



Whatcom County

COUNTY COURTHOUSE
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Agenda Bill Master Report

File Number: AB2023-172

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Assigned to:	Council	Final Action:	03/21/2023		
Agenda Date:	03/21/2023	Enactment #:	ORD 2023-012		

Primary Contact Email:

TITLE FOR AGENDA ITEM:

Ordinance adopting amendments to Whatcom County Code Chapter 16.50, Commercial Property Assessed Clean Energy and Resiliency (C-PACER) Program

SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE:

Proposed ordinance adopting amendments to WCC Chapter 16.50 (C-PACER Program)

HISTORY OF LEGISLATIVE FILE

Date:	Acting Body:	Action:	Sent To:
03/07/2023	Council	INTRODUCED FOR PUBLIC HEARING	Council
		Aye: 7 Buchanan, Byrd, Donovan, Elenbaas, Frazey, Galloway, and Kershner	
		Nay: 0	
		Absent: 0	
03/21/2023	Council	ADOPTED	
		Aye: 7 Buchanan, Byrd, Donovan, Elenbaas, Frazey, Galloway, and Kershner	
		Nay: 0	
		Absent: 0	

Attachments: Staff Report, Draft Ordinance, Exhibit A - Draft Amendments

PROPOSED BY: _____
INTRODUCTION DATE: _____

ORDINANCE NO. 2023-012

ADOPTING AMENDMENTS TO WHATCOM COUNTY CODE CHAPTER 16.50 (C-PACER PROGRAM)

WHEREAS, the Council wishes to continue the Commercial Property Assessed Clean Energy and Resiliency ("C-PACER") program established in RCW 36.165.005 and WCC Chapter 16.50; and,

WHEREAS, Planning and Development Services has made Council aware of certain language in the code that has kept financial institutions from using the program, which Council wishes to rectify; and,

WHEREAS, the Whatcom County Council reviewed and considered staff recommendations and public comments on the proposed amendments; and

WHEREAS, the County Council hereby adopts the following findings of fact:

FINDINGS OF FACT

1. In RCW 36.165.005, the State Legislature granted county governments in Washington the authority to establish a Commercial Property Assessed Clean Energy and Resiliency ("C-PACER") program that jurisdictions can voluntarily implement to ensure that free and willing owners of agricultural, commercial, and industrial properties and of multifamily residential properties with five or more dwelling units can obtain low-cost, long term financing; and
2. The State Legislature found that this financing can be used for qualifying improvements, including energy efficiency, water conservation, renewable energy, and resiliency projects; and
3. The C-PACER program authorized in chapter 36.165 RCW promotes voluntary energy efficiency programs, energy conservation, and resiliency; and
4. Commercial and multi-family buildings are major sources of energy use, and major sources of greenhouse gas emissions; and
5. Permanent improvements to those buildings in the form of efficiency technologies, products, or activities to reduce or support the reduction of energy consumption, or support the production of clean, renewable energy, can save building owners money, and reduce greenhouse gas emissions known to drive climate change; and
6. In 2007, Whatcom County completed a Climate Protection and Energy Conservation Action Plan that laid out specific actions and targets for reducing greenhouse gas emissions and increasing energy conservation efforts in response to potential climate change; and
7. The establishment and operation of a C-PACER program serves important public health and safety interests; and
8. A qualified improvement as defined in RCW 36.165.010 provides benefits to the public, either in the form of energy or water resource conservation, reduced public health risk, or reduced public emergency response risk; and

9. The C-PACER program authorized in chapter 36.165 RCW is consistent with goals and policies of the Whatcom County Comprehensive Plan and the Whatcom County Climate Protection and Energy Conservation Action Plan; and
10. On October 27, 2020 and November 10, 2020, Whatcom County Council discussed the C-PACER program, program administration, and costs; and
11. On March 7, 2023, Whatcom County Council discussed the proposed amendments to the C-PACER program and introduced an ordinance to amend WCC Chapter 16.50; and,
12. On March 21, 2023, the County Council held a duly noticed public hearing on the proposed amendments.

CONCLUSIONS

1. The amendments to WCC Chapter 20.50 are in the public interest.
2. The amendments are consistent with the Whatcom County Comprehensive Plan.

NOW, THEREFORE, BE IT ORDAINED by the Whatcom County Council that:

Section 1. Amendments to the Whatcom County Code Chapter 16.50 are hereby adopted as shown in Exhibit A.

Section 2. Staff is authorized to work with Code Publishing to correct and update any cross-references made ineffective by these amendments.

