landowner's challenge to a special benefits assessment is void, unless it raises a major constitutional issue. *See Oros v. Township of Bridgewater*, 317 N.J. Super. 1 (App. Div. 1998)
[94] *Id.*
[95] *McNally v. Teaneck Twp.*, 75 N.J. 33 (1977).
[96] N.J. STAT. ANN. § 40:56-1.
[97] N.J. STAT. ANN. § 40:56-27.
[98] N.J. STAT. ANN. § 40:56-1

(v) Bond Authority

State law establishes a maximum useful life for buildings and structures financed by bonds. If "additional furnishings" to existing buildings are financed through a municipal bond, the maximum useful life of those furnishings cannot be greater than five years.[99] However, utilities and municipal systems, including "electric power systems" have a maximum useful life of 25 years.[100] Thus, advocates of a Berkeley-FIRST type program could argue that solar installations constitute "electric power systems" to maximize the useful life of projects. Energy conservation projects may have a more difficult time qualifying as an "electric power system."

(vi) Miscellaneous

A recent tax reform bill established a 4% cap on local tax levies.[101] However, because a special benefits assessment is not categorized by law as a traditional property tax levy, [102] it does not appear that this law would present an impediment to Berkeley FIRST style municipal financing programs in New Jersey.

(vii) Key Contacts; References; Links

Marc Pfeiffer, Deputy Director
NJ Division of Local Government Services
101 South Broad Street
PO Box 803
Trenton NJ 08625
Voice: 609-292-4584
Fax: 609-292-9073
E-mail: MPfeiffer@dca.state.nj.us

(j) New Mexico

(i) Source of Authority

Municipalities and counties in New Mexico are statutorily authorized to create Public Improvement Districts in order to construct Public Infrastructure Improvements, including electrical generation facilities, financed via taxation of the properties benefited thereby.[103] Public Improvement Districts are authorized to levy property taxes and to assess special levies or special fees upon any real property within the District.[104]

---

[99] N.J. STAT. ANN. § 40A:2-22.
[100] *Id.*
[101] N.J. STAT. ANN. § 40A:4-45.45, et seq. A summary of the legislation can be found at http://www.state.nj.us/dca/lgs/lfns/07lfns/2007-10.pdf .
[102] N.J. STAT. ANN. § 40:56-1.
[103] N.M. STAT. § 5-11-1 et seq.; § 5-11-2(M)(9).
[104] N.M. STAT. § 5-11-10(7), (12).

Property taxes are not to exceed three dollars per $1,000 assessed value, unless a higher rate is approved at an election of the owners and qualified resident voters of the district.[105]

The meaning of the phrase "public infrastructure improvements" has not been litigated and therefore it is uncertain whether Public Improvement Districts may be formed to finance the installation of privately-owned solar generation. Vote Solar could, therefore, advocate for an amendment explicitly allowing such a use. Alternatively, Vote Solar could attempt to persuade the municipal authorities authorized to create such Districts that relieving the burden on existing electrical infrastructure and reducing CO2 emissions constitute permissible goals to be pursued via these Districts.

(ii) Method of Establishment

Public Improvement Districts are proposed via petition to the governing board of the municipality or county by twenty-five percent of the real property by assessed value to be included in the District.[106] Once such a petition is presented, the governing board must, within 95 days, prepare a resolution outlining the specifics of the proposed District, including a general plan for its implementation.[107] After a public hearing on the proposed District,[108] the governing body must refine the District such that only properties that will benefit from its formation are included within it boundary.[109] The proposed District is then subject to a vote before the owners of property located within the District and all other residents living therein qualified to vote in general elections, with each owner receiving one vote per acre of land to be included in the district.[110] A three-fourths majority is required for adoption of the proposed District.[111]

(iii) Private Beneficiaries

Although there is no specific mention of private beneficiaries in the statutes authorizing Public Improvement Districts, private benefits are appear to be contemplated by the authorization to assess Special Levies against properties within the District in proportion to the benefit derived from the District's efforts.[112]

(iv) Existence of Opt-in Feature

Public Improvement Districts are specifically authorized to "include contiguous or noncontiguous property."[113] All Public Improvement Districts in New Mexico are required to exist wholly within the corporate boundaries of the municipality or county creating the District.

