## REVISED STAFF REPORT

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| **Agenda Item:** | 15 | **Name:** | Jenny Giambattista  Jake Tracy |
| **Proposed No**.: | 2021-0301.2 | **Date:** | October 27, 2021 |

**COMMITTEE ACTION**

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| ***Proposed Substitute Ordinance 2021-0301.2 establishing a commercial property assessed clean energy and resiliency program (C-PACER), passed out of committee on October 27,2021, without recommendation. The Ordinance was amended in committee with Amendment S1 to 2021-0301.1 and Amendment 1 to S1. Additionally, there was a title amendment.*** |

**SUBJECT**

An ordinance establishing a commercial property assessed clean energy and resiliency (C-PACER) financing program.

**SUMMARY**

In 2020, the Washington Legislature adopted the Commercial Property Assessed Clean Energy and Resilience (C-PACER) program in Washington which authorized a statewide program and allows counties to implement their own county C-PACER programs in accordance with RCW Chapter 36.165. The C-PACER program is intended to improve access for commercial properties to financing for qualifying energy efficiency, renewable energy, and resiliency improvements.

Proposed Ordinance 2021-0301 and the accompanying guidebook (Attachment A) would implement King County’s C-PACER program. Under C-PACER, a commercial property owner may finance the costs of an eligible improvement and pay back the costs of the improvement through a voluntary lien assigned by the County to the financed property. The money to finance the improvement is loaned by a private capital provider using a financing agreement between the capital provider and the borrower and there is no financial cost to the County.

At the direction of the Chair, Council staff have prepared a striking amendment (Attachment 2) to make technical changes, clarify language and the role of the parties to the agreement consistent with RCW chapter 36.165, and make several substantive policy changes.

**BACKGROUND**

Property Assessed Clean Energy (PACE)

The PACE model is a clean energy financing mechanism that has largely been used for energy efficiency and renewable energy improvements on private property. PACE programs exist for commercial properties (C-PACE) and residential properties (R-PACE). PACE programs allow a property owner to finance the up-front costs of an eligible improvement and then pay the costs back over time through a voluntary assessment on their property. The unique characteristic of PACE assessments is that the assessment is attached to the property rather than the individual. Because it is a lien, the debt transfers along with the title upon the sale of the property.

PACE programs require state authorization.

HB 2405

On March 18, 2020 Governor Inslee signed HB 2045, the C-PACER Act, (Chapter 36.165 of the Revised Code Washington), that authorizes Commercial Property Accessed Clean Energy and Resiliency (C-PACER) loans in the State of Washington. According to Shift Zero, a green building and C-PACE advocacy organization, more than 25 states have active C-PACE programs. Washington’s version of the program is targeted at commercial property and permits financing for qualifying improvements including energy efficiency, water conservation, renewable energy, and resiliency such as retrofits for seismic safety. Washington’s program is referred to as “C-PACER” for “Commercial Property Assessed Clean Energy and Resiliency."

Like a traditional loan, the terms of the loan are negotiated by the borrower and the lender (defined as a Capital Provider) with the borrower repaying the lender over time. However, with the C-PACER loan, the loan is secured when a property owner voluntarily agrees to have a lien recorded as a county lien on the property title for the term of the debt, which typically lasts 10-25 years. The C-PACER lien is a “senior lien.” Tax liens and other government assessments would remain superior to C-PACER lien. The county assigns the C-PACER lien to the capital provider and the lien stays with the property. The repayment obligation transfers automatically to the next owner if the property is sold.

Under the C-PACER program, the Capital Provider is authorized to enforce delinquent payments and failure to meet the agreed-upon payment schedule could result in foreclosure. The C-PACER lien is a “non-accelerating” lien which means in the event of foreclosure, only the payment in arrears is due.

