



## ARLINGTON COUNTY, VIRGINIA

### County Board Agenda Item Meeting of November 18, 2017

**DATE:** November 10, 2017

**SUBJECT:** Ordinance to enact Chapter 68 of the Code of Arlington County, Virginia, to create a Commercial Property Assessed Clean Energy (C-PACE) program.

**C. M. RECOMMENDATION:**

Adopt Chapter 68 of the Code of Arlington County, Virginia, to create a Commercial Property Assessed Clean Energy (C-PACE) program.

**ISSUES:** There are no known issues related to the ordinance adoption as of the date of this report.

**SUMMARY:** Private sector commercial buildings are responsible for approximately half of Arlington County's greenhouse gas (GHG) emissions. Building owners have pointed to a number of reasons why they have not invested more in reducing their assets' energy usage. Many energy conservation measures do not have a quick enough payback for building owners to justify the initial investment using traditional commercial real estate loan transactions. And most building owners prefer to use their limited capital to address other building needs.

C-PACE is an innovative and tested financing tool to encourage private sector investment in energy use reductions. The C-PACE program will pre-qualify multiple private sector lenders, thereby enabling commercial property owners to obtain project funding from their selected lender for renewable energy, energy efficiency, and water efficiency improvements and repay the lender over a longer period than conventional loans (up to 25 years).

Under the proposed program, up to 100% of a C-PACE project's soft and hard costs can be financed, with the potential for no up-front cost to the building owner. If the property is sold, the repayment obligation can be transferred to the new owner.

County Manager:

*mga / cgm*

County Attorney:

*SDL*

Staff: Richard Dooley (DES)  
Chris Somers (DES)

18.

The program is completely voluntary; each participating owner will pay only for the cost of eligible improvements to that owner's property, including principal, interest, reserves and administrative costs.

Staff will work with the County's contracted C-PACE Program Administrator, Sustainable Real Estate Solutions, Inc. (SRS), on C-PACE program design and implementation.

**BACKGROUND:** At its January 1, 2010 Organizational Meeting, the County Board [announced](#) that the County would work with the community to create a long-term Community Energy Plan (CEP). This Plan would establish community-wide energy and GHG emissions goals out to the year 2050.

County staff, consultants and elected officials spent more than 3 ½ years analyzing information and conducting more than 100 public meetings, where staff and consultants presented technical information, solicited feedback from the public and answered questions from a variety of stakeholders. In June 2013, the County Board adopted the CEP as a new element in the County's Comprehensive Plan. The CEP is designed to (a) improve the reliability and resiliency of our energy sources, (b) reduce price volatility and the long-term cost of energy through efficiency and diversification and (c) reduce the environmental impact of energy use through efficiency and cleaner sources of energy. The Board also approved the CEP Implementation Framework as an administrative guide for CEP implementation. The goal is a 75 percent reduction in GHG emissions community-wide by 2050 compared to a 2007 baseline.

The CEP contains six primary goal areas – one of which focuses on increasing the energy and operational efficiency of all buildings. Arlington's GHG emissions come primarily from private sector buildings. In 2012, buildings contributed more than 60 percent to community GHG emissions, making the improvement of energy efficiency in residential and non-residential buildings one of the most important steps toward meeting the community's energy goals.

The [CEP Implementation Framework](#) provides two key strategies to help existing building owners reduce their energy use and utility costs:

- Strategy 1 (S1.1): *Take advantage of the renovation process to encourage building owners to significantly increase building energy efficiency*

The majority of existing buildings will still exist in and are expected to be renovated by 2050. It is critical that these buildings be made more efficient through a variety of energy-related retrofits as part of planned renovations.

- Strategy 4 (S1.4): *Take advantage of incentives to reduce new and existing building energy usage*

Historically, Arlington building owners have not invested in energy efficiency projects, because the improvements did not meet the owners' necessary rates of return. Owners also are unlikely to invest in projects where the payback date exceeds the date when the owner anticipates selling the

building. Owners typically do not budget for replacing equipment that is not broken, and some are skeptical that new technology and equipment will perform as advertised.

Strategy S1.4 recognizes that implementing incentives such as a C-PACE financing program could encourage building owners to undertake projects that they might not otherwise fund.