---

[105] N.M. STAT. § 5-11-23(A).
[106] N.M. STAT. § 5-11-3(A).
[107] N.M. STAT. § 5-11-3(A).
[108] N.M. STAT. § 5-11-4
[109] N.M. STAT. § 5-11-6.
[110] N.M. STAT. § 5-11-6.
[111] N.M. STAT. § 5-11-8.
[112] N.M. STAT. § 5-11-20.
[113] N.M. STAT. § 5-11-3(A).

(v) Bond Authority

Public Improvement Districts may issue Revenue Bonds, General Obligation Bonds or Special Levy Bonds sufficient to cover the estimated cost of implementing the proposed improvements.[114] Special Levy Bonds are secured by property taxes levied against the real property of the district, assessed proportionally to the benefit each property derives from the District's efforts.[115] General Obligation Bonds, in contrast, are secured by property taxes levied equally against all taxable property located in the district. Revenue Bonds are secured only by the revenues generated by the projects they are issued to finance.

The issuance of Special Levy or General Obligation Bonds requires an election of the owners and residents qualified to vote within the District.[116] Revenue Bonds may be issued upon a resolution by the District's governing body.[117]

(vi) Key Contacts; References; Links

The non-profit organization Wild Earth Guardians is advocating for a program very similar to the Berkeley FIRST model, called Solar Santa Fe.[118] Under this program, the city of Santa Fe would issue municipal bonds and use the proceeds to provide homeowners loans to finance the installation of solar panels on their roofs. On March 26, 2008, the Santa Fe City Council approved a motion to study the implementation of the program.[119] One notable difference between the Berkeley FIRST program and the contemplated "Solar Energy Loan Program" is that the proposal for the Santa Fe program recommends paying a non-profit organization to administer the loan program to avoid the associated administrative expenses.[120] Wild Earth Guardians have expressed interest in potentially partnering with Vote Solar for future efforts in the renewable energy field. For more information, please contact Rebecca Sobel, at rsobel@wildearthguardians.org.

(k) New York

(i) Source of Authority

---

[114] N.M. STAT. § 5-11-8(B).
[115] N.M. STAT. §§ 5-11-2(P), 5-11-20(D).
[116] N.M. STAT. § 5-11-19.
[117] N.M. STAT. § 5-11-21.
[118] Solar Santa Fe Fact Sheet, *available at* http://www.wildearthguardians.org/htm/support_docs/factsheet_solar-santa-fe_08.pdf.
[119] Agenda and Minutes, City Council of Santa Fe, NM, 3/26/2008, *available at* http://nm-santafe.civicplus.com/archives/31/03-26-08%20City%20Council.pdf. Although the approved resolution directed that a financial and feasibility report be made within 30 days of its passage on March 26, 2008, city council meeting minutes to date do not reflect any such report.
[120] Request for Approval of a Resolution Directing Staff to Study the Concept of a "Solar Energy Loan Program" for Homeowners in the City of Santa Fe, *available at* http://www.santafenm.gov/DocumentView.asp?DID=2061.

Town Law of the State of New York allows towns and citizens to create special districts to benefit the health, welfare, safety or convenience of the inhabitants of such district or to benefit the real property in the special district.[121] However, the statute specifies the limited purposes for which these districts are allowed, including parks and road improvements. [122] This list does not include solar projects like the Berkeley-FIRST model. The New York State Legislature has established other types of special districts through via special legislation for purposes such as library, traffic control, or road improvement districts.[123] Therefore, Vote Solar would need to either advocate an amendment to the applicable Town Law provision governing special districts or to lobby the New York State Legislature to enact a new statute to establish a Berkeley-FIRST style program.

(ii) Method of Establishment

There are two types of proceedings for establishing and extending special districts. Under Article 12 of Town Law, such proceedings commence by petition of property owners within the proposed district that is presented to the town board. Under Article 12-A, the town board can establish or extend the districts on its own motion, subject to referendum requirements. Both processes require a public hearing.[124]

Once a special district is established, the method of levying an assessment varies based on the laws of the city or county in which it is located. Some require that an improvement and corresponding assessment can be undertaken only on a property owner's petition or after a referendum.[125] However, the legislature frequently allows local authorities to make some assessments without this step.[126] Should Vote Solar decide to encourage an amendment to New York state statute to permit the establishment of special districts for solar installations, we would recommend legislation that does not require property owner petition to establish the assessment.