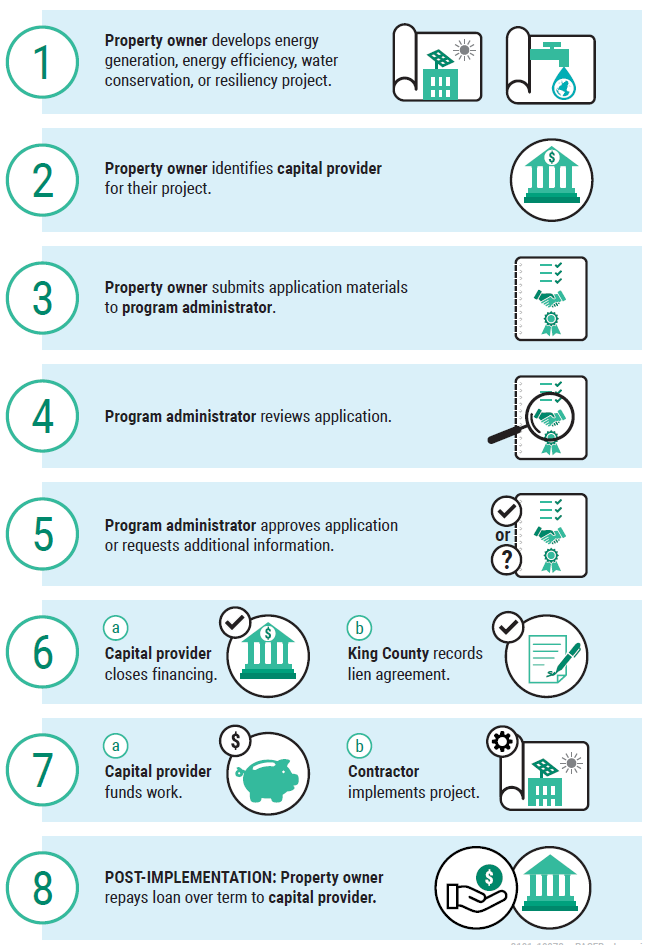
The structure of C-PACE financing is intended to permit a long and predictable payment stream, so that projects can be financed with long payback periods and relatively low interest rates and without the creation of a personal debt obligation to the property owner. According to Shift Zero, a green building advocacy organization and supporter of C-PACE programs, this long term allows property owners to invest in efficiency improvements that raise net operating income and increase property values, where other forms of financing typically would not be cost effective for making such facility investments, especially for short-term holders of commercial properties.

Key Features of Washington’s C-PACER Program

* The loans are privately financed.
* The County C-PACER lien will be assigned to the Capital Provider
* The liens are non-accelerating
* The C-PACER lien is superior to all other liens except tax liens
* The assessments are not required to appear on the tax bill and will not be collected by the County
* Resiliency projects are allowed
* Requirement that existing lien holder consent to project

The figure below from Attachment A to Proposed Ordinance 2021-0301 shows how the C-PACER program would work in King County for those qualified improvements which have not yet been completed. Additionally, the C-PACER Act[[1]](#footnote-1) also allows for C-PACER financing to be used for refinancing eligible projects.

# **C-PACER Program Steps**



Who is Eligible to Apply?

RCW 36.165.010 defines eligible properties as “privately owned commercial, industrial or agricultural real property or multifamily residential real property with five or more dwelling units. “Eligible property” may be owned by any type of business, corporation, individual or non-profit organization permitted by state law.” The proposed ordinance (lines 143-149) specifies the program is available in both unincorporated and incorporated areas of King County.

Eligible Projects

The C-PACER Act, RCW 36.165.010(11) defines eligible “qualified improvements” as:

*“Qualified improvement” means a permanent improvement affixed to real property and intended to:*

*(a) 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 generate electricity, provides thermal energy or regulates temperature;*

*(b) decrease water consumption or demand and address safe drinking water through the use of efficiency technologies, products, or activities that reduce or support the reduction of water consumption, allow for the reduction in demand, or reduce or eliminate lead from water which may be used for drinking or cooking; or*

*(c) increase resilience, including but not limited to seismic retrofits, flood mitigation, stormwater management, wildfire and wind resistance, energy storage and microgrids[[2]](#footnote-2).”*

RCW 36.165.080 also allows for many of the fees associated with the improvements to be financed with C-PACER.

Written Consent from Existing Lienholder(s)

RCW 36.165.070 requires that before a capital provider enters into a financing agreement to provide C-PACER financing, it receives written consent from any holder of a lien, mortgage, or security interest in the real property and 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. For multifamily properties, the capital provider must also receive written consent from any holders of housing covenants, restrictions, or regulatory agreements in real property.

Project Review by an Accredited Individual

Under RCW 36.165.030, an accredited professional must verify the benefits of a project. For an existing project where energy or water related improvements are proposed, the accredited professional must certify that the proposed qualified improvements will either result in more efficient use or conservation of energy or water, the reduction of greenhouse gas emissions, or the addition of renewable sources of energy or water, or where resilience improvements are proposed, certification by a licensed professional engineer stating that the qualified improvements will result in improved resilience.

