KEEPING "PACE" IN COMMERCIAL REAL ESTATE IMPROVEMENTS: A PRIMER ON THE NEW WASHINGTON COMMERCIAL PROPERTY ASSESSED CLEAN ENERGY AND RESILIENCY (C-PACER) PROGRAM

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Commercial property owners in the state of Washington may soon have access to a new source of funding for energy efficiency, renewable energy, and resiliency improvements to their buildings. Washington's C-PACER legislation (House Bill 2405), passed by the legislature during the 2020 regular session, went into effect 11 June 2020. The C-PACER program aims to address the significant needs for property owners to finance energy efficiency upgrades, renewable energy improvements, stormwater management, water conservation, and resiliency retrofits to address vulnerabilities to earthquakes and other natural disasters.

The state and many local governments across the country are imposing new requirements on the owners of existing buildings to reduce water and energy consumption, control stormwater runoff, minimize damage from earthquakes, and convert to renewable sources of energy. These types of building improvements often have high up-front capital costs and long cost-recovery periods. This combination has inhibited investment by property owners who may not plan on holding an asset long enough to see the benefit of these improvements.

With the enactment of the C-PACER program, Washington joins 36 other states that have enacted some form of property assessed clean energy legislation (20 of which have current active programs). Washington's C-PACER program, like some other states, relies on private rather than public financing. Unlike traditional private financing models, C-PACER financing is not a personal debt obligations. Rather, the C-PACER financing is repaid through a voluntary assessment on the improved property that runs with the land and is secured by a super-priority lien. Accordingly, the obligation to repay the C-PACER financing remains with the property regardless of any transfer of ownership. Because of this unique structure, C-PACER financing can allow for a much longer repayment period than traditional financing options. In addition, the super-priority of the lien allows for lower interest rates. In theory, the longer term and beneficial rate will improve the ability of the owner to repay the C-PACER financing, as the owner actually accrues the benefit of savings on utility bills, lower insurance premiums, and other operating cost reductions from the improvements.

The following is a brief summary of the key information to know about the C-PACER program.

IS THE C-PACER PROGRAM AVAILABLE STATEWIDE?

The C-PACER program is a voluntary program that is to be managed on a statewide basis by the Washington Department of Commerce (though a C-PACER program guidebook is not expected this year as a result of

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COVID-19). Once established, each county must opt into the program on a voluntary basis. However, counties are not required to wait for the statewide program. Each county is empowered to establish its own program in compliance with the requirements of the state legislation. Accordingly, availability will vary by jurisdiction. No counties have yet adopted a program.

WHAT PROPERTIES QUALIFY?

Under the C-PACER program, owners of agricultural, commercial, and industrial properties are eligible to obtain financing for qualifying projects. The C-PACER program also applies to owners of multifamily residential properties 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. However, as noted above, individual counties have broad discretion to establish their own program within the parameters of the state legislation and could limit the geographical area in which financing is available as well as the types of improvements that qualify.

WHAT PROJECTS QUALIFY?

C-PACER financing is available both for qualifying improvements to existing commercial buildings and new construction. Qualified improvements include, among others, solar panels, high-efficiency heating and cooling systems, insulation and other improvements that address safe drinking water, or those that decrease energy or water consumption or demand through efficiency technologies, products, or activities. Improvements that support the production of clean, renewable energy, including 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, would also be deemed qualifying improvements. Likewise, improvements that increase resilience are also qualified improvements. Examples of resilience improvements include seismic retrofits, flood mitigation, stormwater management, wildfire and wind resistance, energy storage, and microgrids. The inclusion of resiliency improvements is a feature of the Washington legislation that is not found in other jurisdictions and may be of particular interest for owners of unreinforced masonry buildings and other properties in need of seismic improvements.

HOW IS THE C-PACER FINANCING REPAID?

As discussed above, C-PACER financing is repaid by a voluntary assessment on the improved property, secured by a lien in favor of the county, which is then immediately assigned to the C-PACER capital provider. The lien is second only in priority to the lien for unpaid taxes. Once C-PACER financing is advanced, the administration of the C-PACER financing (including enforcement) is done by the private capital provider. After the adoption of a C-PACER program, a county's role is limited to the approval of an assessment and recordation of a C-PACER lien, as well as to the administration of the C-PACER program (which may be contracted out to a private third party).

WHO PROVIDES C-PACER FINANCING?

Subject to compliance with generally applicable licensing requirements, any private entity can provide C-PACER financing.

WHAT IS THE IMPACT FOR HOLDERS OF MORTGAGES ON THE PROPERTY?

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Because the lien of C-PACER financing is superior to all other debt obligations other than unpaid taxes, written consent of any existing mortgagee or other holder of a security interest in the real property is required before an owner can obtain C-PACER financing. Note that the super-priority nature of C-PACER assessments may be objectionable to mortgage lenders (and, in fact, some lenders expressly prohibit borrowers from obtaining C-PACER financing).

HOW IS THE C-PACER LIEN ENFORCED?

The private capital provider is responsible for collection and enforcement of delinquent C-PACER liens or C-PACER installment payments. The C-PACER lien is enforced by the capital provider in the same manner that the collection of delinquent real property taxes is enforced by the county under chapter 84.64 RCW, including the provisions of RCW 84.64.040, with minor exceptions.

Note: This alert has been updated from the original publication to incorporate terminology consistent with the legislation, as well as to clarify the discretion of individual counties in the adoption of C-PACER programs.

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