ADOPTED this 21st day of March, 2023.

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON

ATTEST:



Dana Brown-Davis, Council Clerk



Barry Buchanan, Council Chair

APPROVED as to form:

Approved () Denied

/s/Royce Buckingham approved via email 3/6/23/MR

Royce Buckingham, Civil Deputy Prosecutor



Satpal Sidhu, Executive

Date: 3/27/23

Exhibit A: Proposed Amendments to WCC Chapter 16.50 (C-PACER Program)

WCC Chapter 16.50

COMMERCIAL PROPERTY ASSESSED CLEAN ENERGY AND RESILIENCY (C-PACER) PROGRAM IN WHATCOM COUNTY

Sections:

- 16.50.010 Establishment.
- 16.50.020 Definitions.
- 16.50.030 Territory.
- 16.50.040 Program administration.
- 16.50.050 C-PACER financing.
- 16.50.060 C-PACER lien.
- 16.50.070 Application and review.
- 16.50.080 Program guidebook.
- 16.50.090 Collection and enforcement.
- 16.50.100 Fees.
- 16.50.110 Enactment.
- 16.50.120 Effective date.
- 16.50.130 No liability – No public funds.
- 16.50.140 Sunset clause.

16.50.010 Establishment

There is hereby established within the boundaries of Whatcom County (the "County") a Commercial Property Assessed Clean Energy and Resiliency ("C-PACER") program (the "program") in accordance with Chapter 36.165 RCW (the "C-PACER Act"). The County finds that it is convenient and advantageous to establish the program, at no net cost to the County, in order to finance qualified projects (as hereinafter defined), repaid by a voluntary assessment on the property benefited by such qualified projects, and that the program is in the public interest, providing for the safety, health, and environmental public benefits, and provides for economic development of the community. The program shall allow financing for the full range of qualified improvements on all eligible properties, as authorized by the C-PACER Act, and shall abide by and operate according to the C-PACER Act.

16.50.020 Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- A. "Application checklist" means the list of items in a project application required by the C-PACER Act, this chapter, and the program guidebook, and the corresponding documentation that the County accepts in order to show the requirement has been met.
- B. "Assessment" means the voluntary agreement of a property owner to allow the County to place an annual assessment on their property to repay C-PACER financing.

- C. "Assessment agreement" means an agreement between the County and a property owner whereby the County agrees to place an assessment and C-PACER lien on the property to secure the obligation to repay the financing.
- D. "Capital provider" means any private entity, their designee, successor, and assignees that makes or funds C-PACER financing under this chapter.
- E. "C-PACER financing" means an investment from a capital provider to a property owner to finance or refinance a qualified project as described under this chapter. The proposed C-PACER financing for a qualified improvement may authorize the property owner to:
 1. Purchase directly the related equipment and materials for the installation or modification of a qualified improvement; and
 2. Contract directly, including through lease, power purchase agreement, or other service contract, for the installation or modification of a qualified improvement.
- F. "C-PACER lien" means the lien recorded at the County on the eligible property to secure the voluntary annual assessment, which remains on the property until paid in full.
- G. "Eligible property" means privately owned commercial, industrial, or agricultural real property or multifamily residential real property with five or more dwelling units, as established in WCC Title 20. Eligible property may be owned by any type of business, corporation, individual, or nonprofit organization permitted by state law. "Eligible property" may include ground leases on eligible property and property financed through power purchase agreements.
- H. "Financing agreement" means the contract under which a property owner agrees to repay a capital provider for the C-PACER financing including, but not limited to, details of any finance charges, fees, debt servicing, accrual of interest and penalties, and any terms relating to treatment of prepayment and partial payment of the C-PACER financing.
- I. "Program" means the C-PACER program established under this chapter.
- J. "Program Administrator" means the department or office designated by the County to administer the C-PACER program.
- K. "Program guidebook" means a comprehensive document that illustrates the program's territory, establishes appropriate guidelines, specifications, approval criteria, and the standard application forms for the program consistent with this chapter and the C-PACER Act.
- L. "Project application" means an application submitted to a program to demonstrate that a proposed project qualifies for C-PACER financing and for a C-PACER lien.
- M. "Project Valuation" shall mean the total amount of C-PACER financing a "Qualified Project" is eligible for, based on the calculated "Qualified Improvements", and standards set forth in this chapter and Whatcom County C-PACER Guidebook.
- M-N. "Property owner" means an owner of qualifying eligible property who desires to install qualified improvements and provides free and willing consent to the assessment against the eligible property.
- N-O. "Qualified improvement" means a permanent improvement affixed to real property and intended to: (1) decrease energy consumption or demand through the use of efficiency technologies, products, or activities that reduce or support the reduction of energy consumption, allow for the reduction in demand, or support the production of clean, renewable energy, including but not limited to a product, device, or interacting group of products or devices on the customer's side of the meter that generates electricity, provides thermal energy, or regulates temperature; (2) decrease water consumption or demand and address safe drinking water through the use of efficiency technologies, products, or activities that reduce or support the reduction of water consumption, allow for the reduction in demand, or reduce or eliminate lead from water which may be used for drinking or cooking; or (3) increase resilience, including but not limited to seismic retrofits, fire suppression, flood mitigation, stormwater management, wildfire and wind resistance, energy storage, and microgrids.

