

Designing Virginia's Statewide C-PACE Program: Legal Considerations

January 12, 2022

Objective and Housekeeping

- ▶ Objective: For Virginia Energy and VPA to present the proposed program structure for the statewide C-PACE program, including core program documents, and get your input on key decision points
- ▶ Housekeeping:
 - ▶ We are recording
 - ▶ Chat comments will be noted. Put your name in the chat if you would like to make a verbal comment

Agenda

- ▶ Background of Statewide Program and Virginia PACE Authority
- ▶ General Overview of Virginia Market
- ▶ Discussion of High Priority Topics
- ▶ Open Discussion
- ▶ Next steps

Virginia Energy

- ▶ [§ 15.2-958.3 of the Code of Virginia](#) authorizes local governments to enact C-PACE ordinances
- ▶ Chapter 664 of the 2020 Acts of Assembly adds language to §15.2-958.3 that provides authority for Virginia Energy to offer a statewide C-PACE program option for localities
- ▶ Virginia Energy competitively selected the Virginia PACE Authority to design and administer the statewide program, with technical support from Slipstream

Virginia PACE Authority

- ▶ Formed in 2019 as 501c3 nonprofit serving Virginia exclusively
- ▶ Key staff promoting C-PACE legislatively since 2014 and providing outreach/education since 2015
- ▶ Slipstream provides technical support
- ▶ Nine localities under contract; 10th anticipated Jan 2022
 - ▶ Five open programs (Loudoun, Fairfax, Alexandria, Norfolk, Dumfries)
 - ▶ Four "soft open" programs (Roanoke, Fredericksburg, Louisa, Winchester)

Virginia C-PACE Statute

- ▶ Existing buildings and new construction are eligible
- ▶ All commercial property types eligible (housing 5+ units), no condo units
- ▶ Broad project eligibility: energy efficiency, renewables, water conservation, resiliency, and stormwater management
- ▶ Open market: private capital providers provide C-PACE loans
- ▶ Loans may refinance eligible improvements
- ▶ Project minimum dollar amounts established by ordinance; no project maximum unless publicly originated

Virginia C-PACE Statute

- ▶ Written subordination agreement from all existing lienholders required
- ▶ Voluntary special assessment on the property does not spur a new property value assessment
- ▶ C-PACE Lien may be enforceable by local government in the same manner as a property tax lien (including recovering expenses, incurring interest)
- ▶ The ordinance must include a draft contract (Program Agreement) specifying the terms and conditions proposed by the locality

Overview of Virginia's C-PACE Market

- ▶ Sixteen localities in Virginia have passed C-PACE ordinances that in total represent nearly half of the state's population; all but two of these ordinances have been adopted within the past three years
- ▶ Direct bill is allowed by AG opinion and preference of most existing localities
- ▶ Importance of statute as strict Dillon Rule state
- ▶ Enabling ordinance to be passed by cities and counties (and potentially incorporated towns)

Overview of Virginia's C-PACE Market

- ▶ Accompanying legal agreements that lay out the responsibilities, rights, remedies and indemnification of the parties to the PACE transaction
- ▶ Both an ordinance and draft financing agreement must be passed by a locality to enable C-PACE. The financing agreement can be modified by locality staff and the program administrator
- ▶ C-PACE loans are approved by a designated individual of the local government and do not require a vote by elected officials

