

VIRGINIA PACE AUTHORITY (VPA) MODEL C-PACE ORDINANCE

AN ORDINANCE TO AMEND THE CODE OF THE [CITY][COUNTY] OF _____, VIRGINIA, BY CREATING A NEW [ARTICLE][CHAPTER] _____, ENTITLED “COMMERCIAL PROPERTY ASSESSED CLEAN ENERGY FINANCING PROGRAM”

[Article][Chapter] ____. “*[Insert Locality Name]* C-PACE Financing Program”

Sec. __-1. Purpose and Creation of C-PACE Financing Program

A. Pursuant to the C-PACE Act, any Virginia locality may enact an ordinance authorizing a Program to provide C-PACE Loans for the initial acquisition and installation of eligible clean energy improvements with willing owners of qualifying Property, which may include renovations to existing improvements or new construction. C-PACE Loans shall be secured by the placement of a C-PACE Lien against the Property, recorded in the Clerk’s Office. The C-PACE Payments shall be due and payable at the same time and in the same manner as Real Estate Taxes are due and payable (pursuant to Title 58.1, Chapter 32 of the Code).

B. After due consideration, the [Council][Board] hereby determines that the promotion and development of a Program will enhance the renovation of existing buildings and foster the construction of new buildings with energy or water efficient features, resulting in economic growth in the [City][County] and the region. The adoption of an ordinance creating a Program for the [City][County] is in the public interest and fulfills multiple public purposes.

C. Therefore, the purpose of this [Article][Chapter] (this “Ordinance”) is to create the “*[Insert Locality Name]* Commercial Property Assessed Clean Energy (C-PACE) Financing Program,” in accordance with the C-PACE Act, which shall operate in accordance with the provisions of this Ordinance and the C-PACE Act.

Sec. __-2. Definitions

“Amortization Schedule” means an amortization schedule of C-PACE Payments necessary to repay the C-PACE Loan, which is attached to the C-PACE Certificate.

“Borrower” means (A) an entity (including a non-profit entity) or other owner of Property, which voluntarily obtains a C-PACE Loan under the Program, resulting in a C-PACE Assessment and C-PACE Lien on the Property, or (B) a successor in title to Borrower.

“Borrower Certification” means a notarized certificate from Borrower, certifying that (A) Borrower is (i) current on all loan payments secured by a lien on the Property, (ii) current on Real Estate Tax and personal property tax payments, (iii) current on all federal, state and local taxes and that there is no federal income tax lien, judgment lien, or other involuntary lien against the Property, and (iv) not insolvent or in bankruptcy or foreclosure proceedings, and (B) the title of the Property is not in dispute, as evidenced by a title report or title insurance commitment from a title insurance company acceptable to Program Administrator and Capital Provider.

“C-PACE” means Commercial Property Assessed Clean Energy.

“C-PACE Act” means Virginia’s clean energy financing law, codified at Section 15.2-958.3 of the Code.

“C-PACE Agreement” means the C-PACE Assessment and Financing Agreement among Borrower, Capital Provider, and the [City][County], which establishes the terms, conditions, party responsibilities and repayment obligations related to the C-PACE Loan and the C-PACE Assessment, a form of which C-PACE Agreement is attached to this Ordinance.

“C-PACE Amendment” means a Certificate of Amendment to Levy and Lien of C-PACE Assessment, executed by Capital Provider without consent from Borrower, as permitted in the C-PACE Documents, which C-PACE Amendment shall be recorded in the Clerk’s Office to evidence each amendment to the C-PACE Assessment and the C-PACE Lien, a form of which C-PACE Amendment is attached to the C-PACE Agreement.

“C-PACE Assessment” means a voluntary, special assessment levied against a Property, at a Borrower’s request, to cover the debt service and recurring fees of a C-PACE Loan benefitting the Property.

“C-PACE Assignment” means a written assignment executed by Capital Provider from time to time without consent from Borrower, which shall be recorded in the Clerk’s Office to evidence Capital Provider’s assignment of the C-PACE Loan and C-PACE Lien, a form of which C-PACE Assignment is attached to the C-PACE Agreement.

“C-PACE Certificate” means a Certificate of Levy and Lien of C-PACE Assessment, which shall (A) be executed by Borrower, Capital Provider, and the [City][County], (B) include an Amortization Schedule, and (C) be recorded in the Clerk’s Office to evidence the C-PACE Lien, a form of which C-PACE Certificate is attached to the C-PACE Agreement.