For new construction, certification by a licensed professional engineer stating that the proposed qualified improvements will enable the project to exceed the energy efficiency or water efficiency or renewable water or resilience requirements of the current building code is required.

Countywide programs authorized

RCW 36.165.020 authorizes the Department of Commerce to establish a voluntary statewide C-PACER program that counties may choose to participate in. Counties are also authorized to establish a separate voluntary countywide C-PACER program by ordinance which conforms to the requirements in the RCW. If a statewide program guidebook with agreements is developed, RCW 36.15.020(6) requires that the state’s agreement forms be used by all county programs.

According to Executive staff, the Department of Commerce does not have funding to implement a C-PACER program. In order to assist counties in developing their own C-PACER programs, Shift Zero, a coalition of green building advocates, developed a model ordinance template and guidebook to be used by counties. According to Shift Zero, Whatcom and Thurston Counties have adopted C-PACER ordinances and the Clark and Snohomish Counties are in the process of adopting C-PACER ordinances as well.

Limited Role of the County

As noted in the Guidebook, the Washington C-PACER Act intends to reduce the administrative burden on participating counties as much as possible. The responsibility of the County is limited to a) adoption of an ordinance and guidelines that govern how its C-PACER program works, b) review of the lien application for compliance with the C-PACER state law, and then recording a unique agreement that includes the acknowledgment of a special property assessment by the County and c) the administration of the program, either by the County or a third-party contractor. The repayment of the C-PACER financing is between a private lender, referred to as capital provider in the C-PACER Act, and a property owner, with no obligation on the part of the County.

Provisions to Address Fraud and Foreclosure Risk

Recent news articles have highlighted the potential risk of fraud in residential PACE programs. Homeowners with residential PACE financing have reported they were not aware of the full cost of the improvement, including the terms of the financing and the potential foreclosure risks.[[3]](#footnote-3) As a result of these concerns, in 2017 California passed legislation seeking to add more consumer protection to PACE loans. Several local jurisdictions, including Los Angeles County, will no longer offer residential PACE programs.

According to Shift Zero, C-PACE programs are very different from residential PACE programs. Shift Zero notes that of the 2,000 buildings and over $1 billion of investment in C-PACE programs, there have been no foreclosures.[[4]](#footnote-4) According to Executive staff, C-PACE borrowers are generally much larger entities than residential property owners and have more financial experience with lending. Washington’s C-PACER law includes several provisions intended to add protection to the borrower as described above. The C-PACER Act requires that for any improvement to be qualified for a C-PACER lien, it must be reviewed by a licensed or certified professional (as defined in the legislation) to certify the benefits will occur. Additionally, the consent required by other mortgage holders adds another screen to ensure that the transaction is prudent because it is assumed that an existing mortgage holder would not want to jeopardize their existing lien position with a fiscally uncertain new lien.

Foreclosure Process

RCW Chapter 36.165.060 specifies that the capital lender is responsible for the collection and enforcement of delinquent C-PACER liens.

36.165.060(5) Collection and enforcement of delinquent C-PACER liens or C-PACER financing installment payments, including foreclosure, shall remain the responsibility of the capital provider.

36.165.060(6) The C-PACER lien shall be enforced by the capital provider at any time after one year from the date of delinquency in the same manner that the collection of delinquent real property taxes is enforced by the county under chapter 84.64 RCW, including the provisions of RCW 84.64.040, excepting that a sworn declaration by the capital provider or assignee attesting to the assessment delinquency of at least one year shall be used in lieu of the certificate required under RCW 84.64.050.

However, as noted below in an American Bar Association treatise[[5]](#footnote-5) on the state’s C-PACER legislation:.

*“The language of Washington Rev. Code Ch 84.64, which contemplates the foreclosure of a tax lien by the county treasurer, with the assistance of the county attorney’s office, may require some additional interpretation because the C-PACER legislation makes clear that enforcement is the responsibility of the capital provider alone. This issue will be of interest to counties as they consider implementing C-PACER programs, and more procedural clarity may arise out of that process.”*

The striking amendment includes additional clarification that the county has no role in the foreclosure process except as may be ordered by a court to facilitate the issuance a deed to the purchaser after a foreclosure sale.

