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A Missed Opportunity: The Texas Economic Development Act, Texas Public School Funding, and Wind Energy

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A MISSED OPPORTUNITY: THE TEXAS ECONOMIC DEVELOPMENT ACT, TEXAS PUBLIC SCHOOL FUNDING, AND WIND ENERGY

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I. INTRODUCTION

On Saturday February 9, 2013, a cold front blew into Texas that generated a record breaking amount of electrical energy.[1] The wind from the cold front generated a record high 9,481 megawatts ("MW") of power; 7,205 MW came from West Texas alone.[2] Wind provided nearly 28% of the Electric Reliability Council of Texas ("ERCOT") system's load on that Saturday.[3] Texas currently leads the country in available wind energy production with over 10,400 MW of commercial wind power capacity.[4] For reference, one MW is enough energy to power "about 500 homes during periods of typical consumption."[5]

In addition to powering homes, wind energy also helps the state save water. Traditional means of electrical power generation, such as nuclear power plants or coal burning power plants, need water, and lots of it, to generate electricity. Electrical power generation from wind requires no water.[6] Environment Texas released a report in November of 2012 claiming that "Texas'[s] current power generation from wind energy saves enough water to meet the needs of 130,800 Texans."[7] Furthermore, the report found that "Texas wind energy displaces as much global warming pollution as taking 3,334,000 cars off the road per year."[8]

On the national level, as the United States avoided falling off the fiscal cliff with the passing of the American Taxpayer Relief Act of 2012 on January 1, 2013, production tax credits for wind energy facilities set to expire in 2012 were extended for another year.[9] Qualifying wind energy projects beginning construction before January 1, 2014, can qualify for these federal tax credits.[10] It is evident that the desire for renewable energy sources across the country is flourishing. Why would Texas then not want to encourage the development of one of its most abundant renewable resources, wind?

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1. The Wind Coalition, *Texas Record – Wind Propels ERCOT to New Wind Record of 9,481 MW* (Feb. 14, 2013), http://windcoalition.org/texas-record-wind-propels-ercot-to-new-wind-record-of-9481-mw/.

2. *Id.*

3. *Id.*

4. *Id.*; U.S. DEP'T OF ENERGY, ENERGY DEPT. REPORTS: U.S. WIND ENERGY PRODUCTION AND MANUFACTURING REACHES RECORD HIGH (Aug. 6, 2013), http://energy.gov/articles/energy-dept-reports-us-wind-energy-production-and-manufacturing-reaches-record-highs.

5. *Id.*

6. The Wind Coalition, *Wind Coalition calls on Texas Legislature to Keep Texas' Energy Supply Growing* (May 20, 2013), http://windcoalition.org/wind-coalition-calls-on-texas-legislature-to-keep-texas-energy-supply-growing/.

7. Luke Metzger, *Wind Energy in Texas Saves Enough Water to Meet Needs of 130,800 Texans* (Nov. 28, 2012), http://environmenttexas.org/news/txe/wind-energy-texas-saves-enough-water-meet-needs-130800-texans.

8. *Id.*

9. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240 § 407, 126 Stat. 2340 (2013).

10. *Id.*

In 2009, the Texas Legislature ended unrestricted supplemental payments made by qualifying project owners to school districts as part of agreements made under Chapter 313 of the Tax Code, also known as the Texas Economic Development Act ("Act").[11] Previously, the Act allowed school districts to enter into agreements with owners of qualifying manufacturing, technology, and renewable-energy projects for uncapped sums of money in exchange for limitations on appraised value of property developed by the project owner.[12] The amount of taxable property value lost by a school district entering into a Chapter 313 agreement was in large part offset through the state's school funding formula.[13] Some critics, including the Texas Comptroller, thought this was contrary to the intent of the Act in part because of the belief that the state was not benefitting from the agreements.[14] In 2009, Chapter 313 supplemental agreements were capped at $100 per student in average daily attendance.[15] Furthermore, in 2011, the Comptroller's office recommended a complete elimination of Chapter 313 supplemental agreements.[16] The main provisions of Chapter 313 were set to expire December 31, 2014.[17] The 83rd Texas Legislature had three options entering the legislative session regarding the Act: 1) let the Act expire; 2) extend the expiration date of the Act without making any other changes; or 3) extend the expiration date of the Act and make changes to the existing provisions of the Act. Jeffrey Clark, executive director of the Wind Coalition, commenting on the possibility of the Act expiring said, "If it's not renewed, my companies will be investing in Oklahoma, Kansas and Nebraska."[18]

Some critics called the uncapped supplemental payments received by predominately rural West Texas school districts prior to 2009 "windfalls."[19] The result of this one-sided understanding, and subsequently the complete elimination of such agreements between school districts and companies owning qualifying projects, is a handicap to what could be utilized as a valuable tool in filling the current deficit for public school funding. In 2011, the 82nd Texas Legislature appro-

11. Morgan Smith, *Wind Farm Money Fuels Spending in West Texas Schools*, TEXAS TRIBUNE (Nov. 11, 2011), *available at* http://www.texastribune.org/library/multimedia/wind-farm-money-spending-schools/.

12. *Id*.

13. SUSAN COMBS, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, TEXAS ECONOMIC DEVELOPMENT ACT REPORT 2010, 1 (Dec. 2010); *see generally* TEX. TAX CODE ANN. § 313 (West 2008 & Supp. 2012).

14. SUSAN COMBS, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, TEXAS ECONOMIC DEVELOPMENT ACT REPORT 2010 (Dec. 2010).

15. H.B. 3676, 81st Leg., Reg. Sess. (Tex. 2009).

16. COMBS, *supra* note 14.

17. TEX. TAX CODE ANN. § 313.007 (West Supp. 2012).

18. Kate Galbraith, *Texas Renewable Energy Faces Hurdles in Legislature*, TEXAS TRIBUNE (Feb. 15, 2013), *available at* http://www.texastribune.org/2013/02/15/texas-renewable-energy-face-hurdles-legislature/.

19. Smith, *supra* note 11.

priated at least $4 billion below what had been the current formula funding level for public education for the 2012-2013 biennium;[20] some estimates had this figure over $5 billion.[21] More recently, in 2013, the 83rd Legislature only returned $3.4 billion to public schools.[22] In a time when funding options are shrinking, why would the Comptroller's office suggest, and the Legislature pass, caps on incentives that provide additional funding for school districts? This Article will explore the development of public school funding in Texas and the possibility of utilizing the Act as a means of providing additional funding for the public school system while encouraging large-scale capital investment, specifically by renewable energy projects qualifying under Chapter 313 of the Texas Tax Code.

II. By the Numbers: Facts and Figures

A. *How Real Property Values Affect the Funding of Public Schools in Texas*

Texas public schools have historically been, and continue to be, funded in large part by local ad valorem tax.[23] Before the late 1980s, all the ad valorem tax collected in a particular school district stayed in that district.[24] As one might expect, certain school districts possess significantly more property wealth than others; property wealth that could be taxed to fund local schools. Districts with an abundance of property value could tax at a relatively low rate in order to meet the demands of funding their public schools.[25] Conversely, districts with relatively low property values still faced shortfall even when taxing property owners at the highest allowable tax rate.[26] Without any other provision, this created a great disparity between property-wealthy and property-poor districts.

In the late 1980s, "the wealthiest school district [in Texas] ha[d] over $14 million of property wealth per student, while the poorest ha[d] approximately $20,000; this disparity reflect[ed] a 700[:]1 ra-

20. Texas Taxpayers and Research Association, An Introduction to School Finance in Texas 3 (Jan. 2012) [hereinafter TTARA].