Commented [CES1]: Adding, as Executive Order Number 2021-06 establishing the C-PACER fees state that the "Program Fee" is based off the "Project Valuation", for which we don't have a definition.

⊖.P. “Qualified project” means a project approved by the Program Administrator, involving the installation or modification of a qualified improvement, including new construction or the adaptive reuse of eligible property with a qualified improvement. Together, qualified improvements, inclusive of all related and eligible costs pursuant to Chapter 36.165 RCW that are to be financed as described in a project application and approved by the Program Administrator, are a qualified project.

16.50.030 Territory.

The program shall be available to all eligible property within the following region, defined by the County in accordance with Chapter 36.165 RCW, within the boundaries of the county, including both incorporated and unincorporated territory. The region is the incorporated and unincorporated areas of Whatcom County.

16.50.040 Program administration.

- A. Pursuant to the C-PACER Act, the County designates the Planning and Development Services Director or their designee as the Program Administrator. The Program Administrator shall review and approve the project applications submitted in accordance with the program guidebook, collect any fees, cause the County Executive to execute the documents required by the program guidebook to enable a C-PACER financing and provide documents to the applicant or lender to record with the County Auditor.
- B. No services, including but not limited to energy audits, project development, or other activities associated or related to the development of a project application or installation of qualified improvements shall be offered through the C-PACER program unless priced separately and open to purchase by the property owner from third parties.

16.50.050 C-PACER financing.

- A. C-PACER financing, under Chapter 36.165 RCW, is to be provided by capital providers through a financing agreement entered into with the owner of an eligible property to fund a qualified project.
- B. The C-PACER financing through a program established under this chapter may include:
 - 1. The cost of materials and labor necessary for installation or modification of a qualified improvement;
 - 2. Permit fees;
 - 3. Inspection fees;
 - 4. Financing or origination fees;
 - 5. Program application and administrative fees;
 - 6. Project development and engineering fees;
 - 7. Third-party review fees, including verification review fees;
 - 8. Capitalized interest;
 - 9. Interest reserves;
 - 10. Escrow for prepaid property taxes and insurance; or
- C. Any other fees or costs that may be incurred by the property owner incident to the installation, modification, or improvement on a specific or *pro rata* basis.
- D. Prior to entering into a financing agreement, the capital provider must receive written consent from every holder of a lien, mortgage, or security interest in the real property that will be subject to the assessment and C-PACER lien agreeing that the property may participate in the program and that the C-PACER lien will take precedence over all other liens except for a lien for taxes. Additionally, prior to entering into a financing agreement on an eligible property that is a multifamily residential property with five or more dwelling units, the Program Administrator must also receive written consent from any holder of affordable housing covenants, restrictions, or regulatory agreements in

the real property as a condition precedent to the participation in the program by the property agreeing that the property may participate in the program and that the C-PACER lien will take precedence over all other liens except for a lien for taxes.

- E. The proposed C-PACER financing for a qualified project may authorize the property owner to:
 - 1. Purchase directly the related equipment and materials for the installation or modification of a qualified improvement; and
 - 2. Contract directly, including through lease, power purchase agreement, or other service contract, for the installation or modification of a qualified improvement.

