

HOUSE BILL REPORT

E2SHB 2405

As Amended by the Senate

Title: An act relating to commercial property assessed clean energy and resilience.

Brief Description: Concerning commercial property assessed clean energy and resilience.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Duerr, Barkis, Fitzgibbon, Shewmake, Hoff, Kloba, Corry, Gildon, Ybarra, Jenkin, Pollet and Doglio).

Brief History:

Committee Activity:

Local Government: 1/21/20, 1/24/20 [DPS];

Appropriations: 2/8/20, 2/11/20 [DP2S(w/o sub LG)].

Floor Activity:

Passed House: 2/18/20, 93-4.

Senate Amended.

Passed Senate: 3/5/20, 40-7.

Brief Summary of Engrossed Second Substitute Bill

- Creates a Commercial Property Assessed Clean Energy and Resiliency (C-PACER) program for financing energy efficiency retrofits and new construction.
- Establishes that a C-PACER lien, with the consent of other lien holders, is superior to any non-tax lien.
- Directs the Department of Commerce to establish and administer a voluntary statewide C-PACER program in which counties may choose to participate.
- Directs the Department of Commerce to establish a C-PACER application and review process to review and evaluate project applications for C-PACER financing.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Pollet, Chair; Duerr, Vice Chair; Appleton, Goehner and Senn.

Minority Report: Do not pass. Signed by 1 member: Representative Kraft, Ranking Minority Member.

Staff: Elizabeth Allison (786-7129).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Local Government. Signed by 23 members: Representatives Ormsby, Chair; Robinson, 1st Vice Chair; Bergquist, 2nd Vice Chair; Stokesbary, Ranking Minority Member; Caldier, Cody, Corry, Dolan, Dye, Fitzgibbon, Hansen, Hoff, Kilduff, Macri, Pettigrew, Pollet, Ryu, Senn, Springer, Steele, Sutherland, Tarleton and Ybarra.

Minority Report: Do not pass. Signed by 8 members: Representatives Rude, Assistant Ranking Minority Member; Chandler, Chopp, Kraft, Mosbrucker, Schmick, Sullivan and Tharinger.

Minority Report: Without recommendation. Signed by 1 member: Representative Hudgins.

Staff: Jessica Van Horne (786-7288).

Background:

Property Assessed Clean Energy Programs.

Property Assessed Clean Energy (PACE) programs provide a financing mechanism to encourage the installation of renewable energy systems and energy efficiency improvements on residential, industrial, or commercial properties. Property Assessed Clean Energy programs exist for both residential properties (commonly referred to as Residential PACE or R-PACE) and commercial properties (commonly referred to as Commercial PACE or C-PACE). Eligible improvements frequently include installation of solar thermal panels, high-efficiency air conditioning, and insulation. Both commercial and residential PACE programs allow a property owner to finance the up-front cost of energy or other eligible improvements on a property and then pay the costs back over time with the debt obligation carried by the property rather than the property owner.

Department of Commerce.

The Department of Commerce (Commerce) is a state agency responsible for facilitating community and economic development. Its mission is to grow and improve jobs in Washington and facilitate innovation. Some of its duties include managing growth and achieving sustainable development, providing greater access to economic opportunity, and stimulating private sector investment and entrepreneurship. In carrying out its business assistance and economic development functions, Commerce is tasked with providing

development services primarily through sector-based, cluster-based, and regionally based organizations rather than providing assistance directly to individual firms.

Summary of Engrossed Second Substitute Bill:

A Commercial Property Assessed Clean Energy and Resiliency (C-PACER) program is established through which qualified energy or resiliency building improvements are financed by private entities. The improvements are repaid as a lien on the property and without the creation of a personal debt obligation to the property owner.

"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, flood mitigation, storm water management, wildfire and wind resistance, energy storage, and microgrids.

Department of Commerce.

Commerce is required to establish a voluntary statewide C-PACER program in which counties may choose to participate. Commerce is responsible for administering the program, which includes:

- establishing uniform statewide criteria for projects and determining whether proposed projects meet the public benefit requirement; and
- preparing a program guidebook including, among other things, a sample contract between the capital provider, the property owner, and Commerce; a description of the application process and eligibility requirements for participation in the program; and a statement specifying that the county has no liability as a result of the agreement.

Commerce must also establish a C-PACER application and review process to review and evaluate project applications for C-PACER financing and must grant any application that satisfies the application criteria determined by Commerce. Applicants must at minimum:

- demonstrate that the project provides a public benefit;
- for existing buildings, provide certification from a licensed professional engineer that the proposed qualified improvement 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 water or energy, or, for resilience improvement, that the project will result in improved resilience;
- for new construction, provide certification from a licensed professional engineer that the proposed qualified improvements will enable the project to exceed the energy efficiency, water efficiency, renewable energy, renewable water, or resilience requirements of the current building code.

Commerce may charge an application fee to cover the costs of establishing and conducting the application review process, and upon the denial of the application, must provide an opportunity for an adjudicative proceeding subject to the provisions of the Administrative Procedure Act. Commerce must also begin accepting applications and approving projects by July 1, 2021, and is permitted to adopt rules to implement these requirements.

