

ATTACHMENT A

ENACT CHAPTER 68 THE CODE OF ARLINGTON COUNTY, VIRGINIA.

BE IT ORDAINED by the County Board of Arlington County, Virginia that Chapter 68, of the Arlington County Code is enacted, to read as follows:

ARLINGTON COUNTY CODE

Chapter 68

CLEAN ENERGY FINANCING ORDINANCE

Article I. In General

§68-1. Purpose

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**ARTICLE I.
IN GENERAL**

§68-1. Purpose

The County finds that facilitating improvements to certain types of non-residential buildings, if such improvements involve renewable energy production and distribution, increased energy efficiency, or increased water usage efficiency, will promote the general welfare and help the County reach its Community Energy Plan goals.

Therefore, the purpose of this Chapter is to create an "Arlington County Commercial Property Assessed Clean Energy (C-PACE) Financing Program," in accordance with the Commonwealth of Virginia's Clean Energy Financing Law (§ 15.2-958.3 of the Code of Virginia of 1950, as amended). The C-PACE program will facilitate loans made by qualified lenders to certain non-residential property owners to finance renewable energy production and distribution facilities, energy efficiency improvements, or water usage efficiency improvements. Subject to the limitations set forth in this Ordinance and other applicable laws, including, without limitation, the Clean Energy Financing Law, each such loan, inclusive of principal, interest and any financed fees, costs or expenses, will be (i) repaid through special assessment payments and (ii) secured by a voluntary special assessment lien on the property that is the subject of such loan.

In furtherance of the C-PACE program, the County, through this Ordinance and subject to the limitations set forth herein and other applicable laws, including, without limitation, the Clean Energy Financing Law, authorizes each qualified lender to (i) file and record such liens on behalf of the County, (ii) assign such liens on behalf of the County, (iii) amend such liens from time to time, and (iv) administer, in all respects, the loans respectively evidenced by such liens; provided, however, for the avoidance of doubt, that the County shall have no obligations with respect to the Program, or any loan, assessment, lien, or transaction related thereto, other than as expressly set forth in this Ordinance.

§68-2. Definitions

"Administrator" means the person or entity contracted in writing by the County to assist with the planning and administration of the Program. With prior written approval from Program Manager, which approval shall be in Program Manager's sole and absolute discretion, Administrator may, in a writing signed by Administrator, delegate one or more of its administrative duties specified herein or in the Program Guide to a person or entity subcontracted by Administrator.

"Assessment Payments" means the periodic repayments of the Loan Amount by Property Owner, due and payable to Lender in such amounts and at such times as described in the Financing Agreement and the Lien.

"Board" means the Arlington County Board.

"Clean Energy Financing Law" means § 15.2-958.3 of the Code of Virginia of 1950, as amended.

"Commonwealth" means "Commonwealth of Virginia."

"Contractor" means any person or entity that (i) for a set price, commission, or fee, undertakes to bid upon, or accepts or offers to accept, any order or contract to perform or manage, in whole or in part, any Project under this Ordinance, (ii) is validly licensed or otherwise permitted under applicable law to provide such service, (iii) has attended Program training provided by Administrator, (iv) has been approved as a registered contractor by Administrator and (v) is either listed in the Program Guide or identified in a publicly available list maintained by Administrator.

"County Attorney" means the County Attorney of the County.

"C-PACE" means Commercial Property Assessed Clean Energy.

"Eligible Building" means any building located, or to be located, on Eligible Property, including all existing and future improvements upon such building, regardless of such building's use or whether such building is existing, under construction, or to be constructed; provided, however, that the term "Eligible Building" shall not include any (i) residential dwelling with fewer than five dwelling units or (ii) condominium project as defined in §55-79.2 of the Code of Virginia of 1950, as amended.

"Eligible Improvement" means any improvement, construction, equipping, installation or modification of or to, as the case may be, an Eligible Building, if designed to (i) facilitate renewable energy production and distribution, (ii) increase energy efficiency, or (iii) increase water usage efficiency.

"Eligible Property" means real estate located within the County, regardless of whether such real estate is subject to taxation by the County.