21. Texas Taxpayers and Research Association, An Introduction to School Finance in Texas (Jan. 2012); Morgan Smith, *A Guide to the Texas School Finance Lawsuits*, Texas Tribune (Feb. 29, 2012), *available at* http://www.texastribune.org/texas-education/public-education/how-navigate-texas-school-finance-lawsuits/.

22. Ryan Murphy & Morgan Smith, *Interactive: 2014-15 School Finance Budget Viewer*, Texas Tribune (May 25, 2013), *available at* http://www.texastribune.org/library/data/83rd-sb1-school-district-funding/?cdc=227901.

23. *See generally* Austin Pennington, *The Texas Education Agency And The Robin Plan: Is Stealing From The Rich Really Giving More To The Poor?*, 12 Tex. Tech Admin. L.J. 389, 391 (2011).

24. West Orange-Cove Indep. Sch. Dist. v. Alanis, 107 S.W.3d 558, 565 (Tex. 2003).

25. *See* Pennington, *supra* note 23, at 391.

26. *See id.*

tio."[27] Furthermore, "[t]he 300,000 students in the lowest-wealth schools ha[d] less than 3% of the state's property wealth to support their education while the 300,000 students in the highest-wealth schools ha[d] over 25% of the state's property wealth."[28] Prior to statutory changes in the early 1990s, spending per student varied widely, ranging from $2,112 to $19,333, depending on the district.[29] The large spending disparity per student within the state led to a series of lawsuits brought primarily by property-poor school districts.[30]

In 2011, the Texas Legislature cut funding for education somewhere between $4 billion and $5.4 billion for the 2011–2012 biennium (September 2011 through September 2013).[31] As a whole, the Texas Education Agency ("TEA") estimated that public education costs during this biennium would top $90 billion.[32] Roughly 45% of public school funding comes directly from locally collected property taxes for use in said district.[33] This percentage amounted to $21.4 billion and $21.5 billion in 2011 and 2012 respectively.[34]

The second largest portion, about 43%, of public school funding comes from the state through the Foundation School Fund ("FSF").[35] In 2011 and 2012, the fund provided $20.4 billion and $19.9 billion respectively.[36] The state's General Revenue Fund primarily makes up this fund; however, other revenue streams contribute to the FSF including: "oil production tax, natural gas production tax, and the gas, water, and electric utility tax [which] are constitutionally dedicated to public education and are deposited into the FSF (approximately $1 billion per year)."[37] The state lottery contributes approximately $1 billion per year as well.[38] The Texas Education Code Chapter 41 "wealth equalization" provisions contribute another $900 million to $1.2 billion to the FSF.[39] This method of "recapture" takes money collected through local property taxes above a statutorily set limit in wealthy school districts and redistributes the funds to districts categorized as property-poor.[40] The Foundation School Program ("FSP")

27. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989).
28. *Id*.
29. *West Orange-Cove I.S.D*., 107 S.W.3d at 565.
30. Texas Education Agency, Manual for Districts Subject to Wealth Equalization (July 2012) [hereinafter TEA Manual].
31. TTARA, *supra* note 21; Smith, *supra* note 21.
32. Texas Education Agency, Operating Budget Fiscal Year 2012 (Dec. 2011); TTARA, *supra* note 21.
33. TTARA, *supra* note 21, at 1.
34. *Id.* at 4.
35. *Id.* at 1.
36. *Id.* at 4.
37. *Id.*
38. *Id*.
39. *Id*.
40. Tex. Educ. Code Ann. § 41 (West 2013).

provides the guidelines for determining whether a school district is subject to recapture.[41]

Schools spend the large majority of their money on Tier I maintenance and operation costs.[42] Among other things, Tier I costs include: "regular basic education, special education, career and technical education, bilingual/English as a Second Language education, compensatory education, gifted and talented education, Public Education Grants, transportation, and new instructional facilities."[43]

Most recently, the 83rd Legislature returned an estimated $3.4 billion of funding back to public education.[44] TEA estimates that the cost of Tier I program funding will be just over $33.3 billion for the 2013–2014 school year.[45] Of that amount, local property taxes will provide an estimated $17,362,208,568 while the state will contribute $16,953,696,035.[46]

B. *Property Value and the Texas Economic Development Act*

Prior to amendments passed by the 83rd Legislature in 2013, Chapter 313 of Texas's Tax Code allowed school districts to limit the appraised value of property for eight years on property developed with a qualifying project.[47] Specifically, the Act allows school districts to limit the maintenance and operations ("M&O") taxable property value.[48] In 2013, the Texas Comptroller reported to the 83rd Legislature that there were 128 active projects utilizing Chapter 313.[49] "Owners of Chapter 313 projects have invested approximately $42.2 billion in Texas through 2011, and have projected a $62.4 billion investment over the lifetime of the project agreements."[50] Furthermore, the Comptroller estimates that projects will pay "$995 million in local property taxes over the life of their agreements."[51]

Of the qualifying Chapter 313 projects, 61% are renewable energy projects, most of which are wind energy projects.[52] Specifically, wind energy electrical generation projects accounted for 76 of the 128 total

41. § 42.009.
42. TTARA, *supra* note 21, at 3.
43. Texas Education Agency, School Finance 101: Funding of Texas Public Schools 9 (Jan. 2011) [hereinafter TEA School Finance 101].
44. Murphy & Smith, *supra* note 22.
45. Texas Education Agency, 2013–2014 Statewide Summary of Finances, https://wfspcprdap1b16.tea.state.tx.us/Fsp/Reports/AsyncCrystalReportViewer.aspx?rpt=33&year=2014&run=9229&charters=N&format=html (last updated July 24, 2013) [hereinafter TEA Statewide Summary of Finances].
46. *Id*.
47. Tex. Tax Code Ann. § 313.027 (West Supp. 2012).
48. § 313.025.
49. Susan Combs, Texas Comptroller of Public Accounts, Report of the Texas Economic Development Act (Jan. 2013).
50. *Id*.
51. *Id*.
52. *Id*.

Chapter 313 projects.[53] The Comptroller estimates that wind energy projects will invest over $15.4 billion in Texas over the length of their agreements.[54] Furthermore, the Comptroller's January 2013 report to the Legislature projected that Chapter 313 supplemental payments to school districts will total $473,086,585.[55] Wind energy electric generation projects will pay $238,436,192 directly to school districts over the course of their supplemental payment agreements.[56]

Prior to 2009, qualifying project owners could agree to pay a school district an uncapped supplemental payment over the length of the project agreement.[57] Large supplemental payments would greatly incentivize a school district to limit the appraised property value of the qualifying project at the lowest possible statutory amount.[58] The state would subsequently supplement a large portion of the money a school district would miss out on because of the limited appraisal value of the property tax where the project was located.[59]

In the two years before the Legislature capped supplemental payments between school districts and project owners at $100 per student, there were eighty-six agreements for projects (2008 and 2009).[60] In the prior five years, there were only thirty-four agreements.[61] There were thirty-two agreements in 2009 alone, before the cap was imposed.[62] In 2010, the year immediately following the imposition of the $100 per student cap, there were only thirteen Chapter 313 agreements.[63] The following year there were only nine agreements.[64] The December 2010 Comptroller's report claimed that the decline in Chapter 313 agreements was "primarily due to the economic recession,"[65] but this perspective completely ignores the possibility that the heavy restrictions placed on supplemental payments in 2009 had an adverse effect on the number of companies pursuing Chapter 313 agreements.