“C-PACE Documents” means the C-PACE Agreement, C-PACE Note, C-PACE Certificate, C-PACE Assignment (if any), C-PACE Amendment (if any), and *[INSERT OTHER APPLICABLE DOCUMENTS]*.

“C-PACE Lien” means the voluntary, special assessment lien levied against the Property as security for the C-PACE Loan, which (A) is *pari passu* (i.e., of equal priority) with the [City][County] Real Estate Tax lien; (B) as to the current C-PACE Payment that is due and any Delinquent C-PACE Payments, is senior to (i) all other special assessment liens, and (ii) all previously recorded senior liens, provided a Lender Consent is recorded for each such senior lien; (C) shall run with title to the Property and shall not be extinguished by a foreclosure; and (D) is evidenced by the C-PACE Certificate, as may be amended and assigned from time to time in accordance with the this Ordinance and the C-PACE Documents.

“C-PACE Loan” means a loan made under the Program by a Capital Provider to a Borrower to finance Eligible Improvements to a Property in accordance with the C-PACE Act, this Ordinance and the C-PACE Documents.

“C-PACE Note” means a promissory note executed by Borrower made payable to Capital Provider in the original principal amount of the C-PACE Loan, including without limitation, any and all modifications, restructurings, extensions, consolidations, amendments and/or assignments thereof, a form of which C-PACE Note is attached to the C-PACE Agreement.

“C-PACE Payments” means the periodic, installment payments of the C-PACE Loan, due and payable by Borrower to Capital Provider to repay the C-PACE Loan in such amounts and at such times as described in the C-PACE Agreement, the C-PACE Certificate, the Amortization Schedule, and the C-PACE Amendments (if any).

“Capital Provider” means (A) a third party capital provider that has been approved by Program Administrator in accordance with the Program Guidelines to originate a C-PACE Loan, or (B) the current holder of a C-PACE Loan.

“[City][County]” means the [City][County] of [*Insert Locality Name*], Virginia, which includes the [City][County] treasurer, assessor or other [City][County] officials that levy, assess, collect and enforce taxes (including Real Estate Tax) for the [City][County].

“Clerk’s Office” means the Clerk’s Office of the Circuit Court of [*Insert Locality Name*], Virginia.

“Code” means the Code of Virginia of 1950, as amended to date and as it may hereafter be amended.

“Delinquent C-PACE Payment” means any C-PACE Payment that was not paid by Borrower when due, which shall include without limitation, all interest, late fees and penalties incurred pursuant to the C-PACE Documents.

“DMME” means the Virginia Department of Mines, Minerals and Energy.

“DMME Guidelines” means the Uniform Statewide Financial Underwriting Guidelines for C-PACE Loans, issued on December 1, 2015, by the PACE Stakeholder Committee organized by DMME.

“Eligible Improvement” means any improvement, renovation, addition, construction, installation, modification of or to, a Property or a building located on a Property, if designed to (A) facilitate renewable energy production and distribution, (B) reduce energy consumption, or (C) reduce water consumption, which Eligible Improvements include without limitation, the types of Eligible Improvements listed in Section 3 below.

“Lender Consent” means an executed consent and subordination agreement from each senior lender having a senior lien on the Property, which shall be recorded in the Clerk’s Office in connection with the C-PACE Loan closing.

“PACE” means Property Assessed Clean Energy.

“Program” means the [City][County] C-PACE financing program established to provide C-PACE Loans to Borrowers in accordance with C-PACE Act, this Ordinance and the C-PACE Documents.

“Program Administrator” means (A) an independent third party (authorized by written contract with the [City][County]), or (B) a designated [City][County] official, which, in either case,

possesses the authority to administer the Program as provided by the Code, this Ordinance and the Program Guidelines.

“Program Guidelines” means those procedures, rules, disclosures, and restrictions promulgated, imposed and enforced by Program Administrator for the governance of the Program.

“Property” means commercial, assessable real property located in the [City][County], whether vacant or occupied, improved or unimproved, excluding a condominium or a residential property with fewer than five (5) dwelling units.

“Real Estate Tax” means the local tax on real estate which the [City][County] levies pursuant to Title 58.1, Chapter 32 of the Code.

“Virginia” means the Commonwealth of Virginia.