**DISCUSSION:** The underlying concept behind PACE is relatively straight-forward: a property owner improves their building by borrowing money pursuant to a Financing Agreement between the property owner and a qualified lender (Attachment B provides a draft optional Financing Agreement that lenders and property owners can use); the property owner agrees to have the qualified lender file and record a Certificate of Levy and Lien of Special Assessment (“lien”) on behalf of the County; and the qualified lender then assigns the lien to the lender on behalf of the County. The lien recognizes the PACE Financing Agreement between the property owner and lender. Pursuant to the Financing Agreement, the lender disburses project funds to the property owner and pays the one-time program administration fee to SRS, and the property owner repays the PACE loan directly to the qualified lender.

PACE started in California and has matured tremendously during the past eight years. From their inception in 2009 through 2016, C-PACE programs around the country provided \$340 million in financing for primarily energy improvements to industrial, commercial office, hotels, retail, healthcare, non-profit and multi-family buildings. (In Virginia, condominiums are not an eligible property type.) The Clinton Climate Initiative estimates the market potential for C-PACE in the United States to be between \$88 and \$113 billion.

Between 2009 and 2015, the General Assembly enacted and then revised legislation that enables Virginia jurisdictions to create C-PACE programs of the type being proposed here.

Selecting SRS as the Program Administrator was the first step toward developing an Arlington C-PACE Program. Arlington’s program will not use any public sector, taxpayer funds to finance C-PACE projects or to pay SRS. SRS will be paid through a one-time Program Design and Administration fee (2.5% of the project cost, with a maximum of \$75,000/project) that is collected in connection with each approved C-PACE project.

SRS’s Program Administrator tasks include:

- Program Design
- Program Administration
- Program Marketing and Outreach
- Program Training and Certification
- Project Technical Review
- Program Reporting and Quality Assurance

Attachment C provides a visual overview of the lifespan of Arlington C-PACE project. The Arlington C-PACE Program uses an open-market model approach, which means that an interested property owner can choose its project’s contractor and lender. Once the building is analyzed and eligible improvements are agreed upon by the building owner, the contractor and

the lender, the building owner and lender execute a Financing Agreement. This agreement acknowledges that the property owner is voluntarily participating in the C-PACE program and has agreed to the agreement's terms and repayment schedule.

The County's role is to authorize the lender to record a lien on the property, the effect of which is to have the loan obligation follow the property, not the property owner (Attachment D provides the full suite of C-PACE program recordation documents). The lien recordation also removes the personal guarantee and 20% up-front capital requirements of traditional commercial real estate loans. The County assumes no liability for the repayment of the loans.

The property owner repays the lender directly per the Financing Agreement. The lender and property owner may modify portions of the draft Financing Agreement as long as the Financing Agreement meets the requirements of the Clean Energy Financing Ordinances (Attachment A).

**PUBLIC ENGAGEMENT:** Throughout the program development process, staff engaged with stakeholders to help shape the C-PACE program:

- Developing financial incentive and/or financing programs for energy projects stems from the CEP's goal of reducing community-wide energy usage and related emissions. The CEP was the result of a three-year public process that sought feedback from stakeholders and commissions.
- Staff focused on developing a C-PACE program after discussing various financial incentive and financing program options with building owners, real estate brokers and other stakeholders.
- Staff sought feedback from building owners, lenders, specialists involved in existing C-PACE programs and other stakeholders to help shape the C-PACE program. For example, the decision to use an open-market model was based on stakeholder feedback.
- Staff presented draft C-PACE program information at the following events to answer questions and help refine the program:
  - *C-PACE Information Meeting for Lenders*, in partnership with the Chamber of Commerce;
  - *Leveraging Resources for Affordable Housing Projects in Arlington* workshop;
  - Environment and Energy Conservation Commission (E2C2) meeting;
  - E2C2's Energy Committee meeting; and
  - NAIOP monthly meeting.

**FISCAL IMPACT:** The Arlington C-PACE Program will not result in a net change in revenues or expenditures to or from the County. The County will pass all programmatic costs to program participants through fees charged and per the Financing Agreements between the property owners and private lenders.

Although the extent of any positive economic effect is impossible to predict at this time, it is expected that a fully functioning C-PACE program would incentivize increased construction activity, improve property values and may have additional positive economic impacts on income, employment and investment in the County.

