



Municipality of Anchorage
Office of the Municipal Attorney
Legal Memorandum

DATE: APRIL 22, 2022

TO: SHAINA KILCOYNE, ENERGY MANAGER, SWS
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SUBJECT: PROPOSED SUNSET AMENDMENT TO HB 227
LAW MATTER NO. 20-1343

Question

You have requested that we address the following question:

Whether the MOA can still service an assessment through the C-PACE Program if the MOA's enabling authority is rescinded?

Brief Answer

Subject to the following background and discussion, our brief answer is Department of Law has serious concerns that if the state were to repeal C-PACE's enabling statute, current contracts could be illegal and the Municipality may no longer be able to collect on them as originally intended.

Background

About C-PACE

Commercial Property Assessed Clean Energy (C-PACE) is a tool to help finance energy efficiency and renewable energy improvements on commercial property. C-PACE uses borrowed capital to pay for the upfront costs associated with energy efficiency or renewable energy improvements. Unlike other project financing, the borrowed capital is repaid over time via a voluntary tax assessment. The security provided by the tax assessment, a long-used and well understood mechanism, results in several compelling

features, including longer term financing and transferability of the repayment obligations to the next property owner. In turn, C-PACE strengthens the business case for investment in longer payback and deeper building retrofits beyond what is possible with traditional financing.

C-PACE is not a federal program, and public funding is not necessary to run a C-PACE program. C-PACE must be authorized by state legislation, and requires further authorization from local governments.¹

C-PACE in Alaska

Authorizing legislation in Alaska was adopted in 2017 (AS 29.55.100-165, “Municipal Property Assessed Clean Energy Act) and allows local governments to create and manage C-PACE programs.² Anchorage approved the first C-PACE program in the state in November 2020, and it is codified in AMC 12.75, Property Assessed Clean Energy Program.³

Proposed sunset provisions

The Alaska Legislature is reviewing HB 227 which would expand the current statute’s scope. After passing the House unanimously, it is currently being reviewed by the Senate. During the April 19 Senate Community & Regional Affairs committee hearing, an amendment was introduced to add a sunset date of June 30, 2052. If the legislature does not explicitly reauthorize the program, then the sunset clause repeals the entire statute. Representative Schrage, an HB 227 sponsor, has asked for a legal opinion from Legislative Counsel. Senator Gray-Jackson also asked for an MOA opinion and legal response. State legislatures are simultaneously considering a ten-yearly program review by the State Department of Commerce, Community, and Economic Development.

An attorney at Nuveen Green Capital, which has provided the MOA with technical and legal assistance with the C-PACE Program, offered this:

I see that the sunset amendment contemplates a municipality continuing to service a written contract made under the program, however, we’d likely need to consult with legal counsel to understand how this sunset would impact the priority of the assessment lien and its survivability during a foreclosure/bankruptcy. To the extent the sunset would impact those pieces then I suspect we would be unable to lend in Alaska to the extent our assessment is expected to mature just prior to or after the sunset date. Would also note

¹ U.S. Department of Energy, Office of Energy Efficiency & Renewable Energy, Commercial Property Assessed Clean Energy (C-PACE) A Fact Sheet for State and Local Governments, October 2017. https://www.energy.gov/sites/prod/files/2017/10/f39/FL1710_WIP_CPACEv2.PDF (4/22/2022).

² Alaska Energy Authority, About Alaska C-PACE. <https://www.akenergyauthority.org/What-We-Do/Grants-Loans/Alaska-C-PACE> (4/22/2022).

³ *Id.* See also Anchorage C-PACE Financing. <https://storymaps.arcgis.com/stories/a36f66ba1c944738883a0c57aaa8f7ea> (4/22/2022).

that the provision permitting the conversion of the written contract to a loan would likely upset mortgage lenders and interfere with the consent process.

Discussion

After reviewing the proposed amendment, current bill, feedback from lender's counsel, and based upon our analysis of the amendment proposed to HB 227, we have substantial concerns regarding the impact of a sunset provision on the Municipality's C-PACE program.

Key components of a C-PACE program are a municipality's ability to impose an assessment to repay the financing for an energy improvement program; and that such an assessment may be enforced as a lien against the property.⁴ The currently contemplated amendment would repeal those empowering sections on June 30, 2052. As such, a C-PACE contract entered into prior to but with a repayment date after June 30, 2052 would lack the necessary legal enabling framework after the sunset date. The municipality would no longer be clearly empowered to collect the repayment assessment under state law nor would the assessment be a priority lien on the property running with the land. This would undermine key assurances to lenders embodied in the program.

If the intent of the legislature is to cut off the ability for a municipality to form a new C-PACE program or to cut off additional C-PACE contracts, we recommend a repeal of AS 29.55.100(a-b) to stop new programs and AS 29.55.105(a)(1) to stop new contracts. Repealing only these limited subsections would remove the ability to form new programs or contracts without removing the legal framework underpinning the whole C-PACE program potentially breaking then existing contracts.

The alternative formulations where the program would be reviewed every 10 years would similarly not undermine core concepts.

Conclusion

The Department of Law has significant concerns regarding the feasibility of the C-PACE program and legality of the attendant contracts if the state approved the proposed sunset dates as formulated in the amendment.

⁴ AS 29.55.105(a)(1) and AS 29.55.135(a).