"Financing Agreement" means a written agreement, as may be amended, modified, or supplemented from time to time, between Property Owner and Lender, regarding matters related to the extension and repayment of a Loan to finance a Project, including, without limitation, (i) the Loan Amount, (ii) the repayment schedule, (iii) the interest rate, (iv) Program Fees, and (v) other fees, costs or expenses charged to Property Owner. Proposed terms and conditions for such agreement are found in the Draft Financing Agreement attached to, and made part of, Section 8.1 of this Ordinance. Property Owner and Lender may choose to deviate from such terms and conditions, or use such other form of financing agreement that Property Owner and Lender may agree upon; provided, however, that each Financing Agreement shall include Sections 2.1 (Assessment and Lien), 2.2 (Loan Terms and Assessment Payments), 5.1 (The Act, the Ordinance and the Program Guide), 5.2 (General), 5.10 (Assignment of Lien and Participation Interests), 7.5 (Governing Law), 7.7 (Jurisdiction) and 7.11 (The County) of the Draft Financing Agreement, with variations permitted to such sections only to the extent that such variations are minor, non-substantive and stylistic to allow such sections to conform to the agreement used by Lender and Property Owner. In the case of a conflict between the terms of a Lien and the terms of the applicable Financing Agreement, the terms of such Lien shall control.

"Lender" means a source of financing that has been approved, by Administrator, as a qualified lender in accordance with the criteria set forth in the Program Guide. Each such qualified lender may make Loans to eligible Property Owners to finance Projects under the Program.

"Lien" means a voluntary special assessment lien duly Recorded against an Eligible Property to secure Assessment Payments. Each Lien (i) shall run with the land, and those portions of Assessment Payments secured by such Lien that have not yet become due are not eliminated by foreclosure of a property tax lien, and (ii) shall have the same priority status as a real property tax lien, except that such Lien shall have priority over any previously recorded mortgage or deed of trust lien on the Property only if a written subordination agreement is executed by the holder of each such previously recorded lien. Such subordination agreement shall be Recorded with the Lien, and shall be in a form and substance acceptable to the prior lienholder in its sole and exclusive discretion. Prior to the Recording of any Lien, Property Owner must submit to Lender evidence that: (i) Property Owner is current on payments on all loans secured by a mortgage or deed of trust lien on the Eligible Property and on property tax payments to the County, (ii) Property Owner is not insolvent or subject to bankruptcy proceedings, and (iii) Property Owner's title to the Eligible Property is not in dispute.

"Loan" means a loan from Lender to Property Owner to finance a Project, as described in a Financing Agreement.

"Loan Amount" means the aggregate amount of a Loan, inclusive of principal, interest and any financed fees, costs or expenses, all as provided for in the Financing Agreement.

"Loan Document" means a Financing Agreement, a Lien, or any amendment thereof, or any other document, agreement or instrument executed in connection with a Loan, a Financing Agreement, a Lien, or any amendment thereof.

"Program" means the C-PACE program established by the County, through this Ordinance, in accordance with the Clean Energy Financing Law.

"Program Fees" means those fees and expenses that shall be specified in the Program Guide; provided, however, that the County reserves the right to revise the nature or amount of such fees at any time; provided further, however, that any such revision shall not apply to any Program Fees specified in an executed Financing Agreement.

"Program Guide" means the detailed description of Program requirements, which shall include, without limitation, (i) examples of Eligible Improvements, (ii) criteria or requirements for the designation of Contractors and Lenders, (iii) criteria or requirements for the eligibility of Property Owners and Projects, (iv) all fees, costs and expenses of the Program, including those of Administrator, (v) certain disclosures to Property Owners regarding the Program, and (vi) the required provisions set forth in Section 8.5 of this Ordinance.

"Program Manager" means County Manager or such person designated in writing by County Manager to run the Program and act as liaison with Administrator; provided, however, that only County Manager shall be authorized to enter into any contract on behalf of the County in respect of the Program, and any such contract shall be subject to Board approval.

"Project" means the development of Eligible Improvements on an Eligible Building.

"Property Owner" means the person or entity that holds title to Eligible Property, together with its successors and permitted assigns, as to be described in a Financing Agreement.

"Record" means "file and record in the land records of the County."

"Savings-to-Investment Ratio" means the total estimated (or projected) energy cost savings over the effective useful life of the Eligible Improvements, divided by the Loan Amount; provided that the foregoing definition may be further described or modified in the Program Guide.

§68-3. Effective Date

This Ordinance shall become effective as of [_____].

