

# HOUSE BILL REPORT

## E2SHB 2405

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### As Passed Legislature

**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.

House Concurred.

Passed House: 3/7/20, 93-4.

Passed Legislature.

#### **Brief Summary of Engrossed Second Substitute Bill**

- Creates a Commercial Property Assessed Clean Energy and Resiliency (CPACER) program, financed by capital providers and administered by counties or the Department of Commerce, for energy and resiliency 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.

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### HOUSE COMMITTEE ON LOCAL GOVERNMENT

**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.

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*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.*

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

**Staff:** Elizabeth Allison (786-7129).

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## 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 through a property assessment. A PACE assessment is attached to the property rather than the individual.

#### Special Assessments.

Special assessments, or benefit assessments, may be imposed on benefitted property to pay for local improvements or to finance their activities and public facilities. Special assessments are not property taxes, but rather special charges created to recover funds to pay for services or improvements that have a particular direct benefit to land and their owners. Unlike property taxes that are based on the assessment value of the property, special assessments are generally determined by an assessment plan that is meant to charge amounts to a parcel of property that reflect the actual benefit the property will receive. These assessments are usually based on a flat fee per parcel, an amount per acre, or a combination of characteristics. Properties may typically be charged in different amounts if it is found that different classes of

property benefit in different ways. Special assessments are not subject to the same limitations and procedures that govern property tax levies.

### **Summary of Engrossed Second Substitute Bill:**

A Commercial Property Assessed Clean Energy and Resiliency (C-PACER) program is established. The program authorizes private entities, or capital providers, to provide financing to property owners. The financing must be used to provide qualified building improvements.

"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 through the use of efficiency technologies, products, or activities that reduce or support the reduction of water consumption or allow for the reduction in demand; or (3) increase resilience, including but not limited to seismic retrofits, flood mitigation, storm water management, wildfire and wind resistance, energy storage, and microgrids. Counties may narrow the definition of "qualified improvements" to be consistent with the county's climate goals.

#### Commercial Property Assessed Clean Energy and Resiliency Program.

The Department of Commerce (Commerce) may establish a voluntary statewide C-PACER program that counties may choose to participate in. A county may establish a separate voluntary countywide C-PACER program.

The program must be managed efficiently and transparently and shall establish uniform criteria for which projects qualify due to their public benefit for participation in C-PACER programs, including criteria for measuring or determining if investments in energy will:

- reduce greenhouse gas emissions;
- be effective for reducing energy;
- be appropriate to meet seismic risks;
- reduce stormwater or pollution; or
- reduce the risk of wildfire, flooding, or other natural or human-caused disaster.

The program must also prepare a program guidebook that must include at minimum:

- a sample form bilateral or tri-party agreement or agreements between a county, the property owner, and the capital provider;
- a statement that the period of the financing agreement will not exceed the useful life of the qualified project that is the basis for the financing agreement;
- a description of the application process and the eligibility requirements for participation in the program;
- statement explaining the lender consent requirement;
- a statement explaining the review requirement;
- a description of marketing and participant education services to be provided for in the program; and

- a statement specifying that the county has no liability as a result of the agreement.

A program guidebook need not be completed or adopted prior to accepting and approving applications by a program. The program guidebook must be available for public inspection on the county's or Commerce's website.

A county or Commerce may contract out the responsibilities of program administration to a public, quasi-public, or private third-party entity.

Commerce may provide grants to counties to assist in the design and implementation of C-PACER programs.

#### Application and Review Process.

A C-PACER program must establish an application and review process to review and evaluate project applications for C-PACER financing and prescribe the form and manner of the application.

Applicants must demonstrate, at minimum:

- That the project provides a public benefit in the form of energy or water resource conservation, reduced public health risk, or reduced public emergency response risk.
- For an existing building, an engineer or other professional listed in the program guidebook must certify: (1) where energy or water usage improvements are proposed, that the proposed qualified improvements will either result in more efficient use or conservation of energy or water, result in the reduction of greenhouse gas emissions, or result in the addition of renewable sources of energy or water; or (2) where resilience improvements are proposed that the qualified improvements will result in improved resilience.
- For new construction, an engineer must certify 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.

The program may charge an application fee to cover the costs of the application review process.

If an application is denied, the program administrator must provide an opportunity for an adjudicative proceeding in accordance with the state Administrative Procedure Act.

Once an approved project is completed, an applicant must provide the program written verification that the qualified project was properly completed and is operating as intended.

The program must begin accepting and approving applications no later than one year after the program is established.

Commerce is authorized to adopt rules to implement the voluntary statewide C-PACER program.

In lieu of establishing a voluntary statewide program, Commerce may produce a program guidebook for reference and use by county programs.

To adopt a C-PACER program, a county must adopt a resolution or ordinance that includes:

- 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;
- a description of the region in which the program is offered; and
- a statement of the time and place of the public hearing.

Counties must also hold a public hearing at which the public may comment on the proposed program.

Counties must record each C-PACER lien in the real property records of the county. The county must also record the assignment of the C-PACER lien from the county to the appropriate capital provider.

#### Commercial Property Assessed Clean Energy and Resiliency Liens.

Commercial Property Assessed Clean Energy and Resiliency 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 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.

Collection and enforcement of the C-PACER lien or C-PACER financing installment payments, including foreclosure, is the responsibility of the capital provider. The lien shall be enforced by the capital provider at any time after one year from the date of delinquency in the same manner as delinquent property taxes, except that a sworn declaration by the capital provider attesting to the delinquency shall be used in lieu of the certificate of delinquency.

The capital provider may sell or assign for consideration C-PACER liens received from the participating county.

#### Commercial Property Assessed Clean Energy and Resiliency Financing.

Before a capital provider may enter into a financing agreement to provide C-PACER financing of a qualified project to a property owner, the capital provider 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.

For multifamily residential real properties, the C-PACER program administrator must receive written consent from any and all holders of affordable housing covenants, restrictions, or regulatory agreements in the real property 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.

Commercial Property Assessed Clean Energy and Resiliency 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.

A county may not enforce any privately financed debt and may not pledge, offer, or encumber the full faith and credit of the county. Neither the state nor any county may use public funds to fund or repay any loan between a capital provider and the property owner.

**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 Reandean, 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 Army 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.