Existing Jurisdictional Differences

	In Guide?	In Ordinance	Fairfax County	Loudoun County	City of Petersburg	City of Fredericksburg	Town of Dumfries	City of Norfolk	City of Roanoke	City of Alexandria	City of Winchester	Louisa County
Closing Fee	Yes	No	1% up to first \$500k then 1.25% over \$500k	1.25%	inactive as of 11/2021	1.25%	1.25%	1.25%	1.25%	1.25%	1.25%	1.25%
Total Project Costs												
Floor for fee	Yes	No	\$2,500	\$3,300	\$3,300	\$3,300	\$3,300	\$3,300	\$3,300	\$3,300	\$3,300	\$3,300
Ceiling for fee	Yes	No	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000
"Servicing" (BCR + Reporting)	Yes	No	1.5% of annual pymt; floor = \$330, ceiling = \$1,350 or Nothing if CP does it	1.5% of annual pymt; floor = \$330, ceiling = \$1,800		\$250 per billing cycle for C-PACE Loans up to \$100,000 or \$500 per billing cycle for C-PACE Loans above \$100,000	1.5% of annual pymt; floor = \$330, ceiling = \$1,800	1.5% of annual pymt; floor = \$330, ceiling = \$1,800		1.5% of annual pymt; floor = \$330, ceiling = \$1,800	VPA offers servicing	VPA offers servicing
Billing (the B in BCR)	Yes	No	Capital Provider or VPA	VPA		City	Capital Provider or VPA	Capital Provider or VPA		Capital Provider or VPA	Capital Provider or VPA	Capital Provider or VPA
Collection (the C in BCR)	Yes	No	Capital Provider or VPA	County		City	Capital Provider or VPA	Capital Provider or VPA		Capital Provider or VPA	Capital Provider or VPA	Capital Provider or VPA
Remittance (the R in BCR)	Yes	No	Capital Provider or VPA	County		City	Capital Provider or VPA	Capital Provider or VPA		Capital Provider or VPA	Capital Provider or VPA	Capital Provider or VPA
City/County Seal included on tax bill?	Yes	No	No	Yes		Yes	No	No		No		
Reporting required?	Yes	No	Only if servicing	Full reporting		City to confirm	Only if servicing	Only if servicing		Only if servicing	Only if servicing	Only if servicing
Recorded documents	No	No	C-PACE Certificate with amortization schedule Lender/owner consent	C-PACE Certificate with amortization schedule Lender/owner consent			C-PACE Certificate with amortization schedule Lender/owner consent	C-PACE Certificate with amortization schedule Lender/owner consent		C-PACE Assignment of Lien, Lender/owner consent		
Lien enforcement by locality	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Eligible Property Types	Yes	Yes	Multifamily 5+ units	Multifamily 5+ units	Multifamily 5+ units	Multifamily 5+ units	No multifamily	Multifamily 5+ units	Multifamily 5+ units	Multifamily 5+ units	Multifamily 5+ units	Multifamily 5+ units
Resiliency and stormwater?	Yes	Yes	Yes	come July 1		No	No	Yes	Yes	Yes	Yes	Yes
2 year lookback, comm condos, no project limits in ordinance?	Yes	Yes	No	Yes	No	No	No	No	No	No	Yes	Yes
incorporated towns included?		No	No	Yes	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Loan term	Yes	Yes	later of weighted average of 30 years based on GAAP	shorter of measure with longest life or 30 years	shorter of weighted average useful life or 30 years	shorter of weighted avg. useful life or 20 years/25 years for solar	shorter of measure with longest useful life or 30 years	shorter of (weighted average) useful life or 30 years (checking with attorney)	shorter of weighted average useful life or 30 years	shorter of measure with longest life or 30 years based on GAAP	shorter of weighted average useful life or 30 years	shorter of weighted average useful life or 30 years
Project Minimum Loan Amount	Yes	Yes	\$50,000	\$50,000	\$50,000	\$20,000	\$50,000	\$50,000	\$30,000	\$50,000	\$50,000	\$50,000
Project Maximum Loan Amount	Yes	Yes	30% of market value or \$50MM, whichever is greater	No cap	\$5MM	\$5MM	30% of market value or \$25MM, whichever is greater	30% of market value or \$25MM, whichever is greater	\$20MM	30% of market value or \$25MM, whichever is greater	No cap	No cap
Fully amortization required	depends	depends	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Program Maximum Loan Amount (private loans)	Yes	Yes	N/A	No limit	\$15MM	\$15MM	No limit	No limit	No limit	No limit	No limit	No limit
Property tax due dates			7/28 and 12/5	6/5 and 12/5	3/30; 6/30; 9/30; 12/31	5/15 and 11/15	6/5 and 12/5	3/31; 9/30; 12/5	4/5 and 10/5	6/15 and 11/15		
Program Guide status			published	published	N/A	awaiting staff action	published	awaiting staff action	awaiting staff action	published	awaiting staff action	awaiting staff action
Other				new ordinance removes all project caps								

Legal Documents in VPA Programs

	Legal document	Existing
1	Ordinance	Yes
2	Lien Certificate	Yes
3	Program agreement	Yes
4	Lender consent	Yes
5	Completion certificate	Yes
6	Disclosure of risk	Yes
7	Assignment of Lien	In process
8	Amendment of Lien	In process
9	VPA/contractor agreement	Yes
10	VPA/capital provider agreement	Yes

High Priority Topics

- ▶ Program Agreement approach
- ▶ C-PACE Lien enforcement process

Program Agreement

Approach 1

Two legal documents including a tri-party agreement and separate loan agreement between capital provider and borrower tailored by lender

- ▶ Loudoun, Fairfax, Dumfries, Alexandria, Norfolk, Louisa, Winchester, Virginia Beach, and Richmond, among others

Approach 2

One document containing all terms found in tri-party and borrower and capital provider loan agreement

- ▶ Fredericksburg, Lynchburg, Roanoke, and Petersburg

Questions

- ▶ Do you prefer one approach over another for the program legal agreements and if yes, why?
- ▶ One of the goals of the state program is to create legal documentation that fits the needs of different types of capital providers, borrowers and local governments.

Do you have any thoughts on the benefits of having a different set of forms based on transaction complexity?

Or do you think there should be one standard set of documents that the parties must adhere to for every transaction?

C-PACE Lien Enforcement Process

- ▶ Most existing ordinances in Virginia offer the option to enforce but also provide the option of assigning the PACE lien to the PACE capital provider
- ▶ Program agreements contain provisions that give varying level of responsibility to each party
- ▶ A clear enforcement process is of paramount importance to the state program

C-PACE Lien Enforcement Process: Excerpt from State Statute

§ 15.2-958.3 of the Code of Virginia: Section E

3. May be enforceable by the local government in the same manner that a property tax lien against real property may be enforced by the local government. A local government shall be entitled to recover costs and expenses, including attorney fees, in a suit to collect a delinquent installment of an assessment in the same manner as in a suit to collect a delinquent property tax; and
4. May incur interest and penalties for delinquent installments of the assessment in the same manner as delinquent property taxes.