16.50.060 C-PACER lien.

- A. The C-PACER lien amount, plus any interest, penalties, and charges accrued or accruing on the C-PACER lien: (1) takes precedence over all other liens or encumbrances except a lien for taxes imposed by the state, a local government, or a junior taxing district on real property, which liens for taxes shall have priority over such C-PACER lien, provided existing mortgage holders, if any, have provided written consent described in WCC 16.50.050(C); and (2) is a first and prior lien, second only to a lien for taxes imposed by the state, a local government, or a junior taxing district against the real property on which the C-PACER lien is imposed, from the date on which the notice of the C-PACER lien is recorded until the C-PACER lien, interest, penalties, and charges accrued or accruing are paid.
- B. The C-PACER lien runs with the land, and that portion of the C-PACER lien that has not yet become due is not accelerated or eliminated by foreclosure of the C-PACER lien or any lien for taxes imposed by the state, a local government, or junior taxing district against the real property on which the C-PACER lien is imposed.
- C. Delinquent installments due on a C-PACER lien incur interest and penalties as specified in the financing agreement.
- D. After the C-PACER lien is recorded as provided in this chapter, the voluntary assessment and the C-PACER lien may not be contested on the basis that the improvement is not a qualified improvement or that the project is not a qualified project.

16.50.070 Application and review.

- A. A property owner and capital provider shall complete a project application and submit it to the program administrator for review.
- B. The project application shall require:
 - 1. An attestation by the property owner that the project is a "qualified improvement" as defined by WCC 16.50.020(N) and the program guidebook.
 - 2. For an existing building seeking improvements (a) where energy or water usage improvements are proposed, a certification by a licensed professional engineer or other professional listed in the guidebook, stating that the proposed qualified improvements will either result in more efficient use or conservation of energy or water, the reduction of greenhouse gas emissions, the addition of renewable sources of energy or water, or the reduction of lead in potable water; or (b) where resilience improvements are proposed, a certification by a licensed professional engineer stating that the qualified improvements will result in improved resilience and savings in insurance, improved property values, or other benefits sufficient to leverage financing of those improvements.
 - 3. For new construction, a certification by a licensed professional engineer or other professional listed in the guidebook stating that the proposed qualified improvements, individually, or acting as a whole, will enable the project to exceed the energy efficiency or water efficiency or renewable energy or resilience requirements of the current building code of the county.

- C. The Program Administrator shall review the application according to the application checklist solely to determine whether it is complete, proposes a “qualified improvement,” contains no errors on its face, and that all information is provided in the substance and form required by the application checklist. If so, the Program Administrator shall sign the checklist indicating that the project application is deemed approved. If a project application is incomplete and/or does not conform to the requirements of the application checklist, the program administrator shall inform the applicant as soon as practicable that the application is denied, the reasons for the denial, and any corrections that could make the application acceptable. If feasible, the applicant shall have an opportunity to correct the application. Any resubmitted C-PACER application previously determined incomplete, and therefore denied, shall be considered a new application subject to the submittal fee as set forth within the Whatcom County Unified Fee Schedule. C-PACER applications are required to be submitted as one complete package with all required materials, or the application will be denied on the basis of incompleteness.
- D. Upon approval of a project application, a property owner or capital provider shall provide the following completed forms to the Planning and Development Services Department, along with proof of signatory authority for all parties, for execution by the County Executive at least five business days prior to close of the C-PACER transaction, along with a requested date for recordation of the assessment agreement, notice of assessment interest and C-PACER lien, and assignment of notice of assessment and assessment agreement. Electronic signatures are acceptable on closing/recordation documents, per Whatcom County Auditor standards.
- E. The County Auditor shall record in its real property records the assessment agreement, the notice of assessment interest and C-PACER lien, and the assignment of notice of assessment and assessment agreement. It is the responsibility of the applicant or lender to record the documents at the County Auditor’s office and pay any applicable recordation fees.
- F. For a property owner and capital provider whose project application is denied by the County’s Program Administrator, either party, or both, may request an adjudicative proceeding before the County’s Hearing Examiner, consistent with the County’s rules and subject to the applicable provisions of Washington’s Administrative Procedures Act, Chapter 34.05 RCW.

Commented [CES2]: Adding to establish a process, fee, and timeframe for resubmittal of denied applications.

16.50.080 Program guidebook.

- A. The C-PACER program shall be administered in accordance with the requirements contained in the program guidebook, adopted herein by reference and available through the Whatcom County Council office and online at www.whatcomcounty.us through an ordinance search. The program guidebook shall include:
1. A project application form, to be used by the property owner and capital provider.
 2. An application checklist, to be used by the program administrator to review and approve or disapprove an application.
 3. A form assessment agreement.
 4. A form notice of assessment interest and C-PACER lien.
 5. A form assignment of notice of assessment interest and assessment agreement.
 6. A statement that the period of the financing agreement will not exceed the useful life of the qualified project, or weighted average life if more than one qualified improvement is included in the qualified project.
 7. A description of the application and review process established under WCC 16.50.070.
 8. A statement explaining the lender consent requirement under the C-PACER Act.
 9. A statement explaining the requirements for qualifying as a capital provider for this program.
 10. A statement that the County has no liability as a result of the agreement and a statement that neither the County, its governing body, executives, or employees are personally liable as a result

of exercising any rights or responsibilities granted under this chapter, especially and including all actions related to, or arising from, administering the program.