The estimated total gross tax benefit to companies in Chapter 313 agreements over the length of their agreements is just under $2.4 billion.[66] The figures that the state and the Comptroller are specifically interested in are the comparisons between the M&O taxable property

53. *Id.* at 4.
54. *Id.*
55. *Id.* at 7.
56. *Id.*
57. Smith, *supra* note 11.
58. *Id.*
59. COMBS, *supra* note 14, at 1; *see generally* TEX. TAX CODE ANN. § 313 (West 2008 & Supp. 2012).
60. COMBS, *supra* note 49, at 3.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1.

value before a Chapter 313 limitation is placed on the taxable property value and M&O taxable property value after a limitation is in place. Simply put, the state wants to know how much M&O taxable property value there would be both with and without Chapter 313 agreements. The 2011 M&O property tax value for the school districts where the 128 Chapter 313 projects are located would have been $16,561,853,374 if there were no limitations in effect.[67] But those school districts' M&O taxable property value was only $2,664,060,735 with the Chapter 313 limitations in place.[68]

One of the best examples of a Chapter 313 agreement is the Blackwell Independent School District's agreement with FPL Energy Horse Hollow Wind GP, L.L.C. and FPL Energy Horse Hollow Wind II GP, L.L.C. The "M&O taxable value of the [project's] qualified property (in 2011) with the limitation in effect [was] $10,000,000."[69] But the actual taxable value of the property had the limitation not been in effect was $449,502,507.[70] Since the limitation began, it has led to an estimated $14,540,850 loss to the school district in M&O tax imposed through 2011.[71] Through their Chapter 313 agreement, entered into prior to the $100 per student cap established in 2009, the project owners have paid the district just under $14,000,000 in supplemental payments.[72] While this might not seem like a lot of money considering that M&O taxable property value provides over $23 billion per year in public school funding for roughly 4.8 million students throughout the state, consider the fact that Blackwell Independent School District has less than 150 students in average daily attendance.[73] This means, at minimum, over the length of this particular Chapter 313 agreement, if spread over a thirteen-year maximum period, the agreement would pay over $7,000 per student per year. Based off of Austin Independent School District's ad valorem tax base, the state will spend a little more than $6,200 per student in weighted average daily attendance in the 2013–2014 school year.[74] Blackwell Independent School District had actually entered into five Chapter 313 agreements by December 2010;[75] this is just an example of one.

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67. *Id*. at 4.

68. *Id*.

69. *Id*. at 30.

70. *Id*.

71. *Id*.

72. COMBS, *supra* note 14, at 3, 22.

73. TEA STATEWIDE SUMMARY OF FINANCES, *supra* note 45; TEXAS EDUCATION AGENCY, 2013–2014 SCHOOL DISTRICT AND EDUCATION SERVICE CENTER (ESC) AVERAGE DAILY ATTENDANCE (ADA) REPORTS, http://www.tea.state.tx.us/index2.aspx?id=7058&menu_id=645&menu_id2=789 (last updated Sept. 18, 2013).

74. Murphy & Smith, *supra* note 22.

75. COMBS, *supra* note 14, at 20–24.

III. The Law: Education Code and Tax Code

A. *Education Code*

Texas's public schools are funded by several revenue sources including: school districts' local property taxes, state funds, and federal funds.[76] The majority of funding comes from the state and local property taxes collected by school districts.[77] The amount of local and state funding a school district receives is determined by the FSP, administered by the TEA.[78] The state's share of funds is allocated through the FSF which is made up of several different revenue streams.[79] One of the sources of revenue for the FSF is recaptured property taxes from wealthy school districts "labeled as 'Appropriated Receipts' and treated as state revenue."[80] This system of "wealth equalization" is codified in Chapter 41 of the Education Code and is often referred to as "Robin Hood," as it takes money from property-wealthy school districts and gives it to property-poor districts.[81]

1. Foundation School Program

The goal of the FSP is to make sure that every school district has "adequate resources to provide a basic instructional program that would be considered acceptable under the state's accountability system, provide facilities suitable to the student's educational needs, and provide access to a substantially equalized enrichment program."[82] Therefore, there are two main components that make up the FSP: operations funding and facilities funding.[83] Both components are tied to the school district's taxable property value.[84] For the current school year (2013–2014), school districts will collect $18,771,045,999 for operations and $4,680,835,520 for facilities.[85] Additionally, the state will spend approximately $19,713,401,327 to fund public schools and the majority of that, $17,885,962,626, will be used for operations funding.[86] Although both operations and facilities funding components are vital, the remainder of this Article will focus on the operations funding component because it is significantly larger. School districts use M&O tax to provide for its portion of Tier I and II entitlement.[87]

76. TEA School Finance 101, *supra* note 43, at 7.
77. *Id.*
78. *Id.*
79. TTARA, *supra* note 21, at 4.
80. TEA Manual, *supra* note 30.
81. *Id.*
82. Tex. Educ. Code Ann. § 42.001(a) (West 2013).
83. TEA School Finance 101, *supra* note 43, at 7.
84. *Id.*
85. TEA Statewide Summary of Finances, *supra* note 45, at 1.
86. *Id.* at 3.
87. TEA School Finance 101, *supra* note 43, at 8.

a. Tier I

Tier I funding is the basic allotment a school district receives, from both the state and its own tax efforts, for regular education.[88] Included in the Tier I allotment is funding for special education, compensatory education, career and technology education, gifted and talented education, transportation, and new instructional facilities, among others.[89] A district's average daily attendance is used in determining its Tier I entitlement.[90] The Education Code uses a semi-complex formula to derive the average number of students in attendance per day in the school district.[91] Students are given a certain weight for purposes of the funding formula dependent upon how much it costs to educate that particular student.[92] In addition to the regular program funding, a district will receive more money for students falling into certain categories, such as: bilingual, special education, or gifted and talented.[93] Students in these types of programs are weighted more heavily because they cost more to educate, in theory.[94]

Once the Tier I entitlement amount has been determined, the FSP must then determine how much a district will pay and subsequently how much the state will owe to fulfill the remainder of the entitlement.[95] The school district's portion of Tier I is called the local fund assignment ("LFA").[96] A district uses its compressed tax rate ("CTR"), or a rate of $1 per $100 worth of property valuation, to calculate its LFA.[97] The CTR, along with the target revenue concept, were created in 2006 as part of the Legislature's efforts to reduce property tax burdens across the state.[98] Since the tax relief efforts statutorily required school districts to reduce M&O tax rates, the target revenue system guarantees a school district a certain amount of funding per weighted average daily attendance ("WADA").[99] H.B. 3646 of the 81st Texas Legislature, first called regular session, 2009, provided that as long as a district's CTR is at least equal to the district's M&O tax rate, the state will guarantee that district a certain amount of revenue.[100]

Following the calculations used to determine a school district's Tier I entitlement, the district will fall into one of two categories: it will

88. TEX. EDUC. CODE ANN. § 42.101 (West 2013).
89. TEA SCHOOL FINANCE 101, *supra* note 43, at 7.
90. TEX. EDUC. CODE ANN. § 42.101 (West 2013).
91. *Id.*
92. §§ 42.101–103.
93. TEA SCHOOL FINANCE 101, *supra* note 43, at 7.
94. *Id.* at 11.
95. *Id.* at 15.
96. *Id.* at 16.
97. *Id.*
98. *Id.* at 29.
99. TEX. EDUC. CODE ANN. §§ 42.151–160 (West 2013).
100. TEA SCHOOL FINANCE 101, *supra* note 43, at 29.

either still need state funding in order to fulfill its Tier I entitlement, or it will be budget balanced, meaning that the LFA collected by the district fully funded or exceeded its Tier I entitlement.[101] If the latter is the case, the district will then be subject to Chapter 41 of the Education Code. These districts are considered property wealthy and are subject to the state's system of recapture contained in the wealth equalization provisions of the Education Code.[102] The Texas wealth equalization provisions are discussed below in the "Robin Hood" Section.

