SPONSOR: Sen. McDowell & Rep. Paradee
Sens. Bushweller, Hansen, Walsh; Reps. Bennett, Brady, Lynn, Mulrooney, Spiegelman, Viola, Heffernan

DELAWARE STATE SENATE
149th GENERAL ASSEMBLY

SENATE BILL NO. 113
AS AMENDED BY
SENATE AMENDMENT NO. 1
AND
SENATE AMENDMENT NO. 2
AND
SENATE AMENDMENT NO. 4
AND
SENATE AMENDMENT NO. 5

AN ACT TO AMEND TITLE 29 OF THE DELAWARE CODE RELATING TO A DELAWARE VOLUNTARY CLEAN ENERGY FINANCING PROGRAM THROUGH LOCAL GOVERNMENT ASSESSMENTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend §8061, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§8061 Delaware Voluntary Clean Energy Financing Program Based on Property Assessments (D-PACE) or Other Local Assessments.

(a) The General Assembly finds and declares that:

(1) The production and efficient use of energy will continue to play a central role in the economic future and environmental sustainability of Delaware and the nation as a whole; and

(2) The development, production, and efficient use of clean energy will strengthen the economy, improve the public and environmental health of this state, and contribute to the energy security of our nation; and

(3) The financing of clean energy systems and energy efficient technologies, and the powers conferred and expenditures made pursuant to this statute, will serve a valid public purpose and that the enactment of this statute is expressly declared to be in the public interest.

(b) It is the purpose and intent of the General Assembly:

(1) To establish a voluntary commercial property assessed clean energy program in the state to provide access to financing for clean energy systems and energy efficient technologies with free and willing commercial property owners of both existing properties and new construction within the State of Delaware.

(2) To utilize the Sustainable Energy Utility and the unique capabilities and qualities inherent within its structure and finances to launch a commercial voluntary assessed clean energy program that ensures the private capital markets can participate in this program.

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(c) Definitions:

(1) "Delaware Voluntary Property Assessed Clean Energy program" or “D-PACE program” means a program that facilitates reductions in energy production and consumption and utilizes the benefit assessments authorized by this section as security for the financing of these qualifying energy improvements;

(2) "Benefit assessment" means a voluntary property assessment or other government service fee assessment, as authorized by this section, which is the mechanism through which a commercial property owner repays the financing for the qualifying energy improvements;

(3) "Benefited property owner" means an owner of qualifying commercial real property who desires to install qualifying energy improvements and provides free and willing consent to the benefit assessment against the qualifying commercial real property;

(4) "Qualifying energy improvements" means any construction, renovation or retrofitting of energy efficient technology, clean energy systems, or qualifying waste heat recovery technologies that are permanently fixed to qualifying commercial real property;

(5) “Energy efficient technologies” means any device or piece of equipment, used in conjunction with existing infrastructure and appliances or as a replacement, that reduces energy consumption, but does not itself generate energy;

(6) “Clean energy systems” means renewable energy power generation including solar photovoltaic and thermal, wind, biomass, or geothermal and including waste heat recovery and other zero or net-zero emission energy sources available with advancing technology;

(7) “Qualifying waste heat recovery technologies” means equipment and processes that capture the waste thermal energy from electric generation and other waste heat sources for use in non-power generating commercial/industrial processes, including but not limited to space and water heating, in qualifying commercial real estate where fossil fuel power generation is not the principal business;

(8) "Qualifying commercial real property" means any commercial property located in the State of Delaware, regardless of ownership, that meets the qualifications established for the D-PACE program;

(9) "Commercial property" means any real property other than a residential dwelling containing less than five dwelling units;

(10) “Energy Utilities” means Delmarva Power and Light, Chesapeake Utilities, Delaware Electric Co-operative, Delaware Municipal Electric Corporation, or their successors as defined in Title 26, Chapter 10 of the Delaware Code;

(11) "County" means any county as defined in Title 9 of the Delaware Code, and as authorized by this legislation or the SEU to issue benefit assessments;

(12) "Participating county" means a county that has entered into a written agreement, as approved by its

legislative body, with the D-PACE program pursuant to which the county has agreed to levy benefit assessments for qualifying energy improvements for benefited commercial property owners within such county and costs reasonably incurred in performing such duties;

(13) "SEU" means the Sustainable Energy Utility as defined in Title 29, Chapter 80 of the Delaware Code; and

(14) "Third party capital provider" means one or more entities, other than the SEU, that provides financing to benefited property owners for energy improvements.