Sec. __-3. Eligible Improvements under the C-PACE Program

A. The Program shall be available throughout the [City][County], provided that Borrower, the Property and Eligible Improvements all qualify for the Program. The following types of Eligible Improvements may be financed with a C-PACE Loan:

i. renewable energy production and distribution facilities (e.g., solar photovoltaic, solar thermal, wind, wave and/or tidal energy and the storage and/or distribution of the energy produced thereby);

ii. energy usage efficiency systems (e.g., high efficiency lighting and building systems, heating, ventilation and air conditioning (HVAC) upgrades, air duct sealing, high efficiency hot water heating systems, building shell or envelope improvements, reflective roof, cool roof or green roof systems and/or weather-stripping);

iii. water usage efficiency improvements (e.g., recovery, purification, recycling and other forms of water conservation);

iv. construction, renovation or retrofitting of a Property directly related to the accomplishment of any purpose listed in subsections (i), (ii) or (iii), above, whether such Eligible Improvement was erected or installed in or on a building or on the ground, it being the express intention of the [City][County] to allow Eligible Improvements that constitute, or are part of, the construction of a new structure or building to be financed with a C-PACE Loan; or,

v. any other category of improvement approved by [City Manager][County Administrator] or Program Administrator as qualifying for financing under the C-PACE Act and the Program.

B. The proceeds of a C-PACE Loan may be used to pay construction, development and consulting costs directly related to a C-PACE Loan, including without limitation, the cost of labor, materials, machinery, equipment, plans, specifications, due diligence studies, consulting services (e.g., engineering, energy, financial and legal), Program fees, C-PACE Loan fees, capitalized interest, interest reserves and C-PACE transaction underwriting and closing costs.

Sec. __-4. C-PACE Loans

A. C-PACE Loans shall be originated by Capital Providers. The [City][County] and/or its respective governmental entities shall have no obligation to originate or guaranty any C-PACE Loans. Except for oversight duties set forth in this Ordinance, the role of the [City][County] shall be limited to (i) levying and assessing the C-PACE Assessments and C-PACE Liens, (ii) facilitating the repayment of the C-PACE Loans by including each C-PACE Payment on Borrower's Real Estate Tax bill and collecting and distributing each C-PACE Payment in accordance with the C-PACE Documents, and (iii) enforcing the timely repayment of the C-PACE Loans in the same manner as delinquent Real Estate Taxes are enforced, in accordance with the C-PACE Documents, any applicable [City][County] ordinances, and Title 58.1, Chapters 32 and 39 of the Code, which enforcement action may include (without limitation) conducting a tax foreclosure sale of the Property by public auction.

B. The minimum initial principal amount of a C-PACE Loan shall be [\$_____], and the maximum initial principal amount of a C-PACE Loan shall be [\$_____].

C. The interest rate of a C-PACE Loan shall be determined by mutual agreement of Borrower and Capital Provider.

D. The term of a C-PACE Loan shall not exceed [____ (____)] years.

E. The amount of a C-PACE Loan shall be fully amortized in the C-PACE Payments over the term of the C-PACE Loan as agreed by Borrower and Capital Provider.

F. Program Administrator will process Program applications from potential Borrowers on a first come, first serve basis in accordance with the Program Guidelines. All potential Borrowers shall meet the Program eligibility requirements contained in this Ordinance and in the Program Guidelines.

Sec. __-5. C-PACE Assessment and Lien [CONSIDER DELEGATING BILLING/COLLECTION RESPONSIBILITIES TO PROGRAM ADMINISTRATOR OR CAPITAL PROVIDER AS AN ALTERNATIVE TO [CITY][COUNTY] BILLING/COLLECTION; HOWEVER DOING SO MAY CALL FOR ADDITIONAL LEGAL ANALYSIS.]

A. A C-PACE Loan shall be secured by a C-PACE Lien, and the C-PACE Lien shall be evidenced by the recordation of a C-PACE Certificate in the Clerk's Office. The C-PACE Assessment shall be payable in C-PACE Payments over a period of years, due at the same time and in the same manner as Real Estate Taxes, in accordance with the C-PACE Certificate.

B. The C-PACE Lien shall have equal priority with the [City][County] Real Estate Tax lien, except that it shall have priority over any previously recorded lien only if (i) a Lender Consent is recorded in the Clerk's Office in connection with the C-PACE Loan closing, and (ii) Borrower has delivered an executed Borrower Certificate to the [City][County] and Program Administrator in connection with the C-PACE Loan closing.