## 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**

**§68-2. Definitions**

**§68-3. Effective Date**

#### Article II. Program Structure

**§68-4. Project Eligibility**

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

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

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

**§68-8. Additional Provisions**

#### 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.

## DRAFT FINANCING AGREEMENT<sup>1</sup>

### [PROJECT ADDRESS]

THIS FINANCING AGREEMENT (the "**Agreement**") is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between [\_\_\_\_], a [\_\_\_\_], with an address at [\_\_\_\_] ("**Borrower**"), and [\_\_\_\_], a [\_\_\_\_], with an address at [\_\_\_\_] ("**Lender**").

### RECITALS

1. The Commonwealth of Virginia (the "**Commonwealth**") has authorized its localities to establish commercial property assessed clean energy programs under Section 15.2-958.3 (the "**Act**") of the Code of Virginia of 1950, as amended (the "**Code**"). In conformance with the Act, the County of Arlington, Virginia (the "**County**") has (i) enacted [\_\_\_\_] (the "**Ordinance**") to create the Arlington Commercial Property Assessed Clean Energy (C-PACE) Financing Program (the "**Program**"), the requirements of which are set forth in the Ordinance and the Program guidelines (such guidelines, as established and amended from time to time pursuant to the procedures set forth in the Ordinance, the "**Program Guide**"), and (ii) selected an administrator to facilitate the Program ("**Administrator**").

2. Borrower owns all that certain real property together with all improvements, buildings and other structures thereon and appurtenances thereto, lying in the County and commonly known as [Address], and more fully described in Exhibit [\_\_\_\_] (the "**Property**"). In accordance with the Ordinance and the Program Guide, Borrower is constructing improvements upon or renovating the Property to increase energy or water usage efficiency or installing a renewable energy production or distribution system to service the Property (the "**Project**"), which Project shall be permanently affixed to such Property.

3. Pursuant to the Act and the Ordinance, lenders may provide loans or advances directly to property owners participating in the Program. Accordingly, Borrower has applied for financing for the Project through a loan of funds from Lender, and Lender desires to provide to Borrower a loan of funds in the amount of [\_\_\_\_] AND 00/100 DOLLARS (\$[\_\_\_\_]), inclusive of principal, interest and any financed fees, costs or expenses provided for herein (including, without limitation, the Program Fees), to finance the Project (as further described in Section 2.2 herein, the "**Loan**").

4. Pursuant to the Act and the Ordinance, Borrower shall repay the Loan through a special assessment secured by a special assessment lien against the Property. After the execution of this Agreement, Lender, acting on the County's behalf as authorized by the Ordinance, will file and record such assessment and lien in the land records of the County, and Lender, acting on the County's behalf as authorized by the Ordinance, will subsequently assign the County's right, title and interest in and to such assessment and lien to Lender, who shall administer the Loan in all respects.

NOW THEREFORE, the parties agree as follows:

### ARTICLE I – DEFINITIONS

1.1 Definitions. As used herein, the following terms shall have the meanings herein specified unless the context otherwise requires.

---

<sup>1</sup> This form contemplates all loan proceeds being advanced in a single disbursement. Add additional provisions as necessary for a drawdown loan.

"**Act**" shall have the meaning set forth in the Recitals.

"**Administrator**" shall have the meaning set forth in the Recitals.

"**Agreement**" shall have the meaning set forth in the preamble to this Agreement.

"**Assessment Payments**" means periodic repayments of the Loan made by Borrower to Lender.

"**Assignee**" shall have the meaning set forth in Section 5.10(a).

"**Borrower**" shall have the meaning set forth in the preamble to this Agreement.

"**CERCLA**" shall have the meaning set forth in Section 3.6(a).

"**Code**" shall have the meaning set forth in the Recitals.

"**Commencement Date**" shall mean [\_\_\_\_\_].

"**Commonwealth**" shall have the meaning set forth in the Recitals.

"**Consent**" shall have the meaning set forth in Section 4.1(a)(v).

"**County**" shall have the meaning set forth in the Recitals.

"**Credits or Incentives**" means (i) any and all environmental benefits, air quality credits, emissions reductions, offsets and allowances, any renewable energy credits or similar credits or certificates and any other tradable energy or environmental related commodity produced by or associated with the Project and (ii) any and all financial incentives, from whatever source, related to the construction, ownership or operation of the Project, including, without limitation, (A) federal, state or local tax credits, (B) any other financial incentives in the form of credits, reductions, or allowances that are applicable to a local, state or federal income taxation obligation and (C) other grants, rebates or subsidies, including utility incentive programs.