(d) The SEU shall establish a D-PACE program in the state to fund qualifying energy improvements to commercial real property, such that the improvements, property, and owner(s) fulfill the requirements enumerated herein, and those established by the SEU as part of the administration of the program.

(1) If a benefited property owner requests D-PACE financing from the SEU or a third party capital provider for qualifying energy improvements under this section, the SEU shall:

a. Require performance of an SEU approved energy audit or feasibility analysis of such qualifying energy improvements on the qualifying commercial real property that assesses the expected energy cost savings over the useful life of such improvements unless a qualifying energy improvement is deemed automatically qualified by the SEU;

b. Require an evaluation of the property owner's credit, history, and other financial obligations, before approving such financing;

c. If financing is approved, either by the SEU or the third party capital provider, require the participating county to levy a benefit assessment on the qualifying commercial real property with the property owner in a principal amount sufficient to pay the costs of the improvements and any associated costs covered by the D-PACE program that will benefit the qualifying commercial real property;

d. Impose requirements and criteria to ensure that the proposed improvements are consistent with the purpose of the D-PACE program;

e. Impose requirements and conditions on the financing to ensure timely repayment, including, but not limited to, procedures for placing a lien on a property as security for the repayment of the benefit assessment;

f. Require that written consent for a superior lien from all existing properly recorded lien holders be obtained before any improvements are financed or made; and

g. Allow the property owner to rescind any D-PACE financing agreement entered into, with either the SEU or a third party capital provider, not later than three business days after such an agreement.

(2) SEU shall collect fees to offset costs associated with executing the program, including but not limited to, administrative costs, conducting feasibility studies, and monitoring and verifying project results.

(3) The SEU may serve as an aggregating entity for the purpose of securing public, foundation, or private third-party financing for qualifying energy improvements pursuant to this section.

(4) The SEU may use the services of one or more private, public or quasi-public third-party administrators to administer, provide support, or obtain financing for the D-PACE program.

(5) The benefit assessment:

a. May cover up to 100% of project costs, including but not limited to, application fees, audits, equipment, maintenance, labor, and other costs directly related to the project over the project's life;

b. May also cover a portion of the D-PACE program costs;

c. May be neither extinguished nor accelerated in the event of default or bankruptcy; and

d. Shall be levied and collected as to assessment payments currently and past due in the same manner as the property assessments of the participating county government on real property.

(6) The benefit assessment shall constitute a lien against the qualifying commercial real property on which the qualifying energy improvements are made. This lien shall:

a. Be superior to any other liens except the lien for other property taxes and other governmental service assessments of the participating county and other municipalities and share the same senior lien as other property taxes and governmental service assessments to the extent only of the amount of the D-PACE assessments, penalties and fees currently due and/or in arrears;

b. Remain with the real property upon sale, including foreclosure; and

c. In the event of default or delinquency, be pursued in the same manner as with other property assessments, with respect to any penalties, fees and remedies and lien priorities; provided that in any event a foreclosure sale brought with respect to D-PACE assessments shall not have the effect of extinguishing any subordinate mortgage liens against the qualifying commercial real property.

d. Notwithstanding any other provision of law:

(A) At the time of a transfer of property ownership including foreclosure, the past due balances of any special assessment under this subchapter shall be due for payment, but future payments shall continue as a lien on the property.

(B) In the event of a foreclosure action, the past due balances described in subdivision (A) immediately above shall include all payments on an assessment under this subchapter that are due and unpaid as of the date the action is filed, and all payments on the assessment that become due after that date and that accrue up to and including the date title to the property is transferred to the mortgage holder, the lien holder, or a third party in the foreclosure action. The person or entity acquiring title to the

property in the foreclosure action shall be responsible for payments on the assessment that become due after the date of such acquisition.

(7) The liens created by benefit assessments may be assigned as follows:

a. Any participating county may assign to the SEU any and all liens filed by the tax collector, as provided in the written D-PACE agreement between participating county and the SEU;

b. The SEU may sell or assign, for consideration, any and all liens received from the participating county;

c. The assignee(s) of such liens shall have and possess the same powers and rights at law or in equity as the participating county and its tax collector with regard to the precedence and priority of such lien, the accrual of interest, the fees and expenses of collection, and lien enforcement including, but not limited to, foreclosure and a suit on the debt; and

d. Costs and reasonable attorneys' fees incurred by the assignee as a result of any foreclosure action or other legal proceeding brought pursuant to this section and directly related to the proceeding shall be assessed in any such proceeding against each person having title to any property subject to the proceedings. Such costs and fees may be collected by the assignee at any time after demand for payment has been made by the assignee.