C. In connection with the C-PACE Loan closing, Program Administrator shall deliver a recorded C-PACE Certificate to the [City][County], and the [City][County] shall levy the C-PACE Assessment and related C-PACE Payments onto the Property's Real Estate Tax bill.

Thereafter, the C-PACE Assessment Payments shall be billed on the Property's Real Estate Tax bill and shall be collected with the payment of Real Estate Taxes.

D. The [City][County] obligation to remit the C-PACE Payments to Program Administrator or Capital Provider shall be a limited obligation, only payable if and when funds from the C-PACE Payments are received by the [City][County]. The [City][County] shall promptly process, deposit and credit C-PACE Payments upon receipt.

E. No later than [fourteen (14)] days after a C-PACE Payment (or any portion thereof) has been received by the [City][County], the [City][County] shall remit the C-PACE Payment (or so much thereof as available) to Program Administrator or Capital Provider in accordance with the Amortization Schedule attached to the most recent C-PACE Certificate or C-PACE Amendment (if any) recorded in the Clerk's Office.

F. Only the current C-PACE Payment and any Delinquent C-PACE Payments shall constitute a first lien on the Property (having equal priority with the [City][County] Real Estate Taxes). Delinquent C-PACE Payments shall (i) accrue penalties and interest in accordance with the C-PACE Agreement, and (ii) be enforced in accordance with the C-PACE Documents, any applicable [City][County] ordinances, and Title 58.1, Chapters 32 and 39 of the Code, which enforcement action may include conducting a tax foreclosure sale of the Property by public auction. C-PACE Payments and Delinquent C-PACE Payments shall be levied, collected and enforced by the [City][County] in the same manner as delinquent Real Estate Taxes are levied, collected and enforced. In addition to the C-PACE Payments and Delinquent C-PACE Payments due to Capital Provider, the [City][County] shall be entitled to recover its costs and expenses, including reasonable attorneys' fees and costs, in the same manner as in a suit to collect delinquent Real Estate Taxes, and may charge interest and penalties for Delinquent C-PACE Payments in the same manner as delinquent Real Estate Taxes. All collection and enforcement costs, expenses, interest and penalties incurred by Capital Provider and the [City][County] shall (i) be added to the Delinquent C-PACE Payments being collected, (ii) become part of the aggregate amount sued for and collected, (iii) be added to the C-PACE Assessment, and (iv) be secured by the C-PACE Lien.

G. The owner of a Property subject to a C-PACE Lien shall assume the obligation to repay all remaining, unpaid C-PACE Payments due on the C-PACE Assessment (according to the Amortization Schedule), whether the transfer of ownership was voluntary or involuntary. Only the current C-PACE Payment and any Delinquent C-PACE Payments, together with any costs of collection, shall be payable at the settlement of a C-PACE Property sale, unless otherwise agreed by the parties.

H. C-PACE Loans may be transferred, assigned or sold by a Capital Provider at any time during the C-PACE Loan term without consent from Borrower, the [City][County] or any other party; provided that Capital Provider shall (i) record a C-PACE Assignment in the Clerk's Office, and (ii) deliver a copy of the recorded C-PACE Assignment to the [City][County] and Program Administrator. The [City][County] or Program Administrator (as applicable) will not be obligated to remit C-PACE Payments to a new Capital Provider unless a recorded copy of the C-PACE Assignment has been provided to the [City][County] and Program Administrator at least fourteen (14) days before the next due date for the C-PACE Payment. Recordation of the C-PACE Assignment shall constitute an assumption by the new Capital Provider of the C-PACE rights and obligations contained in the C-PACE Documents.

I. After the recordation of the C-PACE Certificate, Capital Provider may, in its sole and absolute discretion, amend the C-PACE Assessment and the C-PACE Lien from time to time without consent from Borrower, the [City][County] or any other party, as permitted in the C-PACE Documents; provided however, Capital Provider shall record a C-PACE Amendment in the Clerk's Office.

Sec. __-6. Program Administrator

A. Program Administrator shall be hired by the [City][County], and shall enter into a written agreement with the [City][County], pursuant to a process designed by the [City][County], for a term of not less than [three (3) years, with two (2) one-year] renewal options at the discretion of the [City][County]. The [City][County] [Manager][Attorney] shall be authorized to enter into any contract on behalf of the [City][County] with respect to the Program.