(iii) Private Beneficiaries

In order to assess a special district assessment, the properties assessed must be benefited by the expenditure.[127] Under a Berkeley-FIRST type program, this requirement would be satisfied because only property owners who undertake the solar improvements are assessed.

---

[121] N.Y. TOWN LAW § 202. The Office of the New York State Comptroller published an excellent summary of the use of these Special Districts and their authorization entitled *Town Special Districts in New York: Background, Trends and Issues*, *available at* http://www.osc.state.ny.us/localgov/pubs/research/townspecialdistricts.pdf.

[122] N.Y. TOWN LAW art. 11, art. 12, art. 12-A.

[123] Office of the New York State Comptroller, *Town Special Districts in New York: Background, Trends and Issues*, at 22, *available at* http://www.osc.state.ny.us/localgov/pubs/research/townspecialdistricts.pdf.

[124] N.Y. TOWN LAW art. 12, art. 12-A.

[125] *Gibbs v. Luther*, 158 A.D. 951 (4th Dept. N.Y. 1913) (discussing requirements for street paving assessment).

[126] *Appeal of Ransom*, 87 Misc. 1, (N.Y. County Ct. 1914).

[127] *Niagara Mohawk Power Corp. v. Town of Tonawanda Assessor* (4 Dept. 2005) 17 A.D.3d 1090, *aff'd*, 843 N.E.2d 1138.

(l) Oregon

(i) Source of Authority

Oregon statute enumerates a variety of permissible "special districts" that can be established to finance particular purposes.[128] The special districts may levy annual ad valorem taxes and special taxes on property to repay bonds.[129] None of the statutorily- authorized purposes appears to include a Berkeley-FIRST-type solar improvement program. Vote Solar would need to lobby for an amendment to Section 198 of the Oregon Revised Statutes to include residential solar or energy efficiency improvements as a permissible purpose.

(ii) Method of Establishment

Under Oregon's state statute, a petition for formation must first be filed with the relevant county board and must be endorsed by the relevant local agency.[130] Second, if the county is within the jurisdiction of a local government "boundary commission," the petition must be filed with such boundary commission within 10 days after the petition is filed with the board or after a hearing date on the petition has been set. Finally, the county board must provide public notice of the hearing. After the hearing, the county board must approve or deny the special district.

(iii) Existence of Opt-in Feature

Under Oregon law, a special district may classify property on the basis of services received from the district and prescribe different tax rates for the different classes of property.[131] This suggests that authority may exist to establish an "opt-in" for property owners who choose to install solar improvements on their homes.

(iv) Bond Authority

Districts are authorized to issue bonds to fund their statutorily-prescribed purposes under Oregon statute.[132]

(v) Miscellaneous

(1) Portland Urban Renewal Loans

[128] OR. REV. STAT. ANN. § 198.010.
[129] OR. REV. STAT. ANN. § 268.500.
[130] OR. REV. STAT. ANN. § 198.800
[131] OR. REV. STAT. ANN. § 268.500.
[132] OR. REV. STAT. ANN. §§ 268.520, 268.600.

The Portland Development Commission offers loans for home repairs for qualified individuals who live in two special districts within the city: the Interstate Corridor and the Lents Town Center Urban Renewal Area.[133] The individuals' total annual household income must be at or below 80% of HUD's median family income. These are financed through liens on the property. According to a representative of the program, these loans could be used for solar installations. However, this program is very small because it is limited by these geographic and economic restrictions.

(2) State Energy Loan Program

The State of Oregon has operated the State Energy Loan Program since 1980, which is funded by general obligation bonds.[134] The state lends funds to borrowers to pay for their energy projects, including anything that saves or generates electricity. They are enforced thorough a variety of security vehicles, the most common of which is a lien on the property. This includes both conservation and renewable generation projects, which would include solar improvements. Loan amounts have ranged from $20,000 to $20 million.

(m) Texas

(i) Source of Authority

The Public Improvement District Assessment Act,[135] a Texas state law, is the primary source of authority for Texas cities to finance "public improvements" through special assessments levied on benefited property. The list of permissible "public improvements" is exhaustive and includes streets and water improvements, parks, libraries, parking facilities, mass transit, landscaping, art, fountains, signs, lighting, and "pedestrian malls."[136] Any other "similar" project to these expressly authorized projects is generally authorized.[137] However, it is unlikely that a solar installation or energy efficiency project on a private home would qualify as "similar" to any of the aforementioned projects, and thus an amendment would be required to establish a Berkeley-FIRST type of program.