b. Tier II

The second tier of the FSP enables a school district to raise additional funds using a tax rate above the district's CTR in order to meet the district's LFA.[103] However, the Education Code statutorily limits the total amount of tax effort a district can utilize above the CTR.[104] A district can increase its tax efforts 4¢ at the discretion of the local school board.[105] Any additional tax efforts above 4¢ require voter approval, and the additional tax effort cannot exceed the statutory limit of 17¢.[106] A tax rate that exceeds the rate used to produce a district's LFA is called the district enrichment tax rate.[107]

2. Robin Hood

As previously discussed, when a school district's LFA exceeds its total Tier I entitlement, the district will be subject to Chapter 41 of the Education Code, Texas's Robin Hood provisions.[108] As early as 1971, property-poor districts were initiating litigation challenging public school funding in Texas under the Equal Protection Clause of the U.S. Constitution.[109] In 1989, the Texas Supreme Court held that the Texas school funding formula was unconstitutional because it failed to "make suitable provision for the support and maintenance of an efficient system of public free schools."[110] The lawsuit challenging the state's education funding system was brought by a property-poor school district asserting the claim that the formula, based on property taxes, disadvantaged the property-poor districts in their ability to gen-

101. *Id.* at 17.
102. TEX. EDUC. CODE ANN. § 41 (West 2013).
103. § 42.302.
104. § 42.303.
105. TTARA, *supra* note 21, at 14.
106. *Id*. at 14–15.
107. *Id.*
108. TEX. EDUC. CODE ANN. § 241.002 (West 2013).
109. TEA MANUAL, *supra* note 30, at 15; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
110. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392–93 (Tex. 1989).

erate an adequate amount of funds to meet the minimum requirements of the public education system.[111]

After three lawsuits from the Edgewood Independent School District challenging the constitutionality of various state education funding plans, the first attempt at a wealth equalization system was enacted.[112] The Supreme Court of Texas held that Texas's Robin Hood provisions were constitutional in the fourth lawsuit brought by Edgewood Independent School District.[113] On February 4, 2013, the constitutionality of the state's public school funding system was again found to be unconstitutional.[114] More than 600 Texas school districts were party to the lawsuit in state district court where the presiding judge held that the current system does not provide enough money to school districts, and the money that is provided is not fairly distributed.[115] Following the 83rd Legislature and the restoration of approximately $3.4 billion in public education funding, this case has now been set for a new trial beginning January 6, 2014.[116] If the current funding system is again found to be unconstitutional, and that holding is eventually affirmed by the Texas Supreme Court, then legislators will once again be required to rework the system.

In theory, through the current provisions of Chapter 41 of the Education Code, the state can provide access to a substantially equal amount of funding to all districts. This is accomplished by guaranteeing property-poor districts a definite amount of money for operations funding, despite any handicap a district might have in reaching its LFA through its own M&O tax efforts.[117] One of the ways that the state provides for operations funding in property-poor districts is with the recaptured tax dollars from property-wealthy districts that exceed the statutory equalized wealth levels.[118]

111. *Id.*

112. Paula Moore, *Robin Hood: To Not Be Or How To Be, That Is The Question – An Analysis Of The Problems Texas School Financing Today And A Proposal For A Better Tomorrow*, 38 TEX. TECH L. REV. 455, 462-467 (2006); Smith, *supra* note 21.

113. Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 738 (Tex. 1995).

114. David Muto, *The Big Conversation*, TEXAS TRIBUNE (Feb. 5, 2013), *available at* http://www.texastribune.org/2013/02/05/brief-top-texas-news-feb-5-2013/ (court opinion has not yet been published).

115. *Id.*

116. Morgan Smith, *Texas School Finance Trial Goes for Round Two*, TEXAS TRIBUNE (June 19, 2013), *available at* http://www.texastribune.org/2013/06/19/texas-school-finance-trial-goes-round-two/.

117. TEA MANUAL, *supra* note 30, at 15.

118. *Id.*

B. *Texas Economic Development Act, Before the 83rd Legislative Session*

Chapter 313 of the Texas Tax Code was created in 2001 during the 77th Legislature.[119] Prior to changes enacted by the 83rd Legislature, the purpose of the Act was to:

> (1) *encourage large-scale capital investments in this state, especially in school districts that have an ad valorem tax base that is less than the statewide average ad valorem tax base of school districts in this state*;
> (2) create new, high-paying jobs in this state;
> (3) attract to this state new, large-scale businesses that are exploring opportunities to locate in other states or other countries;
> (4) enable local government officials and economic development professionals to compete with other states by authorizing economic development incentives that meet or exceed incentives being offered to prospective employers by other states and to provide local officials with an effective means to attract large-scale investment;
> (5) strengthen and improve the overall performance of the economy of this state;
> (6) *expand and enlarge the ad valorem property tax base of this state;* and
> (7) enhance this state's economic development efforts by providing school districts with an effective local economic development option.[120]

The legislative findings listed in the Act focused primarily on the following facts: many states enacted progressive economic development laws that attracted large manufacturing investments; growth, specifically in the manufacturing industry, will continue to be important to the Texas economy; and Texas's current property tax system did "not favor capital-intensive businesses such as manufacturers."[121] Although it is clear that the primary focus and intent of the law aimed at attracting large manufacturers and creating a large number of high paying jobs, it is also clear that the Legislature intended to increase property tax values across the state and provide school districts with a tool to increase their ad valorem tax base.

The Act allowed a school district to grant an eight-year limitation on the appraised value of property for purposes of the district's M&O property tax.[122] The incentive allowed the district to attract large-scale capital investment. The Act required that projects taking advantage of Chapter 313 use property for one of eight qualifying projects: "manufacturing, research and development, a clean coal project . . . , an advanced clean energy project . . . , renewable energy electric gen-

119. TEX. TAX CODE ANN. § 313.001 (West 2008).
120. § 313.003 (emphasis added).
121. § 313.002.
122. § 313.027(a) (West. Supp. 2012).

eration, electric power generation using integrated gasification combined cycle technology, nuclear electrical power generation," or a computer center used for one of the qualifying projects.[123]

The Act then divided school districts into two separate categories, Subchapter B and C.[124] Subchapter C applied to school districts with territory that qualified as a strategic investment area or a district in a county with a population under 50,000 in which, from 1990 to 2000, the population increased at a rate less than 3% per year.[125] This subchapter was essentially applicable to rural school districts. All other school districts fell into Subchapter B. Depending on the subchapter, the Act set minimum investment amounts that a qualifying project owner needed to invest to receive M&O property tax limitation.[126] These minimum investment amounts were determined by the existing property values within the school district's jurisdiction.[127] As one might suspect, the minimum investment amount for a qualifying project in a Subchapter C district was lower than in a Subchapter B district.[128] Another difference was that Subchapter C determined categorization for minimum qualified investment based on taxable industrial property as opposed to total taxable value of property.[129] Finally, each subchapter set a categorical minimum amount of limitation that a school district could grant to the qualifying project owner for the eight-year limitation period.[130] This limitation was also dependent on the categorical taxable value of property (or industrial property for Subchapter C) within the district.[131]

For an owner of a qualifying project to apply for a limitation on appraised property value, the owner was required to submit an application prescribed by the Comptroller's office to the school district board where the project was located.[132] Upon receipt of the application, the school district forwarded the application to the Comptroller.[133] The Comptroller then either approved or denied the project.[134] If the Comptroller denied the project, the school district needed two-thirds of its governing board to approve the project for the project to go forward under Chapter 313.[135] A school board also needed to find that the application for the project was truthful, and that the limitation on the appraised value where the project will be located was "in

