



Property Assessed Clean Energy (PACE) Financing: The Ohio Story

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Introduction to PACE

Property Assessed Clean Energy (PACE) programs represent one of the newest mechanisms available for financing energy efficiency and renewable energy improvement projects. They allow qualifying energy improvements to be financed through assessments on a property owner's real estate tax bill. The special assessments are used to secure local government bonds issued to fund the improvements without requiring the borrower or the sponsoring local government to pledge its credit. By allowing participating property owners to pay for energy improvements to their properties via a bond issue tied to a special assessment on their property tax bill, PACE financing enables property owners to reduce energy costs with no upfront investment.

The White House's Policy Framework for PACE Programs

In 2009, the White House released the Policy Framework for PACE Financing Programs to encourage states and local governments to adopt pilot or demonstration PACE programs.¹ The release of the Policy Framework coincided with the United States Department of Energy's release of a Funding Opportunity Announcement (FOA) for competitive grants under its Energy Efficiency Conservation Block Grant Program. Together, these two federal programs sought to expedite the development of PACE programs at the state and local levels.

While the scope of the Policy Framework was limited to residential PACE programs, the principles it established were applicable to, and consistent with, PACE programs for commercial and industrial property owners. As a result, the Policy Framework serves as an important resource for local governments establishing PACE programs, and also establishes important safeguards for the implementation of those programs. While PACE offers a useful set of guidelines, local programs implementing special assessment financing of alternative energy are not legally required to follow them.

A. Brief Description of PACE Financing

Although new to the clean energy realm, the PACE financing model is quite familiar to public finance professionals. As the Policy Framework noted, "[i]n a typical assessment district a local government issues bonds to fund projects with a public purpose such as streetlights, sewer

systems or underground utility lines. Property owners that benefit from the improvement then repay the bond through property assessments secured by a property lien and paid as part of the property taxes.”

B. Consumer Protections

The underlying goal of the Policy Framework for PACE financing programs is to develop best practices in the design and implementation of local PACE programs. The focus is on effective consumer protections and includes the following:

- **Savings-to-Investment Ratio:** Each improvement should be able to “pay for itself.” This means that an investment should only be made if the property owner’s expected savings on average monthly utility bills is greater than the expected monthly increase in real-property assessments due to the PACE improvements. For example, if monthly utility bills decrease by an average of \$50/month, while the increase in property taxes is \$40/month, the investment will pay for itself.
- **Financing Should Focus on High-Value Investments:** The availability of PACE financing should be limited to investments with a high return in terms of energy efficiency or renewable energy gains.
- **Ensuring the Retrofit is Constructed as Intended.** Not only should the scope of the energy project be based upon a list of qualifying projects or an energy audit, but each improvement should be installed by a licensed contractor. Quality assurance reviews should also be available following completion of the project.
- **Limitation of Liability in Foreclosure Proceedings:** The liability for unpaid PACE assessments should be limited to the amount in arrears at the time of the foreclosure proceeding. For example, if a property owners defaults on a 20-year assessment in the fourth year, only the unpaid balance as of the date of default would be due. The remaining 16 years of the assessment is not accelerated as a result of the foreclosure; successor owners become responsible for the remaining years.

C. Safeguards for Mortgage Holders

In addition to the homeowner protections identified above, the Policy Framework also supports additional measures to further limit risk to mortgage lenders:

- **Creation of a Reserve Fund:** A reserve fund should be created at the local government level to provide a backstop against late assessment payments. The use of reserve funds reduces the risk to the first mortgage lender and other private lien holders because initial losses are paid out of the reserve fund. As a result, the “value of the mortgage lenders’ collateral should not be reduced by any failure . . . to pay the PACE assessment.”