(ii) Method of Establishment

A public improvement district must be established by petition to the city council. This petition must include:

---

[133] Portland Development Commission, Home Repair Loan Program, *available at* http://www.pdc.us/housing_services/programs/financial/home_repair_loan.asp.
[134] State of Oregon, Energy Loan Program, available at http://www.oregon.gov/ENERGY/LOANS/selphm.shtml.
[135] TEX. REV. STAT. ANN. § 372 et seq.
[136] TEX. REV. STAT. ANN. § 372.003.
[137] *Id.*

- A statement as to the nature of the proposed improvement, costs, boundaries, method of assessment, apportionment of costs between city and district, and proposed district management;
- Signatures of landowners within the proposed district representing more than fifty percent of the land by value that would be subject to assessments; and
- Signatures of fifty percent of the actual owners or owners of fifty percent of the actual territory proposed for the district.[138]

The following paragraph, excerpted from an excellent article on municipal law in Texas,[139] contains more details on establishing a special assessment:

> In addition to what projects will be pursued, the city council must determine the manner of special assessments. At least ten percent of the project must be paid by the assessments levied against property in the district.[140] The city council determines these assessments on the basis of "special benefits" to property on either a front foot, square foot, property value, or "any other manner that results in imposing equal shares of the cost on property similarly benefited."[141] In determining the manner of assessment, the city may also establish classifications and formulas for determining the apportionment of costs between the city and the district, and may determine special benefits by classification of improvements.[142] An assessment may be annually adjusted.[143] A special assessment bears interest and constitutes a "first and prior lien" superior to all others except for taxes. The assessment is also a "personal liability" of the owner.[144]

(iii) Existence of Opt-in Feature

A local governing body "may undertake an improvement project that confers a special benefit on a definable part of the municipality or county."[145] Because improvement projects "may consist of an improvement on more than one street or of more than one type of improvement...and financed as one improvement project" there does not appear to be a requirement that the "definable part" be geographically contiguous. [146] Thus, to the extent a Berkeley-FIRST style program could frame a special district established in the city that consisted of a patchwork of individual homeowners as "a definable part" of the area, an opt-in feature could be justified.

---

[138] TEX. REV. STAT. ANN. § 372.005.
[139] 23 Tex. Prac. Municipal Law and Practice § 21.11 (2d ed.).
[140] TEX. REV. STAT. ANN. § 372.014.
[141] TEX. REV. STAT. ANN. §§ 372.015(a)-(b).
[142] TEX. REV. STAT. ANN. §§ 372.015(c)(1), (2).
[143] TEX. REV. STAT. ANN. § 372.015(d).
[144] TEX. REV. STAT. ANN. § 372.018(a), (b).
[145] TEX. REV. STAT. ANN. § 372.003.
[146] TEX. REV. STAT. ANN. § 372.004.

(iv) Private Beneficiaries

Private landowners could receive "special benefits" from a public improvement project so long as they resided within that "definable" area.[147] However, because solar and energy efficiency projects are not explicitly listed on the exclusive list of public improvements (see section B(1) above), this receipt of special benefits by private landowners may not be relevant until legislative reform alters the statute.

(v) Bond Authority

The excerpt below from a Texas municipal law article[148] indicates that not only may special assessments be used to finance public improvement bonds, these assessments may also be used to secure bond financing, as was the case with the City of Berkeley.

> Payment of the costs of an improvement project may be made with city funds on hand, special assessments, or revenues derived from the sale of revenue and general obligation bonds.[149] The revenue bonds must have a maturity term of forty years.[150] In connection with any bond issue, the city may pledge revenue, including specifically money to be received from special assessments. As further security; the city may also mortgage property.[151]
>
> Bonds of a public improvement district are authorized sinking funds for other cities, and may secure bank deposits at a depository.[152] The bonds are approved by the attorney general, with further authority to approve any lease or contract that is pledged for the payment of the obligations. Once approved by the attorney general, these bonds, contracts, or leases, become "incontestable in any court or other forum."[153] Once a district is operating, a five-year service plan must be prepared, which is reviewed annually.[154]

(vi) Miscellaneous

(1) Blighted areas

The Tax Increment Financing Act grants cities and counties certain authorities that may allow for the creation of a Berkeley FIRST style program in low income residential areas.[155] However, for landowners to