"**Environmental Law**" shall have the meaning set forth in Section 3.6(a).

"**Event of Default**" shall have the meaning set forth in Section 6.1.

"**Event of Unenforceability**" means any proposed or final legislative or administrative action, any executive decree, order or similar pronouncement or any final judicial order or decree that the Assessment Payments or the Lien are not valid and enforceable under the laws of the Commonwealth, or any unstayed injunctive relief, the effect of which would be to prevent servicing or collection of the Assessment Payments or the Lien.

"**GAAP**" shall have the meaning set forth in Section 3.2.

"**Holder**" means a holder, beneficiary or secured party with respect to a mortgage, deed of trust, security agreement or other similar instrument, as applicable.

"**Indemnified Person**" shall have the meaning set forth in Section 5.8.

"**Lender**" shall have the meaning set forth in the preamble to this Agreement.

**"Lien"** shall have the meaning set forth in Section 2.1.

**"Loan"** shall have the meaning set forth in the Recitals, as further described in Section 2.2.

**"Mortgage"** means a mortgage, deed of trust, security agreement or other similar instrument, as applicable.

**"Ordinance"** shall have the meaning set forth in the Recitals.

**"Participant"** shall have the meaning set forth in Section 5.10(b).

**"Permits"** means all permits, consents, approvals and authorizations by any governmental body necessary for (i) the construction of the Project, (ii) the connection and operation of the Project, including, without limitation, all utilities necessary to service the Project, and (iii) the construction and use of all roadways, driveways, curb cuts and other vehicular or other access to and egress from the Project.

**"Polluting Substance"** shall have the meaning set forth in Section 3.6(a).

**"Program"** shall have the meaning set forth in the Recitals.

**"Program Fees"** means [\_\_\_\_\_], as provided in the Program Guide. The Program Fees shall be financed as part of the Loan and repaid through Assessment Payments.

**"Program Guide"** shall have the meaning set forth in the Recitals.

**"Project"** shall have the meaning set forth in the Recitals.

**"Property"** shall have the meaning set forth in the Recitals.

**"RCRA"** shall have the meaning set forth in Section 3.6(a).

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

**"Release Parcel"** shall have the meaning set forth in Section 5.12.

**"Transaction Documents"** shall have the meaning set forth in Section 6.1(b).

## 1.2 Rules of Interpretation.

(a) The definitions of terms herein shall apply equally to the singular and plural forms of the terms defined.

(b) The word "or" is not exclusive.

(c) Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms.

(d) The words "include," "includes" and "including" shall be deemed to be followed by the phrase "without limitation."

(e) Accounting terms have the meanings assigned to them by GAAP, as applied by the accounting entity to which they refer.

(f) The word "will" shall be construed to have the same meaning and effect as the word "shall."

(g) Unless the context requires otherwise (i) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein or therein), (ii) any reference herein to any person shall be construed to include such person's successors and assigns, (iii) the words "herein," "hereof" and "hereunder," and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision hereof, (iv) all references herein to Articles, Sections and Exhibits shall be construed to refer to Articles and Sections of, and Exhibits to, this Agreement, and (v) any reference to any law or regulation herein shall, unless otherwise specified, refer to such law or regulation as amended, modified or supplemented from time to time (except to the extent otherwise provided herein).

(h) References to "days" shall mean calendar days, unless the term "Business Days" shall be used. References to a time of day shall mean such time in New York, New York, unless otherwise specified.

(i) This Agreement is the result of negotiations between, and has been reviewed by Borrower, Lender and their respective counsel. Accordingly, this Agreement shall be deemed to be the product of the parties thereto, and no ambiguity shall be construed in favor of or against Borrower or Lender.