- **Length of Repayment Obligation:** Homeowners should repay PACE assessments in a period of time not to exceed the expected useful life of the energy-efficiency or renewable-energy improvements made. For example, if the useful life of a solar panel is 20 years, the assessment should be repaid over a period no longer than 20 years.
- **Size of Financing Relative to Property Value:** As a general matter, PACE assessments should not exceed a certain percentage of the appraised value of the home (commonly 10 percent).
- **Clear Title:** Applicants must prove they are the proper legal owners of the property subject to the assessment, including proof that the title is clear of easements or subordination agreements that conflict with the assessment.
- **No Uncured Defaults:** Prerequisites to participation in a PACE program include proof that: (i) property taxes are current; (ii) there are no outstanding and/or unsatisfied tax liens on the property; (iii) there are no notices of default and/or other evidence of property-based debt delinquency for the lesser of the previous three years or the property owner's period of ownership; and (iv) the property owner is current on all mortgages.
- **No Negative Equity Financing:** PACE loans to risky borrowers (e.g. those with mortgage and other debts greater than the current value of the property) are particularly troublesome because of increased default rates. As a result, PACE programs should require a current estimate of the appraised value of the property to ensure that the debt is less than the appraised value of the property.
- **Vulnerable Areas.** Local governments should be cautious in using the PACE model in areas experiencing significant price declines, and where large numbers of risky loans may exist. PACE programs in such areas should proceed only after careful attention to local real estate conditions and the implementation of programmatic safeguards.
- **Escrow.** To reduce the risk of assessment nonpayment, homeowners should escrow payments for PACE programs in situations where they already escrow other property tax assessments.

D. The Department of Energy Expansion of the Policy Framework

On May 7, 2010, the United States Department of Energy issued its Guidelines for Pilot PACE Financing Programs (DOE Guidelines),² which established certain “best practices” consistent with the principles set forth in the Policy Framework. For example, the DOE Guidelines reiterated the following principles: (i) improvements should pay for themselves, (ii) improvements should be based on energy audits or other modeling scenarios, (iii) assessments should not extend beyond the useful life of the improvements, (iv) assessments should not be accelerated upon default, (v) assessments should not exceed 10 percent of a property’s value, (vi) applicants must have clear title to property being assessed, (vii) property equity should exceed property debt, and (viii) there should be no property-related defaults. In addition, the DOE Guidelines established the following best

practices: (i) all mortgage holders of record should receive notice of the PACE assessment, (ii) customer education should be a significant part of any PACE program, and (iii) PACE program developers must collect necessary data for proper evaluation of the program.

The Development of PACE Programs in Ohio

Ohio's entry into PACE programs began on July 17, 2009 when the General Assembly passed, and Governor Strickland approved, Ohio House Bill 1 (HB 1). This legislation allowed Ohio municipalities and townships to assist property owners with solar photovoltaic and solar thermal (e.g., roof-top and ground-mounted solar arrays, solar water heaters) installations through a special financing district called a "special improvement district" (SID). By creating a SID, municipalities and townships are able to facilitate the financing of solar photovoltaic and solar thermal systems through the levy of a special assessment on the real estate tax bill of any consenting, participating property owner. Less than a year later, the General Assembly passed, and the Governor approved, Ohio Amended Substitute Senate Bill 232 (SB 232) which further expanded Ohio's PACE program to provide financing for geothermal, wind, biomass, gasification, and energy efficiency projects.

A. Ohio Projects Eligible for PACE financing

The changes introduced through SB 232 provide municipalities and townships with the flexibility to offer a full range of renewable and advanced energy options to residential, commercial, industrial, nonprofit and government property owners. PACE financing in Ohio is now available for:

- Solar photovoltaic improvements
- Solar thermal improvements
- Geothermal improvements
- Customer-generated energy projects which include wind, biomass or gasification facilities that are either: 1) designed to have a generating capacity of 250 kW or less; or 2) located on the project owner's property, operated in parallel with electric transmission and distribution facilities serving the property, not producing energy for direct sale to the public, and intended primarily to offset all or part of the electricity requirements of the facility-owner)
- Energy efficiency improvements defined to include "technologies, products and activities that reduce or support the reduction of energy consumption, allow for the reduction in demand, or support the production of clean, renewable energy and that are or will be permanently fixed to real property."

Under SB 232, PACE financing can be utilized for solar photovoltaic, solar thermal, geothermal and energy efficiency improvements regardless of size or whether such improvements are on the customer or utility side of the meter. With respect to the other

technologies, PACE financing can be used for projects of any size on the customer side of the meter, or for projects of up to 250 kW on the utility side of the meter.