[147] TEX. REV. STAT. ANN. § 372.003.
[148] 23 Tex. Prac., Municipal Law and Practice § 21.11 (2d ed.).
[149] TEX. REV. STAT. ANN. §§ 372.023, 372.024.
[150] TEX. REV. STAT. ANN. § 372.025.
[151] TEX. REV. STAT. ANN. § 372.026.
[152] TEX. REV. STAT. ANN. § 372.029.
[153] TEX. REV. STAT. ANN. § 372.028.
[154] TEX. REV. STAT. ANN. § 372.013.
[155] TEX. REV. STAT. ANN. § 311 et seq.

be assessed for special benefits received by municipalities, the area must be designated, by city or county ordinance, a "reinvestment zone."[156] To qualify as a reinvestment zone, an area must:

> Substantially arrest or impair the sound growth of the municipality or county creating the zone; retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, moral or welfare in its present condition…[157]

Thus, a Berkeley FIRST style program might be feasible under the Tax Increment Financing Act, but only in economically blighted neighborhoods.

(vii) Key Contacts; References; Links

The following Texas official offered to be of assistance to Vote Solar:

Dennis Hart
Texas Comptroller of Public Accounts--Property Tax Division
800-252-9121, ext. 59845, Dennis.Hart@cpa.state.tx.us

(n) Washington

(i) Source of Authority

The Washington State legislature provides specific authority and procedures for the formation of special purpose districts. None of the existing special purpose districts could reasonably be construed to include a residential solar installation project.[158] Creation of a residential solar installation program similar to the Berkeley-FIRST program would therefore require the authorization by the Washington State Legislature.

(ii) Method of Establishment

Nearly all special districts require a formal hearing to determine the need for the special district, and some may require an additional feasibility study.[159] In addition, most special districts require an election to determine whether a majority of property owners in the district wish to pay taxes for and receive the services provided by the special district.[160]

---

[156] TEX. REV. STAT. ANN. § 311.003.
[157] TEX. REV. STAT. ANN. § 311.005.
[158] For a comprehensive list of Washington special districts, see http://www.mrsc.org/byndmrsc/special.aspx.
[159] *Id.*
[160] *Id.*

(iii) Private Beneficiaries

In general, special districts authorized by the Washington State legislature confer public rather than private benefits.[161] Several special districts, however, can be regarded as conferring significant private benefits. For example, a River and Harbor Improvement district, authorized under RCW Chapter 88.32, largely benefits property owners owning parcels near rivers.[162] In addition, the Public Stadium Authority – a special district created to fund Qwest stadium in Seattle, WA – arguably confers a significant benefits on Football Northwest, the private entity that owns the Seattle Seahawks, by providing an attractive and modern venue to host its professional football games. Accordingly, it is possible that a special district that that confers considerable private benefits in the form of financing for residential solar installations would gain approval by the Washington State legislature.

(iv) Existence of Opt-in Feature

A broad sampling of Washington special district statutes revealed no explicit opt-in features; however, in at least one special district, a similar result is obtained by allowing property owners to seek exemption from the taxes levied by the special district. For example, property owners residing or owning property in a television reception improvement district under RCW Chapter 36 may seek exemption from the special district tax levies if they can establish that they do not receive the benefits of the district.[163] A similar exemption mechanism could be built into a special district created for the financing of residential solar installations, whereby only those property owners receiving financing assistance for residential solar installations would pay special assessments or taxes.

(v) Bond Authority

Special districts in Washington are generally granted authority to issue bonds for financing projects or services. Bond issuances by special districts must be approved by a majority of voters in the district.[164]

* * *

[161] *See, e.g.* http://www.mrsc.org/byndmrsc/special.aspx.
[162] WASH. REV. CODE § 88.32.020.
[163] WASH. REV. CODE § 6.95.120 authorizes the governing board of a television reception improvement district to adopt rules for prorating tax bills of property owners that do not own a television set. In addition, WASH. REV. CODE § 88.32.090, allows property owners in a river and harbor improvement district to appeal the special assessment levied against their property.
[164] Municipal Research and Services Center of Washington (MRSC), SPECIAL PURPOSE DISTRICT FORMATION AND GOVERNANCE, *available at* http://www.mrsc.org/Publications/spd.pdf.