## **ARTICLE II - THE FINANCING**

2.1 Assessment and Lien. The terms of the special assessment and the special assessment lien shall be set forth in the Certificate of Levy and Lien of Special Assessment (the "**Lien**"), substantially in the form attached hereto as Exhibit [ ], which shall have a payment schedule attached thereto. After the execution of this Agreement, Lender, acting on behalf of the County pursuant to the Ordinance, will Record the Lien against the Property. Promptly thereafter, Lender, acting on behalf of the County pursuant to the Ordinance, shall assign solely the County's right, title and interest in and to the Lien to Lender by Recording an Assignment of Special Assessment Lien, substantially in the form attached hereto as Exhibit [ ]. 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. Upon such assignment, Lender shall be responsible, subject to and in accordance with the terms of this Agreement, for all billing, collection, enforcement and administrative duties in respect of each of the Loan, the Assessment Payments and the Lien. **BORROWER HEREBY ACKNOWLEDGES AND AGREES THAT IT SHALL MAKE ALL PAYMENTS DUE IN RESPECT OF EACH OF THE LOAN, THE ASSESSMENT PAYMENTS AND THE LIEN TO LENDER, AND NOT TO THE COUNTY OR ADMINISTRATOR.** The Lien may, in Lender's sole discretion, but subject to the terms of this Agreement, be amended after Lender disburses the Loan. To effect such amendment, Lender, acting on behalf of the County pursuant to the Ordinance, will Record a Confirmation and Amendment of Special Assessment Lien, substantially in the form attached hereto as Exhibit [ ], which shall include the final repayment schedule. Lender shall be responsible for (i) preparing all documentation in respect of the Loan, this Agreement, the Lien, and any assignment or

amendment of any of the foregoing documentation, (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 and as provided for in this Agreement, recover from Borrower the amount of any such reimbursements actually paid to the County, as well as any other costs and expenses incurred by Lender in respect of the transactions contemplated herein.]<sup>2</sup>

2.2 Loan Terms and Assessment Payments. Borrower shall repay the Loan by making Assessment Payments, as described in the Lien, as may be amended to the extent permitted under the Ordinance and the terms hereof, and set forth in Exhibit [\_\_\_]. The Loan shall be in the aggregate amount of [\_\_\_\_\_] AND [\_\_\_]/100 DOLLARS (\$[\_\_\_\_\_] ), inclusive of principal, interest and any financed fees, costs or expenses provided for herein (including, without limitation, Program Fees). Such financed fees, costs and expenses shall be disbursed to Lender on the closing date of the Loan, and Lender shall remit any Program Fees so collected to Administrator, without requiring notice or demand, within ten (10) days of such closing date. Any interest, fees, costs or expenses provided for herein that are not financed as part of the Loan, including, without limitation, [\_\_\_\_\_] ,<sup>3</sup> shall be billed and collected separately by Lender, and shall not be collected through Assessment Payments. The initial principal portion of the Loan shall be in the amount of [\_\_\_\_\_] AND [\_\_\_]/100 DOLLARS (\$[\_\_\_\_\_] ). From and after the Commencement Date, interest on the outstanding balance of the principal portion of the Loan shall accrue at a per annum rate of [\_\_\_\_\_] percent ([\_\_\_]%), [computed on the basis of \_\_\_\_\_] ,<sup>4</sup> Assessment Payments are due and payable in equal installments over a term of [\_\_\_\_\_] ([\_\_\_]) years, at such times and in such amounts as set forth in Exhibit [\_\_\_]. In the event of any conflict between the payment schedule attached to the Lien, as may be amended to the extent permitted under the Ordinance and the terms hereof, and the payment schedule set forth in Exhibit [\_\_\_], the payment schedule attached to the Lien shall control.

2.3 Prepayment [and Penalties].

[INSERT prepayment provision to be negotiated between Borrower and Lender].

2.4 Interest Accrued on Delinquent Payments. Delinquent Assessment Payments shall incur a late payment penalty of [\_\_\_\_\_] percent ([\_\_\_]%) of such amount, and interest shall accrue on delinquent balances (including principal, interest and fees), until paid in full, at the lesser of [\_\_\_\_\_] percent ([\_\_\_]%) per annum or the maximum per annum rate permitted by law. Any fractional part of a month in which any portion of any payment remains unpaid is considered equivalent to a whole month. Further, any partial installment payment will first be applied to the total accrued interest before being applied to outstanding principal.

**ARTICLE III - BORROWER'S REPRESENTATIONS AND WARRANTIES**

Borrower represents and warrants to Lender as follows, which representations and warranties shall be true and correct as of the date hereof and at all times thereafter until the outstanding principal balance of the Loan, all interest accrued thereon and all fees have been paid in full, or such obligations have been transferred or assigned as permitted under this Agreement:

---

<sup>2</sup> Add provisions to this Agreement as necessary to effect the recovery of Lender's costs and expenses from Borrower.