123. § 313.024.
124. §§ 313.021–054.
125. § 313.051.
126. §§ 313.023, .027, .053, .054.
127. §§ 313.023, .027, .053, .054.
128. §§ 313.023–053.
129. § 313.052.
130. § 313.027.
131. §§ 313.022, .052.
132. § 313.025(a).
133. § 313.025(a–1).
134. § 313.025(d).
135. § 313.025(d–1)(2).

the best interest of the school district and the state."[136] However, if the Comptroller determined that the project did not meet the requirements for eligibility based on investment amount and property value within the district—for example, if the project was not a large enough investment for the specific category of school district based on property wealth—there could be a contested hearing.[137] At that time, the project owner had the burden of proving that the project was in fact investing the statutory minimum in order to qualify under Chapter 313, otherwise the project would not qualify.[138]

The Act also provided certain requirements that a project must meet with regards to the amount of jobs the project would create and the amount of pay for the new jobs.[139] But the Act also allowed a school district to waive the jobs requirements when voting to approve a project under Chapter 313.[140]

C. *The "Loophole," Closed by the 81st Legislature in 2009*

There were three types of additional payments that an owner of a qualifying project could agree to pay a school district; the first type was required by statute as "revenue protection payments."[141] These payments guaranteed that the school district would not receive a decreased amount of funding due to a limited property appraisal on a qualifying project.[142] The second type of additional payment by a qualifying project owner to a district was for "educational expenses not funded by the school finance system."[143] As of January 2013, the Comptroller reported that there were no existing payments of this type.[144]

The third type of payment was what some critics considered a windfall for districts entering into agreements to receive them.[145] This type of Chapter 313 payment is often referred to as a "supplemental payment."[146] Prior to 2009, no language existed within the Act capping the amount of money a school district could receive in supplemental payments from a qualifying project owner.[147] The Comptroller's report to the 81st Legislature regarding the Act specifically asserted that supplemental payments were not beneficial to the state and encouraged the Legislature to eliminate supplemental payments. Subse-

136. § 313.025(f).
137. § 313.025(h).
138. *Id.*
139. § 313.021(3).
140. § 313.025(f–1).
141. Combs, *supra* note 49, at 7.
142. *Id.*
143. *Id.*
144. *Id.*
145. *See generally* Smith, *supra* note 11.
146. Combs, *supra* note 14, at 8.
147. *See* Smith, *supra* note 11.

quently, the 81st Legislature capped the amount allowable in supplemental payments at $100 per student.[148]

> A person and the school district may not enter into an agreement under which the person agrees to provide supplemental payments to a school district in an amount that exceeds an amount equal to *$100 per student* per year in average daily attendance, as defined by Section 42.005, Education Code, or for a period that exceeds the period beginning with the period described by Section 313.021(4) and ending with the period described by Section 313.104(2)(B) of this code. This limit does not apply to amounts described by Subsection (f)(1) or (2) of this section.[149]

D. *The Comptroller's Continued Issues with the Act*

The Comptroller continued to suggest a complete elimination of Chapter 313 supplemental payments to the Legislature, still claiming the payments were not beneficial to the state.[150] Prior to the 2009 cap on supplemental payments, a school district had the power to negotiate with a qualifying project owner for supplemental payments in exchange for limitations on property tax appraisals, for "the first eight tax years that beg[a]n after the applicable qualifying time period," knowing that a certain amount of state funding would be guaranteed.[151] This created a situation where school districts might have granted a project the lowest allowable limitation on the project's appraised property value in lieu of large supplemental payments. When this happens, the Comptroller categorizes the agreement and limitation on the property as not beneficial to the state because, during the period of limitation (usually eight years), the state is missing out on large amounts of taxable property that could be taxed and used to fund the local schools or recaptured and redistributed through Chapter 41 of the Education Code.[152] This narrow view does not consider the benefit that school districts receive from supplemental payments, nor does it explore the possibility of reworking the Act to be advantageous for both individual districts utilizing Chapter 313 and the state as a whole.

Furthermore, the Comptroller continued to be critical of the Act as a whole claiming that it is "used to over-incentivize projects that create few or no jobs."[153] In 2010, the Comptroller suggested that the Legislature revisit and construe the Act in a fashion geared more to-

148. TEX. TAX CODE ANN. § 313.027(i) (West Supp. 2012); H.B. 3676, 81st Leg., Reg. Sess. (Tex. 2009).

149. *Id.*

150. COMBS, *supra* note 14, at 4.

151. TEX. TAX CODE ANN. § 313.027 (West Supp. 2012); *see generally* Smith, *supra* note 11.

152. COMBS, *supra* note 14, at 4.

153. *Id.*

wards its original intent.[154] Then again in 2013, with the main provisions of Chapter 313 set to expire on December 31, 2014, the Comptroller continued to urge the 83rd Legislature to evaluate the jobs requirement provisions of the Act.[155] The Comptroller highlighted this concern by noting that, since the jobs requirement became waivable, school districts have waived the jobs requirement for fifty-two of the ninety-five projects.[156] Forty-four of the projects that had the jobs requirement waived are wind energy electrical generation projects.[157]

In 2013, the 83rd Legislature held the future of the Act in its hands. Despite the Comptroller's call for revision, the fact that the majority of projects utilizing Chapter 313 are renewable energy projects, specifically wind energy projects, did not justify an extreme alteration or elimination of existing provisions to an Act that has generated over $62.4 billion of investment in the state.

IV. Analysis: Going Forward

A. *Realizing the Potential and Benefits of the Texas Economic Development Act*

The first step to continued utilization of the Act is coming to the realization that the Act can go forward without necessarily promoting the full original intent. The Act can still achieve the original objectives set forward in the Act, while also promoting goals that were not originally included as objectives. Although the Act's intent to promote large-scale manufacturing development in the state is not fulfilled by wind energy projects, two of the purposes of the Act are certainly being utilized at maximum potential. First, the Act is certainly being utilized to expand the state's ad valorem property tax base by encouraging large-scale capital investments in the state; however, it is renewable energy projects, specifically wind energy, that are taking advantage of Chapter 313 more than large-scale manufacturers.[158] Second, school districts with a tax base below the statewide ad valorem tax base have used the Act to attract new capital investments.[159] In order to utilize the Act and provide a maximum benefit to the state, legislators must accept that sometimes a law does not produce the exact intended outcome, but that does not mean that the result is not desirable.

Additionally, the state's lawmakers must remember that, even with an appraisal limitation as low as $10 million on property worth

154. *Id*.
155. Combs, *supra* note 49.
156. *Id*. at 11–12.
157. *Id*.
158. *Id.* at 1.
159. *Id*. at 16–143; *see generally* Smith, *supra* note 11.

$449,502,507 after development, as seen in Blackwell Independent School District, current limitation agreements will last at most eight years.[160] In 2017, the Chapter 313 appraisal limitations established through deals where the limitation period began in 2009 will expire and the entire value of those properties will begin to be taxed. The state will then begin to see a much greater benefit because the overall ad valorem tax base of the state will increase, one of the statutory purposes of the Act.[161] It would be advantageous for the Legislature to at least extend the current provisions of the Act long enough to see the impact the Act would have on the state when Chapter 313 projects exit their tax limitation periods.

The 83rd Legislature was faced with making one of three decisions regarding Chapter 313 of the Tax Code: (1) let the main provisions of Chapter 313 expire by not passing any legislation during the legislative session, (2) extend the then existing provisions of Chapter 313, or (3) extend the expiration of the Act while also amending it, attempting to make it more beneficial for the state.