**ANALYSIS**

Proposed Ordinance 2021-0301 would add a new section to King County Code establishing the Commercial Property Assessed Clean Energy and Resilience (C-PACER) program. Attachment A to the proposed ordinance is the Guidebook for program implementation. The proposed ordinance and attached guidebook largely mirror the definitions and requirements in RCW 36.165 described in the background section and are similar to the model ordinance and guidebook developed by Shift Zero.

**This section of the staff report highlights substantive additional information and/or direction included in the Proposed Ordinance and Guidebook that is not included in the RCW Chapter 36.165.**

Eligible Projects

The Proposed Ordinance (lines 115-137) would include eligible projects consistent with RCW 36.165.010(11) and would create five categories of “Qualified Improvements.” These categories would include energy efficiency, an electrification improvement, renewable energy improvement, water conservation improvement, and resiliency improvement.

*“K. “Qualified improvement” means a permanent improvement affixed to the real property that is at least one of the following:*

1. *An Energy efficient project, which means it*
2. *Decreases electricity consumption or demand through the use of efficiency technologies, products or activities that reduce or support the reduction of electricity consumption*
3. *An electrification improvement, which means it uses electricity for space or water heating*
4. *A renewable energy improvement, which means it supports the production of clean, renewable energy as defined in the Clean Energy Act [[6]](#footnote-6)*
5. *A water conservation improvement*
6. *A resilience improvement, which means it increases building or community resilience, including, but not limited to seismic retrofits, flood mitigation, stormwater management, wildfire and wind resistance, energy storage, microgrids and public safety and emergency response.*

The “resilience improvement” component of the definition would be different than the definition in C-PACER Act because in the executive’s transmitted version of the Proposed Ordinance, the phrase “public safety and emergency response” was added as a type of resiliency improvement. The phrase “public safety and emergency response” appears to expand the eligibility for a qualified improvement to any type of improvement, including facilities that will improve public safety and emergency response, which is beyond what is contemplated by the C-PACER Act. Executive staff support removing “public safety and emergency response,” and this has been in done in the proposed striking amendment.

Additionally, the RCW does not specify a category of “electrification improvement” but this category appears consistent with the description within the RCW.

Appeals

RCW 36.165.030 requires an appeal process when C-PACER applications are denied. Lines 174-187 of the proposed ordinance sets out an appeal process with the King County Hearing Examiner. However, as transmitted the ordinance only describes an appeal when King County is acting as program administrator. The RCW does not make such a distinction.

Reporting

Although not required by RCW 36,165, the proposed ordinance (Lines 198-203) would require the Executive to file a report two years after the program begins accepting applications and every two years after that. The report must include: the number of project applications received and processed; the total value of project applications received and processes; and the estimated energy and water savings and renewable energy deployed from projects, and the number of resiliency measure finalized.

Fees

RCW 36.165.030 authorizes the County to impose a fee on C-PACER transactions, but does not provide guidance on setting those fees. The proposed ordinance (Lines 222-224) would authorize fees equal to one percent of the total cost of the qualified project or fifteen thousand dollars, whichever is less. However, the attached Guidebook includes a minimum fee of $2,500 which conflicts with the ordinance. Executive staff propose eliminating the minimum fee requirement of $2,500 in the guidebook to correct this inconsistency.

Liability Provisions

Section 6, Lines 236-242 of the proposed ordinance specifies that the members of the Council, the Executive, and County employees are not liable as a result of exercising any rights and responsibility conveyed by 36.165 RCW and this chapter.

Guidebook (Attachment A to Proposed Ordinance 2021-0301)

RCW 36.165.020(3) requires the County establish a guidebook and sets out what must be included in the guidebook. The guidebook and template agreements are included in Attachment A to the ordinance and the proposed ordinance states (lines 150-151), “The executive shall establish the program substantially in the form of Attachment A to this ordinance, the King County C-PACER Program Guide.”

The guidebook is intended to help commercial and multi-family building owners understand the provisions of King County’s C-PACER program and navigate the process to secure funding. The Guidebook largely mirrors the requirements in the Proposed Ordinance and RCW. It describes the statutory and programmatic eligibility requirements and also describes the process for applying for financing.

The guidebook also includes the application template documents that are to be signed by the involved parties.