ARTICLE II. PROGRAM STRUCTURE

§68-4. Project Eligibility

- A. *Prioritization*: Administrator will process Project applications on a first come, first serve basis; provided, however, that all successful applicants must meet the income or property value eligibility requirements established under the Program Guide.
- B. *Project Eligibility Notification*: Administrator shall prepare and deliver to Property Owner a project eligibility notification and a project finance report that includes, if applicable, the Project's Savings-to-Investment Ratio.
- C. *Size Thresholds*: The minimum Loan Amount that may be financed for each Project is fifty thousand dollars (\$50,000). The maximum Loan Amount that may be financed for each Project is twenty-five million dollars (\$25,000,000).

§68-5. Loan; Program Fees; Reporting; Program Guide

- A. *Source of Loan; Financing Agreement*: Loans may only be financed by Lenders. Each Loan must be made pursuant to a Financing Agreement.
- B. *Repayment and Administration of Loan*: Loans will be repaid by Property Owner through Assessment Payments. Upon assignment of the Lien to Lender, as described in Section 6.2 hereof,

Property Owner shall make all such Assessment Payments directly to Lender pursuant to the Financing Agreement, and Lender shall be responsible, subject to and in accordance with the terms of the Financing Agreement, for all billing, collection, enforcement and administrative duties in respect of each of the Loan, the Assessment Payments and the Lien.

- C. *Program Fees:* The Program will be self-financed through Program Fees charged to participating Property Owners that are designed to cover the costs to design and administer the Program, including the compensation of Administrator. Lender shall collect the Program Fees from Property Owner at Loan closing, and shall remit any such Program Fees so collected to Administrator within ten (10) days of the date of such closing, without requiring demand or notice from Administrator.
- D. *Reporting:* No less frequently than semi-annually, each Lender shall provide to the County a written report with summary information regarding the Loan portfolio performance of such Lender, including the (i) types and amounts of Eligible Improvements financed, (ii) locations of Projects, (iii) number of Loans outstanding, (iv) overall aggregate dollar amount outstanding under such Loans, (v) average initial Loan Amount, (vi) number of Loans with delinquent Assessment Payments and (vii) number of Loans foreclosed upon to date and the number of pending foreclosures.
- E. *Program Guide:* The Program Guide and any subsequent amendments thereto shall become effective only (i) to the extent that the Program Guide and such amendments do not contravene this Ordinance and (ii) after review by the County Attorney and written approval by Program Manager. The Program Guide, including any amendments thereto, shall contain the required provisions set forth in Section 8.5 of this Ordinance.

§68-6. Assessment; Recordation of Lien; County Expenses

- A. *Notification of Closing:* Upon the financial closing of a Project, Lender will promptly provide notice thereof to each of Program Manager and Administrator, which notice shall include: (i) a statement of the Loan Amount, (ii) a copy of the Financing Agreement executed by Property Owner and Lender, (iii) a written subordination agreement with each holder of a prior mortgage or deed of trust lien on the Eligible Property, and (iv) evidence that (A) Property Owner is current on payments on loans secured by a mortgage or deed of trust lien on the Property and on property tax payments to the County, (B) Property Owner is not insolvent or subject to bankruptcy proceedings, and (C) Property Owner's title to the Eligible Property is not in dispute.
- B. *Recordation of Lien; Assignment:* Upon receipt of such notice in Section 6.1 hereof, Lender, as authorized by the County for such purposes, shall promptly Record the Certificate of Levy and Lien of Special Assessment on behalf of the County, a form of which is attached to, and made part of, Section 8.2 of this Ordinance. Promptly thereafter, Lender, as authorized by the County for such purposes, shall assign the Lien from the County to Lender, to cause Lender to be named as the holder of the Lien in the land records of the County, by Recording an Assignment of Special Assessment Lien, a form of which is attached to, and made part of, Section 8.3 of this Ordinance. Such assignment shall include only the County's right, title and interest in and to the Assessment Payments and the Lien, and the County shall retain all of its other rights and remedies, including any special powers of enforcement or collection to which the County, by virtue of its status as a political subdivision of the Commonwealth, is entitled or empowered to exercise under applicable laws of the Commonwealth.
- C. *Amendment of Lien:* The Lien may, in Lender's sole discretion, be amended, after Lender disburses the Loan. To effect such amendment, Lender will Record a Confirmation and Amendment of

Special Assessment Lien, a form of which is attached to, and made part of, Section 8.4 of this Ordinance; provided, however, that such amendment shall be permitted only to the extent amendments are permitted under the applicable Financing Agreement.