1. Letting the Act Expire, a Missed Opportunity

The least attractive option the 83rd Legislature could have chosen was to sit idly by and let the Act expire by not passing any legislation extending the Act. If the Legislature chose this option, the main provision of the Act would have expired on December 31, 2014.[162] The consequence of this option would be detrimental to individual school districts across the state as well as the state as a whole.

If the Act expired, the incentives for qualifying project owners to invest in Texas would have expired with it. If school districts lost the ability to offer limitations on the appraised value of M&O property tax for qualifying projects, then they would have been left without any tools to attract potential large-scale capital investors to their local district. Consequently, large-scale capital investors, including manufacturers and renewable energy project owners alike, would find other states to invest in where they would be offered some type of tax incentive or credit. This is why the executive director of the Wind Coalition, a regional group dedicated to the promotion of wind energy development, forecasted wind energy project owners seeking investments in other states if the Act expired.[163]

The other consequence of expiration would impact both individual school districts and the state as a whole. If the Act expired, the property that could have been developed with qualifying projects, increasing the property value, would instead not have been developed, and the value of the property would have remained stagnant. The Act's

160. COMBS, *supra* note 49, at 30.
161. TEX. TAX CODE ANN. § 313.003 (West 2008).
162. § 313.007 (West Supp. 2012).
163. Galbraith, *supra* note 18.

expiration would have negatively affected school districts because they would have missed out on the opportunity to increase their ad valorem tax base, which would subsequently increase available funding for its local schools. Additionally, the state would miss out because increased property value in a single district would help the district reach its Tier I entitlement through its own LFA tax efforts, lessening the burden and cost to the state. Furthermore, in some cases, districts that are currently property-poor, in terms of Chapter 41 of the Education Code, could become property-wealthy with the property value increase from Chapter 313 project investments. In this situation, the district would not only to be able to fully fund its own Tier I entitlement, but it would also contribute funds back to the state to be redistributed to property-poor districts.

2. Extending the Act in its Current State

The second option the Legislature could have chosen was simply to extend the provisions of the Act by extending the expiration date. This option was contemplated by the Legislature in the form of H.B. 621 introduced by State Representative Eiland.[164] H.B. 621 gave the Act ten more years of life by extending the expiration date of the pertinent provisions, Subchapters B, C, and D, until December 31, 2024.[165]

The benefit of extending the expiration date of the Act is that the extension would allow the state and school districts with existing Chapter 313 projects to see the full impact of those projects on the ad valorem tax base as the agreement limitation periods begin to expire. Prior to 2013, Chapter 313 agreements could only limit the appraised value of property for a maximum of eight years.[166] Depending on the exact year that the limitation began, the eighty-six agreements entered into between 2008 and 2009, by far the two years with the most agreements, will expire around 2016 and 2017. The extension on the expiration date would allow for the impact of existing projects to come to fruition, allowing critics to realize the full benefit of the Act. When the agreements expire, school districts will begin to tax the full value of the property where qualifying projects are located. Again, an excellent example of this can be seen in Blackwell Independent School District.

Blackwell Independent School District entered into a Chapter 313 agreement with FPL Energy Horse Hollow Wind GP, L.L.C. and FPL Energy Horse Hollow Wind II GP, L.L.C. on December 28, 2005.[167] This single agreement limited the M&O taxable value of the property

164. H.B. 621, 83rd Leg., Reg. Sess. (Tex. 2013).
165. *Id.*
166. TEX. TAX CODE ANN. § 313.027(a) (West Supp. 2012).
167. COMBS, *supra* note 49, at 30.

to $10 million.[168] In 2011, the market value of the property was $449,502,507.[169] When this agreement expires, the wind energy company will begin to pay M&O tax on the entire value instead of the limited $10 million. In fact, Blackwell Independent School District has entered into a total of five Chapter 313 agreements.[170] The total M&O taxable value of the property where those five projects are located was over $1.33 billion in 2009, but the five project owners were only paying tax on just over $270 million with the agreement limitations in place.[171] As those agreements begin to periodically expire, both the school district and the state will enjoy the benefit of taxing the entire increased property value.

The disadvantage to the simple extension of the Act's expiration is that it does not appear as though the Act, in its current state, encourages new investments like it did prior to 2009 when supplemental payments were not restricted. Only eight of the forty-two applications for Chapter 313 limitation agreements received by the Comptroller's office between April 1, 2012, and November 6, 2012, were wind power generation projects.[172] The rest of the applications were for manufacturing projects.[173] These numbers suggest that the current language of the Act is not encouraging investment outside of manufacturing at the rate that was experienced prior to the 2009 cap of supplemental payments and should therefore not only be extended, but amended as well.

3. Amending the Act

The best and final option available to the Legislature was to both extend and amend the Act to encourage large-scale capital investment in Texas. One alternative would have been to restore the Act to the language used prior to 2009 by removing the $100 per student cap for supplemental payments. A reinstatement of unlimited supplemental payments would once encourage school districts to be more aggressive in the pursuit of Chapter 313 agreements. This would result in a renewed interest in Chapter 313 agreements as seen in the years prior to 2009, specifically by wind energy companies. Discussed below are two possible alternatives for restoring uncapped supplemental payments along with further amendments to the Act, if the Texas Comptroller and the Legislature believe that the state does not benefit when individual school districts receive large supplemental payments.

The first alternative is to require that supplemental payments be used to replace the state's portion of Tier I funding before the school

168. *Id.*
169. *Id.*
170. *Id.* at 28–32.
171. COMBS, *supra* note 14, at 20–24.
172. COMBS, *supra* note 49, at 8.
173. *Id.* at 8–9.

district can use the money from supplemental payments for other purposes, such as building new athletic facilities. For instance, in the five Chapter 313 agreements that Blackwell Independent School District entered into, the district received an estimated $34,962,206 in supplemental payments.[174] The Comptroller estimated that the difference between the M&O taxes imposed on the qualified property with and without the Chapter 313 agreement limitation was $18,079,085.[175] In other words, Blackwell Independent School District would have collected $18,079,085 more if there were no limitations in place. Under this alternative, the statute could be amended to require that the district use part of the nearly $35 million in supplemental payments received to offset the $18,079,085. Even after offsetting the M&O tax difference with supplemental payment dollars, Blackwell Independent School District would still be left with over $16 million in supplemental payments to use as it saw fit.

A second alternative is to dedicate a portion of supplemental payments to the state. Even if the portion dedicated to the state was as high as 50%, it would still be advantageous for a school district to seek the highest possible amount in supplemental payments because the district still receives a great benefit. In 2013, the Comptroller reported that $473,086,585 was being paid in supplemental payments by companies to school districts.[176] The portion of supplemental payments dedicated to the state could go straight to the Education Code Chapter 41 redistribution fund. Under this alternative, the state would see a greater benefit because property-poor districts throughout the state would share in the wealth of Chapter 313 investments.

No matter which option the Legislature chose regarding the reinstatement of uncapped supplemental payments, it appears evident that the cap must be removed for the Act to regain its full utility. Uncapped supplemental payments are the tool school districts need in order to offer lower tax limitations on property values, and, if properly applied, the payments can immediately benefit the state as well.

B. *What the 83rd Legislature Actually Did, H.B. 3390*

During the 83rd Legislative Session in Texas, the Act was indeed saved from expiration and extended through December 31, 2022.[177] Among other changes incorporated to the Act, H.B. 3390 repealed Subchapter D of the Act, which provided a tax credit in "addition to the limitation on the appraised value of the person's qualified property under Subchapter B or C, . . . in an amount equal to the amount of ad valorem taxes paid to that school district that were imposed on the portion of the appraised value of the qualified property that ex-

174. COMBS, *supra* note 14, at 20–24.
175. *Id.*
176. COMBS, *supra* note 49, at 7.
177. H.B. 3390, 83rd Leg., Reg. Sess. (Tex. 2013) [hereinafter H.B. 3390].

ceeds the amount of the limitation agreed to by the governing body of the school district under Section 313.027(a)(2) in each year in the applicable qualifying time period."[178] The two most significant changes made to the Act were the changes in new-jobs-creation requirements and the removal of powers previously held by school district governing bodies, while increasing the authority of the Comptroller.