* Project Application Checklist
* Lien Holder Consent to C-PACER Assessment and Lien
* Certification of Qualified Improvements
* Certificate of Capital Provider Qualification
* Assessment Agreement for C-PACER Financing
* Notice of Assessment Interest and C-PACER Lien and Assessment Agreement
* Certificate of C-PACER Improvements Completion

Total Eligible Construction Costs (TECC)

In the case of new construction and substantial building retrofits, page 13 of the guidebook allows for property owners to finance between 10 and 30 percent of the total construction costs for the entire project, not just the qualified improvements, if certain conditions are met. Excluded costs include land acquisition, off-site improvements, site permitting, environmental testing and remediation, and equipment not permanently installed on the property. The provision for Total Eligible Construction Costs is not specifically authorized by the C-PACER Act but has been described as an administrative approach to calculating the costs when the qualified improvements are integrated for a whole building. Staff analysis related to the consistency with the C-PACER Act is ongoing.

Qualifying Capital Provider RCW 36.150.10(2) defines “capital provider” as “any entity, their designees, successor, and assigns that makes or funds C-PACER financing under this chapter.” The Guidebook sets out general criteria for a Capital Provider on page 9 and those criteria are listed below. Under these criteria, a wide range of private businesses could serve as capital providers. This could also allow for the contractor performing the work to also serve as the capital provider.

As noted in the Guidebook, a qualifying Capital Provider may be any of the following:

* A corporation, partnership, or other legal entity that provides proof that it is currently registered as a C-PACER Capital Provider in two different states with C-PACE programs;
* A federal or state-chartered bank, Community Development Financial Institution, or credit union; or
* A private entity, whose principal place of business is located in Washington state, provided it is licensed or permitted to do business within the state and can produce its most recent audited financial statement or regulatory business filing.

Certification of Qualified Improvements

As discussed above, RCW 36.165.030 requires certification of qualified improvements by an accredited individual. This requirement would be met with Attachment 3 to the Program Guidebook “Certification of Qualified Improvements.” The statements in the certifications affirm a project meets the criteria generally, such as more efficient use or conservation of energy or water, the reduction in greenhouse gas emissions, the addition of renewable sources of energy of water, or improved resilience. For new buildings, the certification affirms that that qualified improvement will enable the property to exceed the code requirements for energy efficiency, water efficiency, or renewable energy. The certification does not require the reporting of any specific metrics such as the amount of efficiency achieved.

A specific certification that the proposed term of the financing does not exceed the weighted average effective useful life of the proposed qualified improvement is not included in the Certification. Executive staff support adding such a certification consistent with RCW 36.165.020(3b) and the guidebook.

Projects must be completed no more than three years prior to qualify for C-PACER

RCW 36.165.010 allows for refinancing of existing projects but does not specify a timeline for which refinancing will be available. The proposed Guidelines would specify that financing or refinancing is available for existing properties that have improvements installed and completed for no more than three years prior to the date of the project application.

How will Black, Indigenous, and People of Color (BIPOC) and low-income businesses/farms/housing be affected by this program?

Council staff asked how BIPOC and low-income property owners would be affected by C-PACER. Executive staff responded as follows:

* While most of the interest in C-PACER is by large property owners (to date), C-PACER expands access to energy efficiency, renewable energy, and resiliency for ALL property owners.
* The purpose of a C-PACER program is to make efficiency and resiliency upgrades more affordable, and thereby more accessible, for building owners. This should serve as a benefit to low-income businesses that may not have been able to pursue these upgrades in the past due to financial barriers.
* Executive Staff have launched a project to create outreach materials targeting BIPOC, low-income, and non-English as first language speakers in King County to help increase awareness and understanding of the C-PACER program. We are working to increase awareness of C-PACER beyond the downtown core with a video series. The video series will also help raise awareness about a Department of Commerce grant program that can complement C-PACER for some buildings, we want to make sure that building owners (especially outside of the downtown core) understand both programs and how they can benefit from each.
* We are working with the City of Seattle’s Office of Sustainability and the Environment. OSE is analyzing existing resources for small business and low/moderate income building owners and seeking to develop mechanisms for those communities to better access financing to improve their buildings.
* We will also work with our K4C city partners to disseminate information to smaller businesses and more localized avenues.

**FISCAL NOTE**

Executive staff report this program would not have a fiscal impact on the County because all costs are intended to be recovered. The fiscal note states the County estimates $10,000,000 in transactions in the 2021-2022 biennium, with a decline to $5,000,000 in subsequent biennia. The County would charge one percent of the financed costs to over the administrative costs up to a maximum of $15,000. The revenue from the fees would be passed through to pay third party administrator to process transaction or used to pay for staff resources should there be no administrator.