B. Creating an Energy SID in Ohio

In order to take advantage of PACE financing, an Ohio municipality or township must create a SID, which is a special financing district established under Ohio Revised Code Chapter 1710. Traditionally, SIDs were used for the purpose of implementing locally controlled projects, such as sidewalk improvements. HB 1 and SB 232, however, established the concept of an Energy SID, which is unlike a traditional SID because: 1) the properties included within an Energy SID do not have to be contiguous; and 2) an Energy SID requires the consent of 100 percent of the property owners who will be assessed for the costs of the energy project, which means that participation in an Energy SID is entirely voluntary³.

Creating an Energy SID is a straightforward, statutory process, but it does require some effort on the part of the Ohio municipality or township forming the Energy SID. However, all Ohio municipalities and townships that approve the creation of SIDs to finance special energy improvement projects should strive to ensure that their SID plans align with the PACE Policy Framework and are responsive to the best practices in the DOE Guidelines. If possible, bond counsel or other legal counsel should be retained to assist local governments in navigating the procedural steps required by Ohio Revised Code Chapter 1710 to form an Energy SID and levy a special assessment. Some practical steps to establishing an Energy SID are as follows:

- **Get the Word Out.** The municipality or township communicates the availability of the new energy program to their community.
- **Circulate the SID Petition.** Property owners that want to participate will need to sign a “petition.” The municipality or township will develop a simple “form” petition to be filled out by participating property owners.
- **Choose the Energy Projects.** The petition contains an “initial plan” that outlines the energy projects the participating property owners want to install on their property. The municipality or township may prequalify a list of project manufacturers and installers.
- **Determine the Assessment Amount.** The petition acts as a request that the Ohio municipality or township levy a special assessment on the participating property owners’ real estate to pay the costs of their energy project(s). The municipality or township will need to determine how much each energy project will cost in order to set the assessment amount in the petition. Financing and administrative costs of the Energy SID, if any, can be included within the assessment.
- **Approve the Energy SID.** The municipality or township must, by ordinance or resolution, approve the SID petition.
- **Submit Proper Documentation to the Ohio Secretary of State.** Once the SID petition has been approved, governmental entities must submit documentation to the Ohio Secretary of State’s Office for review and approval. The documentation should include the Energy SIDs articles of incorporation, the

ordinances/resolutions authorizing the Energy SID, and the initial plan of how the Energy SID will operate.

- **Implement the Energy SID.** Implementation of the Energy SID will be a collaborative effort between the Ohio municipality, township and the Energy SID's Board of Directors. Together, these groups will administer the program, determine general criteria for eligible improvements (including cost, size and zoning-related considerations), and determine the scope of direction of the Energy SID. In addition, many Energy SIDs will be able to provide property owners with project-specific information, including a list of approved/qualified vendors based on information from the Ohio Department of Development.
- **Levy the Assessment/Finance the Project(s).** It is worth noting that multiple bonds can be issued to finance projects in the Energy SID. This "microbond" process allows the governmental entity to issue bonds once there are a certain number of participating property owners, and then to issue additional bonds once more property owners join the SID. As a result, the initial participating property owners are not the only persons able to take advantage of the benefits of an Energy SID.

C. Financing an Ohio Energy Project Through a SID

Assessments are powerful tools that allow each participating property owner to finance new energy projects in installments instead of requiring an up-front capital investment. A municipality or township, in cooperation with the Energy SID, can levy a special assessment on participating property owners' real property for up to 30 years, which is significantly longer than the 10 years permitted in a traditional SID financing.

Municipalities and townships have several options at their disposal to finance energy projects using an Energy SID assessment. "General obligation" bonds that are backed by the full faith and credit of the municipality or township may be available for financing energy projects. Through a "general obligation" financing, the municipality or township issues its bonds and pledges its credit to the payment of the bonds issued to finance the energy projects. The municipality or township will pay the bonds over time with its general property tax receipts.