11. A description of the marketing and participant educational services, if any, provided in support of the program.
- B. The program guidebook and forms may be updated by the Program Administrator without approval by the Whatcom County Council, so long as it complies with this chapter and Chapter 36.165 RCW.

16.50.090 Collection and enforcement.

- A. The assessment and C-PACER lien shall be assigned by the County to the capital provider at the close of any approved C-PACER financing by the County, as provided in RCW 36.165.050(3). The C-PACER lien, as assigned to the capital provider, shall maintain the same precedence and priority and characteristics set forth in WCC 16.50.060.
- B. Billing, collection and enforcement of delinquent C-PACER liens or C-PACER financing installment payments, including foreclosure, shall remain the responsibility of the capital provider.
- C. Pursuant to the assessment agreement, the C-PACER lien shall be solely enforced by the capital provider at any time after one year from the date of delinquency, and may be foreclosed in the same manner as a mortgage lien under Chapter 61.12 RCW, except that no sale of the property shall discharge or in any manner affect the priority of the C-PACER lien with respect to installments not yet due and payable at the time of sale, and no deficiency judgment may be sought by the capital provider with respect to any unpaid assessment at the time of sale. The participation of the County Sheriff in any such foreclosure action shall not be deemed in violation of, or inconsistent with, RCW 36.165.110 limiting the role of the County in the enforcement of a C-PACER lien.
- D. The capital provider may also pursue any other enforcement method authorized under Chapter 36.165 RCW, as it may be amended from time to time.

16.50.100 Fees.

An application fee as provided in the Unified Fee Schedule shall be paid to the County when the project application is submitted.

Upon approval of an application by property owner and a capital provider, and prior to recordation of documents for a C-PACER transaction, the parties shall pay a program fee as provided in the Unified Fee Schedule, as a good faith estimate of the costs of establishing and implementing the program, to the County to make the costs of the C-PACER program cost-neutral.

16.50.110 Enactment.

The provisions of this chapter are hereby declared to be severable and if any section, phrase or provision shall for any reason be declared by a court of competent jurisdiction to be invalid or unenforceable, such declaration shall not affect the validity or enforceability of the remainder of the sections, phrases and provisions hereof. All ordinances, orders, resolutions, and parts thereof in conflict herewith are to the extent of such conflict hereby repealed upon the effectiveness of this chapter. No provision of the Whatcom County Code or violation of any provision of the Whatcom County Code shall be deemed to impair the validity of this chapter or the instruments authorized by this chapter or to impair the security for or payment of the instruments authorized by this chapter; provided further, however, that the foregoing shall not be deemed to affect the availability of any other remedy or penalty for any violation of any provision of the Whatcom County Code. In the event and to the extent of a conflict between this chapter and Chapter 36.165 RCW, Chapter 36.165 RCW shall govern.

~~16.50.120 Effective date.~~

~~The ordinance codified in this chapter shall take effect 10 days after enactment. The County Planning and Development Services Department shall begin accepting applications for review no later than 90 days after the effective date.~~

Commented [CES3]: Don't need this, as it's already in effect. Effective dates belong in ordinances, not code.

16.50.130 No liability – No public funds.

- A. This chapter does not confer any right of action nor property interest upon any party to a C-PACER transaction against the County, and the County shall incur no liability for enacting this program, nor shall the County be liable or members of its governing body, executives, or employees be personally liable as a result of exercising any rights or responsibilities granted under this chapter.
- B. The County shall not enforce any privately financed debt under this chapter. The County shall not use public funds to fund or repay any loan between a capital provider and property owner. No section under this chapter shall be interpreted to pledge, offer, or encumber the full faith and credit of the County, nor shall the County or any local government within the county pledge, offer, or encumber its full faith and credit for any lien amount through a program.

~~16.50.140 Sunset clause.~~

~~The commercial property assessed clean energy and resiliency (C-PACER) program shall be dissolved 24 months after the effective date of this chapter, unless specifically extended by ordinance. The county council shall review the need to continue the C-PACER program four months prior to the sunset date.~~

Commented [CES4]: Deleting this would make the program permanent until Council acts to eliminate it.