Counties.

Counties may choose to opt into the voluntary statewide C-PACER program established by Commerce and adopt a program within its boundaries. A county that chooses to opt in must hold a public hearing and adopt a resolution or ordinance including:

- a statement that financing qualified projects is in the public interest for safety, health, and other common good reasons;
- a description of the region in which the program is offered; and
- a statement of the time and place for the public hearing.

Counties may amend the program guidebook prepared by Commerce as necessary and may also narrow the definition of "qualified improvements" to be consistent with the county's climate goals.

Counties must record each C-PACER lien in the real property records of the county in which the property is located.

The duties of a counties adopting a C-PACER program are limited to designating the region of the county in which the program will be administered and recording the C-PACER lien.

A county that adopts a program and designates a region for the program is prohibited from: (1) conditioning the issuance of permit, license, or other authorization from the county to a person who owns property in the region contingent on the person entering into a contract to repay the financing of a qualified project; or (2) compelling a person who owns property in the region to enter into a contract to repay the financing of a qualified project.

C-PACER Liens.

C-PACER liens take precedence over all other liens or encumbrances except a lien for taxes on the property imposed by the state, a county, or a junior taxing district. Each 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 a property tax lien.

After a C-PACER lien is recorded, the 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.

Collection and enforcement of the C-PACER lien, including foreclosure, is the responsibility of the capital provider. After the expiration of one year from the date of delinquency, the capital provider may foreclose and enforce the lien by a civil action. The capital provider may sell or assign any and all C-PACER liens.

C-PACER Financing.

Before a capital provider may enter into a financing agreement to provide C-PACER financing of a qualified project to a record owner of any eligible property, Commerce must

receive written consent from any holder of a lien, mortgage, or security interest 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 imposed by the state, a local jurisdiction, or junior taxing district.

C-PACER financing may include the cost of materials, permit fees, inspection fees, lender's fees, program application and administrative fees, project development and engineering fees, third-party review fees, capitalized interest, interest reserves, escrow for prepaid property taxes and insurance, or other related costs. The financing may authorize the property owner to directly purchase related equipment or materials and to contract directly for the installation or modification of a qualified improvement.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment:

- permits rather than requires the Department of Commerce to establish a voluntary statewide C-PACER program that counties may choose to participate in;
- allows counties to establish a separate voluntary countywide C-PACER program;
- specifies that investments in energy be effective for reducing energy demand or replacing nonrenewable energy with renewable energy as applied to the development of program project criteria;
- requires that the program guidebook include sample form bilateral or triparty agreement or agreements between a county, the property owner, and the capital provider which details the agreement between the county and the property owner to have an assessment placed on the qualified property as repayment for C-PACER financing; an agreement by the county to place a lien on the property to secure the obligation to repay; the obligation of the property owner to repay the C-PACER financing to the capital provider; and an assignment of the C-PACER lien by the county to the capital provider;
- specifies that a program guidebook need not be completed and adopted prior to accepting and approving applications by a program;
- allows a county or the Department of Commerce to contract out the responsibilities of program administration to a public, quasi-public, or private third-party entity;
- requires form agreements developed by the statewide program guidebook be used by all county programs from the time that the first C-PACER lien is recorded under the statewide program;
- allows the Department of Commerce to provide grants to counties to assist in the design and implementation of C-PACER programs;
- removes the requirement that applicants, as part of the application, provide a copy of the ordinance or resolution adopted by the county approving C-PACER financing for an area within the county;
- removes the requirement that written verification that the project was properly completed and is operating as intended be from one or more qualified independent third parties;
- requires counties to begin accepting and approving applications no later than one year after the governing body of a county establishes a program;
- requires a county ordinance or resolution adopting a program to include a statement that financing qualified projects, repaid by voluntary assessments on property

- benefited by C-PACER improvements, is in the public interest for safety, health, and other common good reasons;
- allows the Department of Commerce to produce a program guidebook for reference and use by county programs in lieu of establishing a voluntary statewide program;
 - requires the recording of the C-PACER lien to contain a copy of the voluntary assessment agreement between the county and the property owner and requires the county to record the assignment of the C-PACER lien from the county to the capital provider;
 - provides that the program shall establish uniform criteria for which projects qualify.
 - specifies that the lien and release shall be prepared in conformity with county auditor requirements;
 - requires the recording of the lien to contain the assessor's parcel number of the property; the grantor's name, which must be the same as the property owner on the assessment agreement; and the grantee's name, which must be the county in which the property is located;
 - requires the lien holder or assignee to record a release upon discharge of the lien and allows the lien holder to record a partial release;
 - specifies that the portion of a C-PACER lien that has not yet become due is not accelerated or eliminated by foreclosure of the CPACER 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;
 - specifies that the voluntary assessment may not be contested on the basis that the improvement is not a qualified improvement or that the project is not a qualified project;
 - provides that the C-PACER lien shall be 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, 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 property tax certificate of delinquency, rather than requiring the capital provider to foreclose and enforce the lien through a civil action in the manner prescribed for the judicial foreclosure of a mortgage;
 - requires the capital provider to receive written consent from any holder of a lien, mortgage or security interest, and for eligible multifamily properties, the program administrator to receive written consent from any and all holders of affordable housing covenants, restrictions, or regulatory agreements that the property may participate in the program and will take precedence over all other liens except liens by the state, a local government, or a junior taxing district;
 - provides definitions for "assessment" and "program administrator:" "Assessment" means the voluntary agreement of a property owner to allow a county to place an annual assessment on their property to repay C-PACER financing; and "program administrator" means the party designated by a county or the Department of Commerce, the county itself, or a third party, provided that the administration procedures conform to the requirements of this chapter;
 - amends the definition of "capital provider" to include their designee, successor, and assigns.
 - amends "C-PACER financing" to include refinancing of a qualified project; and

