

ORDINANCE NO. _____

DESIGNATING A COMMERCIAL PROPERTY ASSESSED CLEAN ENERGY AND RESILIENCY (C-PACER) PROGRAM WITHIN WHATCOM COUNTY

WHEREAS, commercial and multi-family buildings are major sources of energy use in Whatcom County, and major sources of greenhouse gas emissions; and

WHEREAS, 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

WHEREAS, 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

WHEREAS, Chapter 10 of the Whatcom County Comprehensive Plan recognizes that climate change is a global phenomenon that has the potential for significant local impacts to natural resources, ecosystem functions, as well as human health, infrastructure, and the economy; and

WHEREAS, Policy 10B-1 of the Whatcom County Comprehensive Plan is to develop environmental programs, involving non-regulatory measures that include voluntary activity, education, and incentives; and

WHEREAS Policy 10D-7 of the Whatcom County Comprehensive Plan encourages sustainability by developing strategies and practices to increase the use of renewable energy; and

WHEREAS, Policy 7G-4 of the Whatcom County Comprehensive Plan supports renewable energy and conservation techniques to minimize demands for energy; and

WHEREAS, 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

WHEREAS, the State Legislature found that this financing can be used for qualifying improvements, including energy efficiency, water conservation, renewable energy, and resiliency projects; and

WHEREAS, the establishment and operation of a C-PACER program serves important public health and safety interests; and,

WHEREAS, A qualified improvement as defined in RCW [36.165.010](#) provides benefit to the public, either in the form of energy or water resource conservation, reduced public health risk, or reduced public emergency response risk; and

WHEREAS, the C-PACER program authorized in RCW 36.165.005 promotes voluntary energy efficiency programs, energy conservation, and resiliency; and

WHEREAS, the C-PACER program authorized in RCW 36.165.005 is consistent with goals and policies of the Whatcom County Comprehensive Plan and the Whatcom County Climate Protection and Energy Conservation Action Plan.

NOW, THEREFORE, BE IT ORDAINED that Whatcom County adopt a C-PACER Program as outlined in Exhibit A to this ordinance.

ADOPTED this ____ day of _____, 2020.

ATTEST:

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON

Dana Brown-Davis, Clerk of the Council

Barry Buchanan, Council Chair

WHATCOM COUNTY EXECUTIVE
APPROVED AS TO FORM:

WHATCOM COUNTY, WASHINGTON

Civil Deputy Prosecutor

Satpal Sidhu,
County Executive

() Approved () Denied

Date Signed: _____

EXHIBIT A

(Drawn from a model ordinance available from the Northwest Energy Coalition.)

SECTION 1: 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.

SECTION 2: Definitions

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

- (1) "Application Checklist" means the list of items in a Project Application required by the C-PACER Act, this Ordinance, and the Program Guidebook, and the corresponding documentation that the County accepts in order to show the requirement has been met.
- (2) "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.
- (3) "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.
- (4) "Capital Provider" means any private entity, their designee, successor, and assigns that makes or funds C-PACER Financing under this Ordinance.
- (5) "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 Ordinance. The proposed C-PACER Financing for a Qualified Improvement may authorize the Property Owner to (a) purchase directly the related equipment and materials for the installation or modification of a Qualified Improvement; and (b) contract directly, including through lease, power purchase agreement, or other service contract, for the installation or modification of a Qualified Improvement.
- (6) "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.
- (7) "Eligible Property" means privately owned commercial, industrial, or agricultural real property or multifamily residential real property with five or more dwelling units. 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.
- (8) "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.

- (9) "Program" means the C-PACER program established under this Ordinance.
- (10) "Program Administrator" means the department or office designated by the County to administer the C-PACER program.
- (11) "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 Ordinance and the C-PACER Act.
- (12) "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.
- (13) "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.
- (14) "Qualified Improvement" means a permanent improvement affixed to real property and intended to: (a) 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; (b) 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 (c) increase resilience, including but not limited to seismic retrofits, fire suppression, flood mitigation, stormwater management, wildfire and wind resistance, energy storage, and microgrids.
- (15) "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 RCW 36.165 that are to be financed as described in a Project Application and approved by the Program Administrator, are a Qualified Project.

SECTION 3: Territory.

The Program shall be available to all Eligible Property within the following Region, defined by the County in accordance with RCW 36.165, within the boundaries of the County, including both incorporated and unincorporated territory. The Region is the incorporated and unincorporated areas of Whatcom County.