**AMENDMENT**

At the direction of the Chair, staff prepared the attached striking amendment (Attachment 2). The striking amendment includes technical and drafting corrections throughout the ordinance and Attachment A, as well as substantive edits. The proposed changes can be seen in the attached redline versions (Attachments 6 and 7). Additionally, there is a title amendment.

The major changes in the striker are described below:

Fossil fuel exclusion:

In both the striker (Lines 127-156) and Attachment A, the definition of “qualified improvement” is changed to specify that the installation, maintenance, or repair of equipment that burns fossil fuels is not allowed unless it is to replace existing fossil fuel equipment for which there are no reasonably available electrically operated alternatives, completing the project will result in a significant reduction in greenhouse gas emissions and the project is expected to be completed by December 31. 2023. Updates are made throughout Attachment A to reflect this new definition of eligible improvements. Additionally, (Line 118), adds a definition of “fossil fuel” as defined in K.C.C. 21.A.06.532(C). Lastly, in support of this policy, a reference to the 2020 Strategic Climate Action Plan goal to phase out fossil fuel use in existing buildings is added to the preamble (Lines 34-40).

The limiting of eligible projects in this way appears consistent with RCW 36.165.040(4) which states, “A county adopting a C-PACER program pursuant to this chapter may narrow the definition of “qualified improvements” to be consistent with the county’s climate goals.”

EV infrastructure

The striker (lines 140-141) adds language to specify EV infrastructure is an eligible improvement. Changes are made throughout Attachment A to reflect this.

Clarifies County’s role in foreclosure process

The striker (lines 174-184) adds language to clarify that the County has no role in foreclosures of C-PACER liens unless directed by the Court. Corresponding changes are made in Attachment A, particularly in the Assessment Agreement.

Hearing Examiner

The striker (Line 204 and Lines 255-424) adds necessary information on the process for appeals to the Hearing Examiner, clarifies that all C-PACER application denials may be appealed, and amends KCC 202.22.040 related to the Hearing Examiner to reflect the addition of the body of work for C-PACER appeals. The striker also adds one sentence to the Guidebook noting the appeal process if an application is denied.

Advisory to applicants to seek legal and financial advice

In Attachment A, language is added to encourage property owners to seek legal and financial advice prior to engaging in a C-PACER program.

Incentive for existing buildings to operate without fossil fuels

In Attachment A, language is added to allow for existing buildings performing above code and operating without fossil fuels to be eligible for C-PACER financing for 30 percent of the Total Eligible Construction Costs. Corresponding edits are made to the “Certification of Qualified Improvements” to require verification of this achievement by an accredited individual.

In Attachment A, “Certification of Qualified Improvements”

The striker makes edits for consistency with revised definitions of “qualified improvements” such that the accredited individual is verifying the improvements consistent with the revised definitions.

Attachment A, “Assessment Agreement”

The striker changes the assessment agreement from a two-party agreement between the County and the Property Owner to a three-party agreement with the addition of the Capital Provider to the Agreement. Additionally, edits are made for consistency with RCW Chapter 36.165 and to clarify the role of the parties in the agreement.

1. RCW 36.165.010: “C-PACER Financing” means an investment from a capital provider to a property owner to finance or refinance a qualified project as described under this chapter. [↑](#footnote-ref-1)
2. According to the U.S. Department of Energy, a “microgrid” is a local energy grid with control capability, which means it can disconnect from the traditional grid and operate autonomously.” . [↑](#footnote-ref-2)
3. Some articles highlighting the risk of fraud in residential PACE programs: Khouri, Andrew. “. Some Homeowners struggled to pay PACE improvements. The Coronavirus made it harder. Bloomberg. Los Angeles Times. April 6, 2021. Burns, Rebecca. “The Subprime Solar Trap for Low-Income Homeowners: Predatory deals from the financial crisis are back—just in time for the climate crisis.” *Bloomberg*. April 6, 2021. [↑](#footnote-ref-3)
4. Shift Zero, May 2021, FAQ: C-PACER Financing-Implementation in Washington [↑](#footnote-ref-4)
5. Larson, K. L., Hefta, R.W (March/April 2021) Update for Washington State Property Owners. *American Bar Association,* *Probate and Property* [↑](#footnote-ref-5)
6. RCW 19.405.020 (34) [↑](#footnote-ref-6)