1. New Authority for the Comptroller

H.B. 3390 wasted little time increasing the Comptroller's role in the administration of the Act. Section 1 of the Bill amended the legislative intent of the Act, which previously stated that "economic development decisions should occur at the local level."[179] The Bill added the language that economic decisions made at the local level should have oversight from the state.[180] The extensive oversight that H.B. 3390 created is vested in the office of the Comptroller.[181]

The most significant power given to the Comptroller can also be found in Section 1 of H.B. 3390. Included in the amendments to the legislative intent are the new guidelines the Comptroller must follow in implementing the Act:

> (A) strictly interpret the criteria and selection guidelines provided by this chapter; and
> (B) issue certificates for limitations on appraised value only for those applications for an ad valorem tax benefit provided by this chapter that:
> (i) create high-paying jobs;
> (ii) provide a net benefit to the state over the long term; and
> (iii) advance the economic development goals of this state.[182]

This new language means that no new Chapter 313 agreement can be entered into without a certificate, issued by the Comptroller, for limitation on appraised value. Section 6 of the Bill grants the Comptroller ultimate authority over the project-approval process.[183] Specifically, the Act was amended to state that "a school district may not approve an application unless the [C]omptroller submits to the governing body a certificate for a limitation on appraised value of the property."[184] Prior to the new amendment, a school district could approve a project application even if the Comptroller disapproved, if the district held a public hearing and the project subsequently received two-thirds of the governing body's votes of approval.[185] With this new requirement, the

178. *Id*. at 32; TEX. TAX CODE ANN. § 313.102 (West 2008).
179. H.B. 3390, at 3; Fiscal Note, H.B. 3390, 83rd Leg., Reg. Sess. (Tex. 2013) [hereinafter Fiscal Note, H.B. 3390].
180. H.B. 3390 at 3; Fiscal Note, H.B. 3390.
181. H.B. 3390, at 4; Fiscal Note, H.B. 3390, at 2.
182. H.B. 3390, at 4; Fiscal Note, H.B. 3390, at 2.
183. H.B. 3390, at 13; Fiscal Note, H.B. 3390, at 3.
184. H.B. 3390, at 13; Fiscal Note, H.B. 3390, at 3.
185. TEX. TAX CODE ANN. § 313.025(d–1) (West Supp. 2012).

Comptroller has a virtual veto power over any project that she determines fails to meet the criteria of the Act. Therefore, even though the Act still states that economic development decisions should be made "at the local level with oversight by the state,"[186] the decision to approve a Chapter 313 project has essentially been completely removed from local decision makers.

Section 7 of H.B. 3390 also adds criteria to the issuance of a certificate for a limitation on appraised value.[187] In order for the Comptroller to issue a certificate, a proposed project must be:

> reasonably likely to generate, before the 25th anniversary of the beginning of the limitation period, tax revenue, including state tax revenue, school district maintenance and operations ad valorem tax revenue attributable to the project, and any other tax revenue attributable to the effect of the project on the economy of the state, in an amount sufficient to offset the school district maintenance and operations ad valorem tax revenue lost as a result of the agreement.[188]

This language gives the Comptroller yet another tool to gain more control over the administration of the Act. Fundamentally, if the Comptroller deems that after twenty-five years a project would not offset the school district's M&O tax revenue lost during an agreement, then the Comptroller will not issue a certificate for a limitation on appraised value and there will be no such agreement.[189]

With power and decision-making authority moving from the local level to the state level, in the form of the Comptroller's office, the challenges for renewable energy projects, specifically wind energy, seem to be growing. One of those challenges will indeed be the Comptroller's new authority to review Chapter 313 agreements and the jobs created by a project, and impose penalties on project owners failing to meet the new qualifying jobs requirements.

2. Focus on New Qualifying Jobs Requirements

The Comptroller's report to the 83rd Legislature urged the members to "consider the role of job creation and the economic contribution to our state of each industry currently included in the Act."[190] The report also pointed out that the majority of Chapter 313 projects that had the minimum-jobs requirement waived were in the renewable energy industry.[191] Accordingly, the Legislature responded by changing the Act's job-creation requirements.

186. H.B. 3390; Fiscal Note, H.B. 3390, at 2.
187. H.B. 3390; Fiscal Note, H.B. 3390, at 4.
188. H.B. 3390; Fiscal Note, H.B. 3390, at 4.
189. H.B. 3390; Fiscal Note, H.B. 3390, at 4.
190. COMBS, *supra* note 49.
191. *Id.*

Section 3 of H.B. 3390 amends the Act by adding the word "qualifying" to the new-jobs-creation requirement.[192] The Act provides that a permanent full-time job is a "qualifying job" if the job:

> (A) requires at least 1,600 hours of work a year;
> (B) is not transferred from one area in this state to another area in this state;
> (C) is not created to replace a previous employee;
> (D) is covered by a group health benefit plan for which the business offers to pay at least 80 percent of the premiums or other charges assessed for employee-only coverage under the plan, regardless of whether an employee may voluntarily waive the coverage; and
> (E) pays at least 110 percent of the county average weekly wage for manufacturing jobs in the county where the job is located.[193]

Section 3 of H.B. 3390 also clarifies that the twenty-five new jobs created by a qualifying project under Subchapter B of the Act must be new "qualifying jobs."[194] Likewise, Section 16 of the Bill applies the same language change to the ten new jobs required for projects qualifying under Subchapter C.[195]

Section 3 also sets forth a new provision that grants the Texas Workforce Commission ("TWC") the authority to determine whether a property owner has created the requisite number of new-qualifying jobs.[196] In making this determination, the TWC may take into consideration "operations, services and other related jobs created in connection with the project, including those employed by third parties under contract."[197] However, a job created in connection to a project will only be counted towards the minimum number of new qualifying jobs if the TWC "determines that the cumulative economic benefit to the state of these jobs is the same or greater than that associated with the minimum number of qualified jobs required."[198]

Finally, Section 11 of H.B. 3390 requires the Comptroller to annually review Chapter 313 projects to insure that they are meeting qualifying-job-creation requirements.[199] If the Comptroller determines that a project owner has failed to meet the job-creation requirements for one year following an initial notification from the Comptroller, then the project owner will be subject to monetary penalties.[200] Additionally, if the Comptroller penalizes a project owner three times, the

192. H.B. 3390, at 8; Fiscal Note, H.B. 3390, at 3.
193. H.B. 3390, at 6; Fiscal Note, H.B. 3390, at 2.
194. H.B. 3390, at 6; Fiscal Note, H.B. 3390, at 2.
195. H.B. 3390, at 6; Fiscal Note, H.B. 3390, at 3.
196. H.B. 3390, at 7; Fiscal Note, H.B. 3390, at 3.
197. H.B. 3390, at 7; Fiscal Note, H.B. 3390, at 3.
198. H.B. 3390, at 7; Fiscal Note, H.B. 3390, at 3.
199. H.B. 3390, at 22; Fiscal Note, H.B. 3390, at 4.
200. H.B. 3390, at 22; Fiscal Note, H.B. 3390, at 4.