Because of the limitations imposed by some of Ohio's laws on municipal and township debt (including the direct debt limitations and the indirect, ten-mill limitation), "general obligation" financing of energy projects may not be an option for all Ohio municipalities or townships. If "general obligation" bonds are not an option, it is likely that the municipality or township can finance energy projects using a "special obligation" revenue bond financing. In a "special obligation" revenue bond financing, the Ohio municipality or township assigns any assessment revenues that it may receive from the Energy SID to another governmental entity that is capable of issuing bonds on behalf of the municipality or township. In Ohio, port authorities are an example of a third-party, or "conduit," issuer that can issue bonds on behalf of an Ohio municipality or township. In turn, the conduit issuer, like an Ohio port authority, will issue its bonds on behalf of the municipality or township and will pay the principal of and interest on those bonds over time using the assessment revenues received by the municipality or township.

and transferred to the conduit issuer. Using this arrangement, the Ohio municipality or township can obtain financing for energy projects and avoid any impact that such financings may have on its debt limitations.

Ohio municipalities and townships can also utilize federal programs designed to lower borrowing costs for states and local governments. For example, the U.S. Department of Energy Loan Guarantee Program secures low interest rate loans for PACE-style projects through federally designated “development finance organizations.” The U.S. Department of Agriculture’s Building and Industry Loan Guarantee Program is a similar program that secures low interest rate loans for eligible projects. If possible, Ohio municipalities and townships should retain bond counsel or other legal counsel to assist with identifying and selecting financing alternatives for energy projects.

All municipalities and townships that approve the creation of SIDs to finance special energy improvement projects should strive to ensure that their SID plans align with the PACE Policy Framework and are responsive to the best practices in the DOE Guidelines.

D. Added Benefits of Ohio’s Energy SIDs

Property owners participating in an Ohio Energy SID and own a qualifying advanced- and renewable-energy project may be eligible for a variety of federal tax credits, including federal investment tax credits and federal production tax credits. For example, the federal investment tax credit equals 30 percent of the eligible costs of a qualifying project. For projects placed in service in 2009 or 2010, participating property owners may elect a 30 percent grant equal to and in lieu of the investment tax credit. For either the tax credit or grant to apply, Ohio municipalities and townships need to structure the PACE program so that each project is transferred to the participating property owner after the special assessment is levied, but before the project is “placed in service.” This is important because the municipality or township will generally own the project initially, but Ohio law allows for the project to be transferred to the property owner prior to the place-in-service date.

Ohio Energy SIDs are expressly authorized in SB 232⁴ to aggregate the renewable energy credits (RECs) generated by the energy projects in the Energy SID. By aggregating the RECs, the Energy SID will be able to facilitate the negotiation of the sale of those RECs, and can apply REC proceeds to lower the Energy SIDs required assessments.

E. Federal Regulators Curb Development of Residential PACE Programs

Federal regulators have begun to express serious concerns about PACE programs, in particular residential programs. The problem is simple: a PACE assessment would have first-lien status, which means that it would take priority over a mortgage in the event a homeowner defaulted on the assessment. Proceeds from a foreclosure would be used to pay off the PACE assessment before the mortgage. That arrangement makes the mortgages unpalatable to many lenders—a position emphasized in two May 5, 2010 letters from Fannie Mae and Freddie Mac to their respective loan sellers and servicers.⁵ In particular, the two mortgage loan giants contended

that PACE assessments were actually loans, and therefore could not take priority over a Fannie Mae or Freddie Mac mortgage under the terms of their standard loan documents.

The Federal Housing Finance Agency (FHFA)—which regulates Fannie Mae and Freddie Mac—issued a statement on July 6, 2010, documenting its opposition to residential PACE programs.⁶ The FHFA explained that PACE programs carry with them “significant safety and soundness concerns that must be addressed.” More specifically, the FHFA noted that PACE financing “alters traditional lending priorities,” and that “programs with first liens run contrary to the Fannie Mae-Freddie Mac Uniform Security Instrument.”

Expanding on the FHFA’s statement, the Office of the Comptroller of the Currency (OCC) issued a similar statement on July 6, 2010,⁷ stating that “Under most of these [PACE] programs, such loans acquire priority lien, thereby moving the funds advanced for energy improvements ahead of existing first and subordinate mortgage liens. This lien infringement raises significant safety and soundness concerns that mortgage lenders and investors must consider.” Reiterating the FHFA’s position, the OCC concluded that it “supports commercial and residential energy lending,” but only “when such lending programs observe existing lien preference, ensure prudent underwriting, and comply with appropriate consumer protections.” Notably, however, neither the FHFA nor the OCC specifically weighed in on the viability of commercial PACE programs—likely the result of the fact that commercial mortgages generally include more restrictive mortgage covenants requiring the property owner to obtain the consent of the lender prior to placing PACE assessments on the commercial property.