B. The principal duties of Program Administrator may include (without limitation) the following: (i) creating the Program Guidelines and modifying the Program Guidelines as necessary; (ii) coordinating the billing and collection process; (iii) processing C-PACE applications to determine eligibility for a C-PACE Loan and related Eligible Improvements; (iv) promoting the Program; (v) providing C-PACE training to prospective service providers; and (vi) certifying that prospective C-PACE service providers and Capital Providers are eligible to participate in the Program.

C. The Program will be self-financed through Program fees charged to participating Borrowers that are established to cover the costs to design and administer the Program, including the compensation of Program Administrator. Program Administrator will price and deliver its services to minimize the fees and costs that a Borrower must pay for a C-PACE Loan, all with the goal of promoting and facilitating the [City][County] C-PACE Loans. The Amortization Schedule shall include Program Administrator's on-going fees (in an amount established by Program Administrator) to be included with each C-PACE Payment, and such fees shall be retained by Program Administrator upon payment by Borrower or delivered to Program Administrator by Capital Provider if payment is made directly to Capital Provider.

D. To the extent reasonably practical, the Program Guidelines will incorporate the DMME Guidelines; however, Program Administrator is expressly authorized, in its reasonable discretion exercised jointly with the [City][County], to modify the Program Guidelines from time to time.

E. Program Administrator (i) will endeavor to conduct a competitive, open-market Program, available to all pre-certified Capital Providers, contractors, engineers and consultants who apply to provide services or funding for the Program, and (ii) shall not grant any lender or service provider an exclusive right to provide services or funding for the Program.

F. *[THE LOCALITY SHOULD INCLUDE A JOINT AND COOPERATIVE PROCUREMENT PROVISION (PER CODE SECTION 2.2-4304) IN ITS RFP TO ENGAGE A PROGRAM ADMINISTRATOR FOR ITS PROGRAM.]* The [City][County] acknowledges that Program Administrator may extend its agreement with the [City][County] to any other jurisdiction in Virginia in accordance with the joint and cooperative procurement provisions included in the [City's][County's] Request for Proposal for a Program Administrator and its attachments, which provisions shall govern such joint and cooperative procurement. Program

Administrator shall indemnify, defend and hold the [City][County] harmless against any claim brought against the [City][County] or any liability imposed on the [City][County] as a result of any action or omission to act by Program Administrator in a jurisdiction to which its program administration agreement with the [City][County] was extended under such joint and cooperative procurement.

Sec. __-7. Limitation of Liability

By executing a C-PACE Agreement or any other C-PACE Document, or otherwise participating in the Program, each Borrower, Capital Provider, contractor or other party or participant hereby acknowledges and agrees, for the benefit of the [City][County] and as a condition to the [City's][County's] participation in the Program, that: (A) the [City][County] does not undertake any obligations under or in connection with the C-PACE Act, this Ordinance, the Program Guidelines or any C-PACE Document, except as expressly stated therein or herein, and no implied covenants or obligations of the [City][County] exist; (B) regardless of any default by Borrower, the [City][County] has no obligation to remit any C-PACE Payments or Delinquent C-PACE Payments to Program Administrator or any Capital Provider, or any other payments related to any C-PACE Loan, except from the funds actually received by the [City][County] in payment therefor, as the obligation to remit such funds to Capital Provider is hereby declared to be a special or limited obligation of the [City][County]; (C) the C-PACE Loan, C-PACE Lien, C-PACE Payment, and/or any other obligations arising from any C-PACE Document, the C-PACE Act and/or this Ordinance (i) are not backed by any credit of the [City][County], Virginia or any of its political subdivisions, or any taxes, taxing power or governmental funds, and (ii) shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction; (D) the [City][County] has not made any representations, financial or otherwise, regarding Borrower, the Property or the Eligible Improvements; (E) the [City][County] makes no representation or warranty as to, and assumes no responsibility with respect to, the accuracy or completeness of any C-PACE Lien; (F) the [City][County] assumes no responsibility or liability for the Eligible Improvements, or the planning, construction or operation thereof, (G) each Borrower, Capital Provider and contractor shall, upon request, provide the [City][County] with any information associated with the C-PACE project or the C-PACE Loan; and (H) each Borrower, Capital Provider, contractor and other C-PACE participant in the Program shall comply with all applicable requirements of the C-PACE Act, this Ordinance, the C-PACE Documents and the Program Guidelines.

§__-__. Effective Date

This Ordinance shall become effective as of [_____], 2018].

END OF ORDINANCE