- D. *Preparation of Documentation; Expenses:* Lender shall be responsible for (i) preparing all documentation in respect of the Loan, the Financing Agreement, the Lien, and any assignment or amendment of the Lien, (ii) presenting such documentation to the County prior to the Recording of any Lien or any assignment or amendment thereof, and (iii) reimbursing the County for any reasonable out-of-pocket expenses incurred by the County in connection with the review, preparation or Recording of such documentation. Lender shall make such reimbursement within ten (10) days upon written demand from the County. Lender may, if provided for in the Financing Agreement, recover from Property Owner the amount of any such reimbursements actually paid to the County.

§68-7. Role of the County; Limitation of Liability

By executing a Financing Agreement or any other Loan Document, or otherwise participating in the Program, each Property Owner, Lender, Contractor or other party or participant acknowledges and agrees, for the benefit of the County and as a condition of participation in the Program, that: (i) the County undertakes no obligation under or in respect of any Loan Document or the Program Guide, and no implied covenants or obligations of the County shall be read into either, (ii) regardless of any default by Property Owner, the County has no obligation to make Assessment Payments to any Lender, or any other payments in respect of any Loan, including, without limitation, any fees, expenses and other charges described in any Loan Document, (iii) none of any Loan, Assessment Payment, Lien or other obligation arising from any Loan Document, the Act, or the Ordinance shall be backed by (A) any credit of the County, (B) any credit of the Commonwealth or its political subdivisions, including, without limitation, the County, or (C) any taxes or governmental funds, (iv) none of any Loan, Assessment Payment, Lien or other obligation arising from any Loan Document, the Act, or the Ordinance shall constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction, (v) the County has not made any representations, financial or otherwise, in respect of Borrower, the Property or the Project, (vi) the County makes no representation or warranty as to, and assumes no responsibility with respect to, the accuracy or completeness of any Lien, or any assignment or amendment thereof, (vii) the County assumes no responsibility or liability in respect of any Project, or the planning, construction or operation thereof, (viii) each Property Owner, Lender and Contractor shall, upon request, provide the County with any information associated with the Project or the Loan that is reasonably necessary to confirm that the Project or Loan meets all requirements of the Act, the Ordinance and the Program Guide and (ix) each Property Owner, Lender, Contractor and other participant under the Program shall comply with all applicable requirements of the Act, the Ordinance and the Program Guide.

68-8. Additional Provisions

- A. *Draft Financing Agreement:* Each Financing Agreement shall be in substantially the form below, with such additions, deletions or alterations as permitted by this Ordinance. [ATTACH]
- B. *Form of Certificate of Levy and Lien of Special Assessment:* Each Certificate of Levy and Lien of Special Assessment shall be in the form below, with only minor variations permitted to complete the form. [ATTACH]
- C. *Form of Assignment of Special Assessment Lien:* Each Assignment of Special Assessment Lien shall be in the form below, with only minor variations permitted to complete the form. [ATTACH]

- D. *Form of Confirmation and Amendment of Special Assessment Lien:* Each Confirmation and Amendment of Special Assessment Lien shall be in the form below, with only minor variations permitted to complete the form. [ATTACH]
- E. *Required Program Guide Provisions:* The Program Guide, including any amendments thereto, shall contain the following provisions:

"This Program Guide (this "Guide") has been prepared pursuant to Chapter 68 of the Arlington County Code (the "Ordinance"), for purposes of providing a more detailed description of the requirements applicable to the Arlington County Commercial Property Assessed Clean Energy (C-PACE) Financing Program (the "Program"). This Guide and all provisions hereof are subject to the Ordinance in all respects, including, without limitation, the provisions of the Ordinance governing the amendment of this Guide. In the case of any conflict between the provisions of this Guide and the provisions of the Ordinance, the provisions of the Ordinance shall control."

"THIS GUIDE IS ONLY A REFERENCE DOCUMENT, AND CREATES NO LEGAL RIGHTS IN FAVOR OF ANY PROPERTY OWNER, LENDER, CAPITAL PROVIDER, CONTRACTOR OR ANY OTHER PERSON, NOR DOES IT IMPOSE ANY LEGAL DUTY OR OBLIGATION ON THE COUNTY OF ARLINGTON, VIRGINIA."

- F. *Narrow Construction; No Precatory Sections:* This Ordinance shall be narrowly construed. All portions of this Ordinance, including, without limitation, §68-1 (Purpose), shall have full regulatory effect and are not precatory.