With these statements, federal regulators warned financial institutions that residential PACE programs could impact the ability of those institutions to sell residential mortgage loans to Fannie Mae, Freddie Mac and other national banks. From a practical standpoint, this guidance slowed and/or stopped the vast majority of residential PACE programs across the country. As a result, numerous lawsuits have been filed seeking to uphold the validity of PACE programs. For example, on July 14, 2010, the California Attorney General’s Office filed a lawsuit in federal district court against the FHFA, Fannie Mae and Freddie Mac.⁸ Among other things, the lawsuit asked the federal court to: 1) declare that participation in PACE programs does not violate the standard lending documents of Fannie Mae and Freddie Mac; and 2) not take any adverse action against property owners that participate in PACE programs. Similar lawsuits have been filed by the Natural Resources Defense Council,⁹ Sonoma County (California),¹⁰ Leon County (Florida),¹¹ the City of Palm Desert (California),¹² and the Sierra Club.¹³

On the federal legislative front, the PACE Assessment Protection Act of 2010 has been introduced in both the House of Representatives (House Bill 5766)¹⁴ and the Senate (Senate Bill 3642)¹⁵ to ensure that FHFA underwriting standards are consistent with, and facilitate the use of, PACE programs.¹⁶ House Bill 5766 was introduced on July 15, 2010, and referred to the House Committee on Financial Services. There has been no further action taken on House Bill 5766. Likewise, Senate Bill 3642 was introduced on July 22, 2010, and referred to the Senate Committee on Banking, Housing, and Urban Affairs. No further action has been taken in regard to Senate Bill 3642.

F. City of Cleveland—First Suburbs: A Potential Ohio Success Story

Despite the continuing debate over the long-term viability of PACE programs at the federal level, the creation and implementation of Energy SIDs in Ohio has proceeded. The unique Ohio Energy SID program has spurred Cleveland and contiguous suburbs to take advantage of the law's permission to form essentially a regional SID that is initially composed of municipalities. During the summer of 2010, the City of Cleveland and 14 member communities of the First Suburbs Development Council partnered to create an Energy SID to be named the City of Cleveland-First Suburbs Development Council Advanced Energy District ("Cleveland – First Suburbs") under a demonstration program consistent with the Policy Framework for the purchase and installation of solar electricity generation projects.

From a procedural standpoint, each of the 15 member communities in the Cleveland-First Suburbs Energy SID has passed a resolution approving the SID petition, which contained an initial operating plan for the SID and the proposed articles of incorporation of the Energy SID. The initial property owners in the Cleveland-First Suburbs program will be the 15 member communities themselves, rather than private or other public sector property owners. As a result, the demonstration solar projects will be installed on government-owned buildings (e.g., city halls).

The Energy SID statute requires that in forming an Energy SID, the petitioning parties file their petitions, an initial plan and articles of incorporation with the Ohio Secretary of State which Cleveland—First Suburbs has accomplished¹⁷. Thereafter the petitioners form a board of directors and adopt by-laws to govern the advanced energy district. The board must have at least 5 members of whom one must be a mayor or his/her economic development officer or finance director and another who is appointed by the local legislative authority such as city council. Once the initial board is in place, subsequent petitioners who join are not voting members of the Energy SID, but are governed by the Energy SID plan filed with the Ohio Secretary of State and are subject to the requirements of the Energy SID

When the Ohio law passed to permit Energy SIDs, it was anticipated that most Energy SID boards would have a combination of private and public representatives (such as a mayor and council delegate). However, the City of Cleveland and the First Suburbs Development Council, which has formed the Energy SID, is composed exclusively of municipalities. The Cleveland-First Suburbs Energy SID board is comprised of development directors from each of the municipalities involved in its formation. The Board anticipates that new members will include private enterprise commercial and industrial property owners, but the voting board members will remain entirely from the municipal governments. The best practices set forth in the Policy Framework for demonstration programs will commence when commercial and industrial property owners become members of the Energy SID.