Comptroller has the authority to rescind the agreement between the project owner and the school district.[201]

While H.B. 3390 does not remove section 313.025(f-1) of the Act, which allows a governing body of a school district to waive the new-jobs-creation requirement, a school district cannot enter into an agreement without a certificate of limitation from the Comptroller.[202] Apparently, new agreements will not be approved by the Comptroller without the guarantee of new-qualifying-jobs-creation requirements being met. This will be particularly important for wind energy projects moving forward because of the relatively low number of onsite jobs created once a wind farm has been constructed and is operational. It will be up to the TWC to determine whether wind energy projects continue to meet job-creation requirements through jobs that are created subsequent to a wind energy electrical power generation project's completion.[203] In other words, will manufacturing, technical services, research and development, transportation, or electrical transmission jobs created because of a wind energy project be considered new qualifying jobs for the purposes of the Act?

3. Other Notable Changes

H.B. 3390 made several additional notable changes to the Act. One of the changes was the addition of "Texas priority projects" to the list of qualifying projects.[204] These projects require a $1 billion investment from the project owner.[205] Another change was the increase to the minimum amount of limitation for projects qualifying under Subchapter C.[206] This change raised the lowest possible dollar amount for limitation on appraised value for projects in certain rural school districts and districts classified as "strategic investment zones."[207]

The eligibility for school districts to qualify under Subchapter C was also amended by adding the definition of strategic investment areas to the subchapter.[208] The Comptroller was granted the authority to determine which counties qualify as strategic investment areas.[209] Following the determination of areas that will qualify as Subchapter C areas, the Comptroller will annually publish the findings no later than October 1 each year.[210] This may help spawn growth in these areas because Subchapter C requires less capital investment than Sub-

201. H.B. 3390, at 24.
202. TEX. TAX CODE ANN. § 313.025(f–1) (West Supp. 2012).
203. H.B. 3390, at 7; Fiscal Note, H.B. 3390, at 3.
204. H.B. 3390, at 7–8; Fiscal Note, H.B. 3390, at 3.
205. H.B. 3390, at 9; Fiscal Note, H.B. 3390, at 3.
206. H.B. 3390, at 31; Fiscal Note, H.B. 3390, at 5.
207. H.B. 3390, at 29, 31.
208. H.B. 3390, at 29; Fiscal Note, H.B. 3390, at 5.
209. H.B. 3390, at 29; Fiscal Note, H.B. 3390, at 5.
210. H.B. 3390, at 30; Fiscal Note, H.B. 3390, at 5.

chapter B for a qualifying project,[211] along with the creation of only ten new qualifying jobs.[212]

The limitation period for Chapter 313 agreements was also changed from "the first eight tax years that begin after the applicable qualifying time period."[213] H.B. 3390 provides that limitations will be for a ten-year period.[214] The Bill further states that the limitation period will begin on the first day of the first tax year following: "(A) the application date; (B) the qualifying time period; or (C) the date commercial operations begin at the site of the project."[215]

Finally, supplemental payments from qualifying project owners to school districts were restricted yet again.[216] Now, supplemental payments cannot extend longer than three years past the expiration of the limitation period.[217] Additionally, supplemental payments may not exceed $50,000 per year.[218] With the $100 per student in average daily attendance cap on supplemental payments already in place, the $50,000 limitation will only affect school districts with over 500 students.

V. Conclusion: The Future for Wind Energy and the Texas Economic Development Act

With the Act set to expire at the end of 2013, the 83rd Texas Legislature extended the Act while making substantial changes to the existing provisions.[219] Specifically, local autonomy was removed from local school districts and placed with the state in the office of the Comptroller. Now that the Comptroller must issue certificates for limitation on appraised value for Chapter 313 projects to go forward,[220] local school districts have been stripped of their authority to make important economic-development decisions. With the changes made to the Act by the 83rd Legislature, two new provisions stand out as the most challenging for the future of wind energy in Texas: increased restrictions imposed on supplemental payments between project owners and school districts—instead of lessening or removing the restrictions, and the increased emphasis placed on new-job creation—instead of focusing on the increased property value, or any other benefit, that a project would bring to the state.

Once again, supplemental payments between project owners and school districts were increasingly restricted. Since 2009, when supple-

211. Tex. Tax Code Ann. § 313.027, .054 (West Supp. 2012).
212. *See* Fiscal Note, H.B. 3390, at 2.
213. § 313.027(a).
214. H.B. 3390, at 19; Fiscal Note, H.B. 3390, at 4.
215. H.B. 3390, at 19.
216. H.B. 3390, at 21; Fiscal Note, H.B. 3390, at 4.
217. H.B. 3390, at 21; Fiscal Note, H.B. 3390, at 4.
218. H.B. 3390, at 21; Fiscal Note, H.B. 3390, at 4.
219. *See* H.B. 3390.
220. H.B. 3390, at 12–13; Fiscal Note, H.B. 3390, at 3.

mental payments were first capped at $100 per student, the number of wind energy projects taking advantage of Chapter 313 has not been nearly as strong.[221] Rural school districts have been the most disadvantaged by these restrictions. Small districts, primarily across West Texas, were able to build new facilities, provide students with access to the latest technologies, and even set up earmarked scholarship funds for higher education.[222] Since the 2009 restrictions, supplemental payments are no longer available to fund these great ventures. Furthermore, school districts have lost one of their biggest and best incentives available to attract project owners and their investments. Without supplemental payments, school districts will not be able to provide extraordinary opportunities for their students and project owners will continue to find themselves with nothing to offer in exchange for the lowest possible limitation on appraised value.

Although wind energy projects do not provide as many onsite jobs as a large-scale manufacturer might, many jobs have in fact been brought to the state because of these projects.[223] Wind farms require a technical construction process that includes unique manufacturing and transportation opportunities during construction.[224] Once constructed, a wind farm still requires maintenance service as well as transmission of the power generated.[225] Although many of these jobs may not be permanently located on the site developed by a wind energy project, they require highly skilled employees. The Wind Coalition reports that "more than 26,000 Texans work in fields connected with wind energy."[226] With the amendments made to the Act, the onus will lie with the TWC to recognize and credit those jobs to future wind energy projects seeking Chapter 313 agreements.[227]

Wind energy projects continue to satisfy the original purposes of the Act by bringing large-scale capital investment to the state—specifically to school districts with an ad valorem tax base less than the statewide average, creating new high-paying jobs, strengthening the overall performance of the state's economy, and expanding the state's ad valorem tax base as a whole. Moreover, wind energy projects provide many other benefits. At times, wind power provides more than 25% of the state's commercial electrical energy supply.[228] Furthermore, with Texas in a seemingly constant drought, wind energy provides a power source that uses no water.[229] Additionally, wind energy is emissions free, providing the state with power that does not produce

221. COMBS, *supra* note 49, at 3.
222. Smith, *supra* note 11.
223. The Wind Coalition, *supra* note 6.
224. *Id.*
225. *Id.*
226. *Id.*
227. H.B. 3390, at 7; Fiscal Note, H.B. 3390, at 3.
228. The Wind Coalition, *supra* note 1.
229. The Wind Coalition, *supra* note 6.

pollution.[230] Finally, elected officials cannot ignore the fact that wind energy projects have invested more than $15 billion in the state through Chapter 313 agreements.[231] Given the benefits that wind energy projects have provided to the state, it is apparent that the Legislature, by following the suggestions of the Comptroller, has once again missed an opportunity to utilize the Act to attract even more wind energy projects, which would have increased the state's ad valorem tax base and put more money into the public school coffers. The silver lining is the fact that the Act has been extended until the end of 2022;[232] meaning that four more bodies of legislators will have the opportunity to amend the Act and restore uncapped supplemental payments, utilizing the Act to its full potential.

230. *Id*.
231. COMBS, *supra* note 49.
232. H.B. 3390, at 4; Fiscal Note, H.B. 3390, at 2.