<sup>3</sup> Insert cross references that apply. For instance, as an example, one might cross-reference Section 2.4 herein for interest on delinquent payments.

<sup>4</sup> Insert desired interest calculation method.

3.1 Organization and Authority. Borrower is a [\_\_\_\_], duly [incorporated/organized], validly existing and in good standing under the laws of the [Commonwealth/State] of [\_\_\_\_] and all other jurisdictions where legally required in order to carry on its business. Borrower has all necessary power and authority to own its properties, conduct its business and enter into the transactions contemplated hereby. Borrower has the right to enter into and perform this Agreement, and the execution, delivery and performance of this Agreement and all other documents executed in connection herewith have been duly authorized and constitute valid and binding obligations of Borrower, each enforceable in accordance with its respective terms, and such execution, delivery and performance do not and will not contravene any other instrument or agreement binding on Borrower. Borrower has had for the previous [\_\_\_\_] ([\_\_\_\_]) years (except as previously disclosed to Lender in writing) the legal name and form of business organization in the state described above. Borrower's chief executive office and notice address, taxpayer identification number and any organizational identification number is as described with its execution of this Agreement below. Borrower shall notify Lender in writing at least thirty (30) days before changing Borrower's legal name, state of organization, chief executive office location or organizational identification number.

3.2 Financial Statements and Other Data. Borrower shall (i) maintain books and records in accordance with generally accepted accounting principles consistently applied ("GAAP") and prudent business practice, (ii) promptly provide Lender, within [\_\_\_\_] ([\_\_\_\_]) days after the close of each fiscal year of Borrower, and, upon Lender's request, within [\_\_\_\_] ([\_\_\_\_]) days of the end of each quarter of Borrower's fiscal year, a copy of financial statements for Borrower, prepared in accordance with GAAP and (A) in the case of annual statements, audited by independent certified public accountants or (B) in the case of quarterly statements, certified by the chief financial officer of Borrower; provided, however, that for so long as Borrower is legally and timely filing annual and quarterly financial reports on Forms 10-K and 10-Q with the Securities and Exchange Commission that are readily available to the public, the filing of such reports shall satisfy the foregoing financial statement reporting requirements for such entity and (iii) furnish to Lender all other financial information and reports and such other information as Lender may reasonably request concerning Borrower and its affairs, the Property or the Project. Borrower represents and warrants that all information and financial statements at any time furnished by or on behalf of Borrower are accurate and reasonably reflect as of their respective dates, results of operations and the financial condition of Borrower or other entity they purport to cover. Credit and other information regarding Borrower or its affiliates, the Property or the Project may be disclosed by Lender to its affiliates, agents and potential assignees, notwithstanding anything contained in any agreement that may purport to limit or prohibit such disclosure.

3.3 No Litigation. There are no actions, suits or proceedings pending, or to the knowledge of Borrower threatened, against or affecting it that could materially adversely affect Borrower, any of its properties, its financial condition or the construction of the Project.

3.4 Clear Title. Borrower's title to the Property is not in dispute, and is free of encumbrances other than those subordinated permitted encumbrances set forth in Exhibit [\_\_\_\_].

3.5 Compliance with Law. Borrower has complied with, and will continue to comply with, all applicable laws, statutes, rules, regulations and ordinances binding, in any jurisdiction, on Borrower, including, without limitation, all anti-money laundering laws and regulations. All Permits either (i) have been obtained, are final (i.e. not subject to any appeal periods and not subject to any pending appeals), are valid, are in full force and effect and have been complied with by Borrower in all respects or (ii) will be obtained, will be final (i.e. not subject to any appeal periods and not subject to any pending appeals), will be valid, will be in full force and effect and Borrower will be in compliance therewith in all respects prior to Lender's disbursing the Loan. Construction of the Project has complied and will comply with

applicable zoning, use, building or other applicable codes, laws, regulations and ordinances and any restrictive covenant affecting the Property.