C-PACE Lien Enforcement Process: Excerpt from Ordinance

Loudoun County: Chapter 825, 825.06 (e) Enforcement and Collection Costs

(1) In the event of Borrower's default under the terms of the Loan Documents, the County shall enforce the C-PACE Lien for the amount of the Delinquent Payments, penalties, interest, and any costs of collection in the same manner that a property tax lien against real property may be enforced. In the alternative, the County may assign the C-PACE Lien to the Capital Provider by executing a C-PACE Lien Assignment and recording the Assignment in the Land Records. Upon such assignment, the Capital Provider may enforce the C-PACE Lien according to the terms of the Loan Documents.

C-PACE Lien enforcement process: Excerpts from Program Agreement #1

Loudoun County: Chapter 825, Appendix A-1 C-PACE Program Agreement

Section 2 - Representations

(d) The parties acknowledge and agree that should Borrower default on the C-PACE Loan, the County will enforce the C-PACE Lien for the benefit of Capital Provider according to the Loan Documents, the Act, and Ordinance. [In the alternative, the County may assign the C-PACE Lien to the Capital Provider for enforcement according to the terms of the Loan Documents.]

C-PACE Lien Enforcement Process: Excerpts from Program Agreement #1

Loudoun County: Chapter 825, Appendix A-1 C-PACE Program Agreement

Section 2 - Representations

(h) Lien Priority and Enforcement: Pursuant to Act, Ordinance, and Program Guide:

(3) In the event of a default by Borrower for failing to make the Loan Payments called for by the Loan Documents and upon written request by the Capital Provider, the County will enforce the C-PACE Lien in the same manner as a property tax lien against real property may be enforced by a county in Virginia as set forth in Title 58.1, Chapters 32 and 39 of the Code of Virginia. Capital Provider agrees to cooperate with County in its enforcement of the C-PACE Lien by providing all necessary documents and information concerning the delinquent C-PACE Loan as requested by the County Attorney's Office.

C-PACE Lien Enforcement Process: Excerpts from Program Agreement #2

City of Roanoke: Chapter 32.3

Recitals

G. The City has agreed to levy, assess, and enforce the C-PACE Lien in the same manner as the City levies, assesses, and enforces Real Estate Taxes on the Property, subject to the terms and conditions contained in the C-PACE Documents

C-PACE Lien Enforcement Process: Excerpts from Program Agreement #2

City of Roanoke: Chapter 32.3

Section 4: Additional Covenants and Agreements

Section 4.01. Compliance with C-PACE Act.

Borrower has read the C-PACE Act and Ordinance, and Borrower covenants and agrees to comply in all respects with the provisions of the C-PACE Act and Ordinance. Borrower acknowledges and agrees that the C-PACE Loan (and each C-PACE Payment) shall be collected by Capital Provider in accordance with the C-PACE Documents. The C-PACE Lien shall be enforced in the same manner as the Real Estate Taxes are enforced by the City, including the collection of any penalties or fees and the exercise of any remedies, all in accordance with the C-PACE Documents.

C-PACE Lien Enforcement Process: Excerpts from Program Agreement #2

City of Roanoke: Chapter 32.3

Section 5: Additional Covenants and Agreements

Section 5.02. Capital Provider Remedies.

(b) Upon written request by Capital Provider, the City will enforce the C-PACE Lien in the same manner as a real property tax lien may be enforced by a City in Virginia as set forth in Title 58.1, Chapters 32 and 39 of the State Code. Capital Provider agrees to cooperate with the City in its enforcement of the C-PACE Lien by providing all necessary documents and information concerning the Delinquent C-PACE Payment as requested by the City. In a suit to collect Delinquent C-PACE Payments, the City will be entitled to recover the Delinquent C-PACE Payments, penalties, and interest due, and the costs and expenses of collection, including attorney's fees, all as set forth in the C-PACE Documents.

Questions

- ▶ **Locality enforcement:** Do you think that the localities should be solely responsible for enforcement? If yes, please explain?
- ▶ **PACE lender enforcement:** Would you be comfortable with having the PACE lender be solely responsible for enforcement and if yes, how would it need to be structured?
- ▶ **Locality and PACE lender enforcement:** What is your opinion of this approach and what is the best way to structure to make the roles and responsibilities clear?
- ▶ **State enforcement:** If possible, would a centralized enforcement process at the state be possible and desirable?

Open discussion: What else?

Next steps

- ▶ Upcoming workshops
 - ▶ Technical considerations - January 19
 - ▶ Local Government considerations - January 26
 - ▶ Equity considerations - February 2
- ▶ Statewide program roll out in Q2 following program design finalization

Contact us anytime:

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