This newly formed Cleveland-First Suburbs program appears to be groundbreaking as a model of regional, intergovernmental cooperation, and is designed to not only provide cost savings to commercial and industrial property owners, but also to serve as a model replicable in other communities throughout the state of Ohio. One of the reasons the demonstration program was limited to commercial and industrial property owners was based on the uncertainty at the

federal level regarding the long-term viability of residential PACE programs. Already, several other metropolitan communities are investigating the Cleveland—First Suburbs model.

Conclusion

In the coming months and years, federal regulators, legislators, local communities, and clean energy developers will attempt to resolve a number of unanswered questions, including: 1) whether PACE programs will be available solely to commercial property owners; 2) whether subordinate-lien PACE programs are a viable option; and 3) whether PACE programs are to be limited to energy efficiency improvements rather than renewable energy investments. In the meantime, the outlook for Ohio seems bright, as Cleveland-First Suburbs and other local groups explore the endless possibilities associated with Energy SIDs (albeit, for the time being, in the limited context of commercial and industrial property owners).

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¹ For a copy of the Policy Framework, go to http://www.whitehouse.gov/assets/documents/PACE_Principles.pdf.

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- ² For a copy of the DOE Guidelines, go to http://www1.eere.energy.gov/wip/pdfs/arra_guidelines_for_pilot_pace_programs.pdf.
- ³ The statutory authority from these bills has now been codified in Ohio Revised Code Chapter 1710.
- ⁴ Codified in Ohio Revised Code Section 1710.06 (A)(7).
- ⁵ For copies of the letters, go to <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/111006.pdf> (for Fannie Mae) and <http://www.freddiemac.com/sell/guide/bulletins/pdf/iltr050510.pdf> (for Freddie Mac).
- ⁶ For a copy of the FHFA's statement, please go to <http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf>.
- ⁷ For a copy of the OCC's statement, please go to <http://www.occ.gov/news-issuances/bulletins/2010/bulletin-2010-25.html>.
- ⁸ For a copy of the California Attorney General's Complaint, please go to http://graphics8.nytimes.com/packages/pdf/science/PACE_Final_Complaint.pdf. The FHFA recently filed a Motion to Dismiss the lawsuit, a copy of which can be found at http://go2.wordpress.com/?id=725X1342&site=californiagreenbuildingblog.wordpress.com&url=http%3A%2F%2Fcaliforniagreenbuildingblog.files.wordpress.com%2F2010%2F10%2Ffhfa_motion_to_dismiss.pdf&sref=http%3A%2F%2Fcaliforniagreenbuildingblog.com%2F2010%2F10%2F2.
- ⁹ For a copy of the NRDC's Complaint, please go to http://docs.nrdc.org/energy/files/ene_10100601a.pdf.
- ¹⁰ For more information on the Sonoma County lawsuit, please go to <http://www.pressdemocrat.com/article/20100727/articles/100729543?tc=ar>.
- ¹¹ For more information on the Leon County lawsuit, please go to http://go2.wordpress.com/?id=725X1342&site=pacedata.wordpress.com&url=http%3A%2F%2Fpacedata.files.wordpress.com%2F2010%2F10%2Fnr_10-08-10_leoncountyfhfasuit.pdf&sref=http%3A%2F%2Fpacedata.org%2F2010%2F10%2F11%2Fleon-county-fl-files-suit%2F.
- ¹² For more information on the City of Palm Desert's lawsuit, please go to <http://www.mydesert.com/article/20101004/NEWS01/101004018/Palm+Desert+ suing+ feds+ over+ energy+ loan+ program>.
- ¹³ For more information on the Sierra Club's lawsuit, please go to http://action.sierraclub.org/site/MessageViewer?em_id=183284.0.
- ¹⁴ For more information on House Bill 5766, please go to <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.05766:>.
- ¹⁵ For more information on Senate Bill 3672, please go to <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03642:>.
- ¹⁶ It is interesting that no Representative or Senator from Ohio joined as a co-sponsor of these bills.
- ¹⁷ The formation of the Cleveland – First Suburbs Energy SID is expected to be completed by the end of 2010.