(8) The SEU shall allow third party capital providers to provide loans directly to benefited property owners in lieu of, or in addition to, the SEU providing such loans.

(9) Pursuant to the purpose and objectives outlined herein, and with respect to the responsibilities of administering the D-PACE program, the SEU shall develop program guidelines governing the terms and conditions under which financing may be made available to the D-PACE program, in consultation with the Department of Natural Resources and Environmental Control, Division of Energy and Climate, energy utilities, the banking industry, local governments, and commercial property owners;

The program guidelines document shall include:

a. Underwriting criteria, which at a minimum must include verification of ownership, an assessment of property debt and value, an ability to pay evaluation, and for all financing arrangements by the SEU and third party capital providers a savings to investment ratio evaluation;

b. A requirement that the life of the improvements is greater than the term of the financing;

c. Qualifications for improvements, including but not limited to: minimum project life for cost-effective, permanent application; minimum project value, consistent with ensuring the recapture of applicable administrative costs; maximum project value and project value relative to property value, consistent with local and national renewable and energy efficiency credit/funding programs and ensuring mortgage lender support; and maximum renewable energy project size consistent with local and national credit/funding programs, and with local energy service company (utility) regulations;

d. Recommended energy efficiency improvements to qualified commercial property owners seeking financing for clean energy generation systems;

e. Criteria for approving energy audits and auditors, selecting engineering reports for feasibility analyses, and determining the appropriate method of analyzing expected energy performance for D-PACE projects;

f. Standards for the processes of approval, financing, construction, repayment, including optional repayment at the time of sale of the property and SEU, third party capital provider, and/or participating county actions of recourse in the event of default;

g. Standards for monitoring and verifying the energy and cost savings and other relevant outcomes of D-PACE funded projects, consistent with the project scale and scope, as well as the goals of the D-PACE program;

h. A requirement to educate the property owner about the costs and risks associated with participating in the D-PACE program established by this section, including but not limited to, the effective interest rate of the benefit assessment, fees charged by the SEU to administer the program, and the risks related to the failure of the property owner to pay the benefit assessment; and

i. Greater detail on all program specifications, processes, and party duties as assigned to the SEU in this bill, as well as all necessary program guidelines and other specifications consistent with the administration of a statewide D-PACE program not listed herein.

(e) The SEU shall have the authority to:

(1) Use principal and interest payments from existing benefit assessments to fund other projects;

(2) Use other legally available funds for project financing, including but not limited to, existing revenues, federal, state, local, or philanthropic grants, or private financing, notes, or other obligations;

(3) Impose fees to offset costs associated with executing the financing, including but not limited to, administrative costs, attorney fees, conducting feasibility studies, and monitoring and verifying project results;

(4) Specify whether these fees are to be collected at certain steps or intervals, or added into the project financing;

(5) Set a fixed or variable rate of interest for the repayment of the financing amount at the time the financing is arranged, or allow a third party capital provider to set the interest rate, provided that party is financing the improvements;

(6) Enter into a financing agreement with the owner of qualifying commercial real property, to include billing and receiving payments from the participants (in the same manner property and government service assessments are collected);

a. With approval of the participating county, transfer the rights and authorities of the financing agreement, including but not limited to billing and receiving payments, to a third party capital provider, such that

the party is directly financing the qualified energy improvement.

(7) Establish a D-PACE Loss Reserve.

(g) The D-PACE program shall not be operational and available for commercial property owner participation/financing until a comprehensive program guideline document is adopted by the SEU Board of Directors. Prior to submission to the Board of Directors for adoption, the SEU shall:

(1) Organize a public hearing regarding the program guidelines document;

(2) Publish a notice to include the time, date, place of the public hearing, and a summary of the nature of the guidelines in at least two Delaware newspapers of general circulation, and by electronic posting on the SEU website, a minimum of twenty days prior to such hearing; and

(3) Provide the SEU Board of Directors minutes of the public hearing with the submission of the program guidelines.