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New Economic Development Tool Promotes Clean Energy, Resilience Improvements (Part 1)

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Category: Strategies and Programs

During the most recent session the Legislature adopted Engrossed Second Substitute House Bill 2405, which creates the Commercial Property Assessed Clean Energy and Resilience (C-PACER) program in Washington State. The C-PACER program is available for counties to implement. If adopted, a C-PACER program allows commercial property owners within the county to access additional private financing for qualifyingenergyefficiency, renewable energy, water conservation, and resiliency improvements for their buildings. Similar programs have been adopted in more than 37 states and territories since 2010.

This blog summarizes the C-PACER program and raises some questions that we hope to address in a future post.

Long-Term Program Financing Incentivizes Commercial Building Upgrades

What makes this funding program unique is that the private financing becomes a priority lien against the property, which makes it more likely that the loan will be repaid in the event of a sale of the property. This lien takes precedence over all other private liens and is second only to a tax lien. This is possible because all other existing lienholders, including mortgages, must agree to allow the C-PACER lien to have priority.

This program as implemented in other states has provided a much-needed financing tool to encourage building owners to invest in their buildings. Testimony in favor of the bill before the House Committee on Local Government emphasized that the longer-term financing available through these types of programs encouraged lenders to fund energy conservation programs and rehabilitation of older and historic properties by lowering the lender's risk of losing money on its investment.

The other thing that makes this program unique is that while the funding is completely private, the county participates in the process along with the borrower and the lender. In adopting a program under the

statute, the county agrees to perform an administrative role in managing the program by taking on the following; creating an application and review process, verifying that a funding agreement complies with the requirements of the program, recording the lien against the property, and then assigning the lien to the lender. Payments are made directly to the lender, and the lender is intended to be solely responsible for enforcement of the lien (if necessary).

C-PACER program proponents have done an excellent job of providing a folder of model documents for counties to work from so that they do not have to create their programs from scratch. All model documents have been drafted by Shift Zero, a non-profit alliance funded in part by the NW Energy Coalition (NWEC), whose membership is composed of for-profit organizations, nonprofit organizations, Indian tribal organizations, and local governments.

The statute and model ordinance (Document 03 in the folder) provided by Shift Zero are sufficiently broad to allow the county to either manage the administration of the program itself, to coordinate with other counties for joint services, or to contract out the processing to another agency, which can be a for-profit, non-profit, or economic development agency.

As with any model, one size may not fit all. Counties need to balance the advantages for lenders to have reasonably consistent procedures from county to county with being able to tailor the program to best meet the needs of the county's property owners. They will also need to consider the county's available staff resources.

What Is C-PACER's Impact on County Government?

On first review, the program is clearly designed to have minimum impact on the counties. According to Shift Zero, since these types of programs began in 2008 there have been noforeclosures on any of the 2,000+ properties that have participated in program financing. The statute clearly states that county funds or credit are prohibited from being used to back any assessment or C-PACER lien. And, under the model ordinance, any costs incurred by the county are passed on to the property owner and lender.

But as always, details are important. In my review of the model documents, these nine items caught my attention. To be clear, I do not consider them "deal-breakers'.' But counties adopting this program should carefully coordinate with their Prosecuting Attorney's Office to make sure theyre comfortable with how the program is established.

Item One: There is always a question of whether the county's administrative role violates the prohibition in Article Xlll, Sec. 7 of the Washington State Constitution against gifts of public funds. MRSC has done no independent analysis on this question. However, attorneys from Cairncross & Hempelmann (on behalf of Shift Zero) have concluded that it does not. Their opinion is based on their conclusion that: 1) no public funds are directly expended or at risk; 2) there is a public benefit for energy conservation and resiliency and; 3) the service fees provided by the borrower and lender compensate the counties for the administrative services provided. [Read the memo].

Item Two: Sec. 7 of RCW 36.165.060 gives the C-PACER lien priority equal to state, local, and junior district real property taxes. But what is the effect of this priority lien on liens for regulatory fees? What about prior non-property tax liens that have not been foreclosed, i.e., HOA assessment liens? This section says that liens

survive foreclosure of property tax liens. Is there an argument that foreclosing an HOA lien will wipe out a C-PACER lien?

Item Three: The model assessment agreement (Document 03) is a two-party agreement between the property owner and the county. The statute allows for a three-party agreement that would additionally include the lender. Counties should consider which version provides the best protection for the county.

Item Four: Section 5(c) of the model assessment agreement (Document 03) says that if the property subject to the lien is subdivided, the assessment will be allocated to each new parcel based on some proportion to be determined by the county. How will the county determine who is responsible for doing that, the lender or the county? And how will the county ensure that there is a process that ensures the assessment will be apportioned before the subdivision is approved?

Item Five: Many counties require programs to be reviewed under an "equity lens." How can counties amend the model ordinance to incorporate those requirements?

Item Six: While the program's intent is to reduce or eliminate county liability, the county is still acting in its official capacity and may be liable under claims for due process or other improper governmental action for how it administers the program. How will counties minimize this kind of potential liability?

Item Seven: Section 10 of the model assessment agreement (Document 03) contains an indemnification clause that requires the property owner to indemnify the county. As mentioned above, this is a two-party agreement that does not include the lender. Counties should consider whether a three-party agreement provides more protection. And, whether a provision that provides a more specific waiver of claims against the county by the property owner and the lender should be included.

Item Eight: Included among the model documents is Document 06, titled "Assignment of notice of assessment interest and lien and assignment of assessment agreement." Since the notice itself it has no legal effect, consider whether these should be two separate documents: an assignment document that transfers the assessment agreement and the lien, and then a notice of assignment to be recorded.

Item Nine: RCW 36.165.060(6) says that the C-PACER lien is enforced by the capital provider. The statute clearly states the legislature's intent that billing, collection, AND enforcement rests with the capital provider. However, the statute says that the lien is enforced "in the same manner as RCW 86.64." RCW 86t64 contains other duties such as publication of a notification of sale, issuing a tax deed at a foreclosure sale, and, if there are no bidders, the county is considered a bidder in trust for the taxing district. It is unclear whether the statute puts the lender in the shoes of the county for all of these functions or if some of them are non-delegable.

Conclusion

There is little doubt that refitting commercial buildings to be more energy-efficient and better able to withstand seismic impacts has long-term benefits not just for the buildings' owners and tenants, but for the public that visits those buildings and taxpayers that would likely provide support in the event of disaster. This new financing mechanism could be part of the answer to provide long-term benefits to Washington communities.

As counties begin considering implementation, MRSC hopes to gather resource documents and to work with counties, Washington Association of Prosecuting Attorneys (WAPA), Washington State Association of Counties (WSAC), and Shift Zero to answer these and other questions. If you are working with C-PACER programs and have some possible answers to the issues I've noted, please send them along to me at sgr@ssømrsc.org. I'll share these possible solutions in Part 2 of this blog.

In related news, MRSC is hosting an upcoming webinar series on economic development for local governments. Part 1 on November 10 will provide a solid introduction to economic development and identify the steps taken by successful organizations to assist local businesses and promote job retention/creation. part 2 on December 9 will feature case studies about positive efforts to retain existing jobs and create new jobs from the Thurston County economic development council, the Bellingham port authority, and the City of Burien's economic development department.

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About Steve Gross

Steve Gross joined MRSC as a Legal Consultant in January 2020.

Steve has worked in municipal law and government for over 20 years as an Assistant City Attorney for Lynnwood, Seattle, Tacoma, and Auburn, and as the City Attorney for Port Townsend and Auburn. He also has been a legal policy advisor for the Pierce County Council and has worked in contract administration.

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