- amends "C-PACER lien" to mean 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.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (Local Government):

(In support) Many property owners own a building for around five years before selling, which can disincentivize efficient improvements. Participation in PACE programs is voluntary. There are many unreinforced masonry buildings and older buildings. The state should enable the program and let counties decide if it would be a fit. Carbon reduction efforts and energy conservation efforts are already being done for lower cost improvements, but property owners may not have the capital for big improvements. Many old, unreinforced buildings need retrofitting. The PACE programs have been successful in other states and help with clean energy and provide jobs. In buildings where tenants pay the utilities, the property owner is often unwilling to update the property because the owner is not paying for the utilities. Tenants are also not likely to invest in improvements on property they do not own. Property Assessed Clean Energy programs provide long-term financing for these improvements. Architects know how to design and retrofit resilient buildings that are energy efficient, but cost is an issue. There is payback on energy efficiency over time in lower utility bills and lower output. The lien attaches to the property as opposed to the improvement. Liens on improvements match the life of the improvement, and financing is often five to 10 years of chattel attachment and can have high rates and risk. Commercial owners will not want to undertake improvements under that type of financing. Low up-front costs that attach to the property are good. Property Assessed Clean Energy financing allows people to overcome steep up-front costs. Property Assessed Clean Energy financing is extending a well-known policy mechanism of public infrastructure funded by bonds issued by private entities. Property Assessed Clean Energy uses private funds. Public funds are not necessary. Property Assessed Clean Energy programs spur the economy by encouraging improvements. Property Assessed Clean Energy programs appeal to property owners because debt does not show up on the owner's balance sheet. Tenants reap the most benefit from mitigation to reduce the impacts. Improvements could make properties more valuable by reducing costs. It can be difficult for old buildings to keep up with seismic updates.

(Opposed) There is a risk of piercing the veil of the foreclosure process. The lien survives the foreclosure process, which is a risk for the public if the county obtains the property. Collecting private debt on a public document has never been done before. The survival of the lien in the foreclosure process will suppress possible bid prices if the property goes up for auction.

Staff Summary of Public Testimony (Appropriations):

(In support) Much of the state's building stock needs improvements for energy efficiency, clean energy, and resilience purposes. However, many building owners cannot afford to make these improvements. This bill would make the financing process less onerous. It will also assist in the implementation of the Clean Buildings Act passed in the 2019 Legislative Session. The bill promotes public-private partnerships and would provide public and private benefits. Other states have passed this kind of legislation, and there is a network of state officials who implement similar programs. The state may be able to benefit from other states' experiences and see savings when implementing the program.

(Opposed) County treasurers support the concepts of the bill but have serious concerns. The bill would add a new private debt collection component for counties. This has not been done before and should be done very carefully. Counties are also concerned that the liens for the C-PACER loans would survive property tax foreclosure. This would be the only time a private lien would survive a property tax foreclosure and would give the lien better status than child support payments or payments related to civil action judgments. Existing laws could be used as the basis for new language around these liens.

Persons Testifying (Local Government): (In support) Representative Duerr, prime sponsor; Barb Graff, City of Seattle; Rod Kauffman, Building Owners and Managers Association; Bonnie Frye Hemphill, Solar Installers of Washington; Erik Makinson, Resource Synergy; Kirsten Smith, American Institute of Architects; Alan Crain, Kitsap Bank; Genevieve Sherman, Greenworks Lending; Noah Reandeau, Northwest Energy Efficiency Council; Amy Wheelless, NW Energy Coalition; Court Olson, Optimum Building Consultants; Kraig Stevenson, International Code Council; Phyllis Farrell, League of Women Voters; and Suzie Hanson, Washington Federation of Independent Seattle Schools.

(Opposed) Jeff Gadman, Washington Association of County Treasurers and Washington Association of County Officials; and Arny Davis, Lewis County Treasurers' Office.

Persons Testifying (Appropriations): (In support) Court Olson, Shift Zero.

(Opposed) Jeff Gadman, Washington State Association of County Treasurers.

Persons Signed In To Testify But Not Testifying (Local Government): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.