SECTION 4: Program Administration

- A. Pursuant to the C-PACER Act, the County designates [] as the Program Administrator. The Program Administrator shall review and approve the Project Applications submitted in accordance with the Program Guidebook, collect any fees, execute the documents required by the Program Guidebook to enable a C-PACER Financing, and record the documents requested by the Property Owner and Capital Provider.
- 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.

SECTION 5: 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 Ordinance 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
- (11) 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.
- (12) Any other costs or fees as outlined in the Program Guidebook.

C. 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.

D. 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.

SECTION 6: C-PACER Lien

A. The C-PACER Lien amount, plus any interest, penalties, and charges accrued or accruing on the C-PACER Lien: (a) 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 section 5.C of this

Ordinance; and (b) 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 Ordinance, 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.

SECTION 7: 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 Section 2(13) of this Ordinance and, if applicable, 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.

D. Upon approval of a Project Application, a Property Owner or Capital Provider shall provide the following completed forms to the [] Office for execution at least five (5) 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. Expedited service may be available for a fee to be determined by the [] office.

E. The County [] 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, at the date requested by the Property Owner and Capital Provider or, at the request of the Property Owner and the Capital Provider, the executed documents may be delegated for recordation by the parties to the C-PACER transaction.

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 adjudicative body, consistent with the County's rules and subject to the applicable provisions of Washington's Administrative Procedures Act, RCW 34.05.

SECTION 8: Program Guidebook.

A. The C-PACER Program shall be administered in accordance with the requirements contained in the Program Guidebook, adopted and incorporated herein as Exhibit A. 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 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 Section 7 of this Ordinance.
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 Ordinance, 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 Board of Commissioners, so long as it complies with this Ordinance and RCW Chapter 36.165.

SECTION 9: Collection and Enforcement

A. Collection and enforcement of delinquent C-PACER Liens or C-PACER Financing installment payments, including foreclosure, shall remain the responsibility of the Capital Provider.

B. 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 in the same manner that the collection of delinquent real property taxes is enforced by the County, by prosecution of foreclosure proceedings under chapter 84.64 RCW et seq. This includes the provisions of RCW 84.64.040, excepting that a sworn declaration by the Capital Provider or assignee attesting to the assessment delinquency of at least one year shall be used in lieu of the certificate of delinquency required under RCW 84.64.050. The sworn declaration shall have the same legal standing as a certificate of delinquency enumerated in RCW 84.64.050.

C. Chapter 36.165 RCW provides that "collection and enforcement of delinquent C-PACER liens or C-PACER financing installment payments, including foreclosure, shall remain the responsibility of the capital provider" and that "the capital provider or their assignee shall have and possess the same powers and rights at law or in equity to enforce the C-PACER lien" in the "same manner that the collection of delinquent real property taxes is enforced by the county under chapter 84.64 RCW." As such, the County shall have no obligation to prosecute the foreclosure of a C-PACER Lien on behalf of the Capital Provider, and the Capital Provider, by accepting an assignment of a C-PACER Lien pursuant to an Assignment of Notice of Assessment and Assessment Agreement, shall assume under applicable law, the obligations, responsibilities, and duties of the County in respect of the enforcement and foreclosure of a C-PACER Lien under chapter 84.64 RCW. Any duties by the County mutually deemed non-delegable by the County shall be performed, on a reimbursable basis, by the County on behalf of the Capital Provider.

SECTION 10: Fees.

An application fee of \$500 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 fee equal to 1% of the financing amount of the C-PACER transaction, with a minimum fee of \$2,500 and a cap on the fee of \$15,000, 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.

SECTION 11: Enactment.

The provisions of this Ordinance 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 Ordinance. No provision of the [County Code] or violation of any provision of the [County Code] shall be deemed to impair the validity of this Ordinance or the instruments authorized by this Ordinance or to impair the security for or payment of the instruments authorized by this Ordinance; 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 [County Code]. In the event and to the extent of a conflict between this Ordinance and chapter 36.165 RCW, chapter 36.165 RCW shall govern.

SECTION 12. Effective Date.

This Ordinance shall take effect ten days after enactment. The County shall begin accepting applications for review no later than sixty (60) days after the effective date.

SECTION 13: No Liability. No Public Funds.

A. This Ordinance 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, its governing body, executives, or employees be personally liable as a result of exercising any rights or responsibilities granted under this Ordinance.

B. The County shall not enforce any privately financed debt under this Ordinance. The County shall not use public funds to fund or repay any loan between a Capital Provider and Property Owner. No section under this Ordinance 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.