### 3.6 Environmental Matters.

- (a) The term "**Polluting Substance**" shall mean any hazardous, ignitable, corrosive, caustic, reactive, toxic, or polluting waste or substance including, without limitation, any of the following: "hazardous waste" (as defined in the regulations adopted under RCRA, defined below), oil or petroleum products, chemical liquids or solid, liquid or gaseous products, asbestos, polychlorinated biphenyls, formaldehyde compounds, explosives, radioactive materials or any other potentially harmful waste or substance regulated by Environmental Law. The term "**Environmental Law**" shall mean any federal, state or local statute, regulation, ordinance or decisional law pertaining to protection of the environment or to any Polluting Substance, including (without limiting the generality of the foregoing) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("**CERCLA**") and the Resource Conservation and Recovery Act of 1976 ("**RCRA**"), as any of them may be amended from time to time, with the regulations promulgated thereunder. As used herein, "release," "spill" and any similar terms shall have the respective meanings set forth in each applicable Environmental Law, and in the case of a conflict or ambiguity, the broadest interpretation of such meanings shall apply. In the event any Environmental Law is amended to broaden the meaning of any term defined thereby, such broader meaning shall apply subsequent to the effective date of such amendment.
- (b) Borrower has taken all reasonable and necessary steps to investigate the past and present condition and usage of the Property and the operations conducted thereon and based upon such diligent investigation, Borrower represents and warrants that Borrower and those persons having a legal or beneficial interest in Borrower: (i) have not been involved in operations at the Property involving any Polluting Substances in violation of any Environmental Laws, (ii) have not caused any release of a Polluting Substance at or affecting the Property, or any contiguous land included in the property description of the Property, (iii) know of no Polluting Substance located on or affecting (in a manner in violation of Environmental Laws) (A) the Property, (B) any contiguous land included in the property description of the Property or (C) any other properties adjacent to the Property, (iv) have not permitted any tenant or occupant of the Property to engage in any activity involving any Polluting Substance in violation of Environmental Laws, (v) have not received any notice, order, claim, or demand from any governmental authority under any Environmental Law and (vi) have disclosed to Lender all information it has regarding whether there are any Polluting Substances located on or affecting the Property.
- (c) Borrower further represents and warrants to Lender that, to the best of its knowledge: (i) the Property is not in violation of or subject to any existing, pending, or threatened investigation or inquiry by any governmental authority or any response costs or remedial obligations under any Environmental Law and this representation and warranty would continue to be true and correct following disclosure to the applicable governmental authorities of all relevant facts, conditions, and circumstances, if any, pertaining to the Property and (ii)

Borrower has not obtained and is not required to obtain any permits, licenses or similar authorizations to construct, occupy, operate or use any buildings, improvements, fixtures, and equipment forming a part of the Property by reason of any Environmental Law.

3.7 Compliance with Documents. No Event of Default (as defined herein or therein) has occurred hereunder or under any Transaction Document, and no event has or shall have occurred and be continuing that, with the lapse of time or the giving of notice, or both, would constitute such an Event of Default.

3.8 No Misrepresentation or Material Nondisclosure. Borrower has not made and will not make to Lender, in this Agreement or otherwise, any untrue statement of a material fact, nor has it omitted to state a material fact necessary to make any statement made not misleading. Borrower has provided true and correct copies to Administrator of such items, documents, applications, disclosures or other information as Administrator has required.

3.9 Insurance. Borrower has provided to Lender satisfactory evidence of the current insurance policies that are required under this Agreement and, at all times while any indebtedness under the Transaction Documents is outstanding, Borrower shall promptly provide Lender with evidence satisfactory to Lender of any renewal of any such required policies. Such policies must (i) be issued by insurance companies admitted in the Commonwealth, (ii) be issued by insurance companies with an A.M. Best rating of A- or better, (iii) be in a form and contain content reasonably acceptable to Lender, (iv) shall specify Lender and Borrower as insureds and provide that such policies may not be canceled or altered in any way that would affect the interest of Lender without at least thirty (30) days' prior written notice to Lender (ten (10) days' in the case of nonpayment of premium), (v) provide that all amounts payable by reason of loss or damage to the Property shall be payable solely to Lender, unless Lender otherwise agrees, (vi) shall be primary, without right of contribution from any other insurance carried by Lender, (vii) contain waiver of subrogation and "breach of warranty" provisions satisfactory to Lender and (viii) shall contain such other endorsements as Lender may reasonably require. Should Borrower fail to maintain required insurance, Lender may, but shall not be obligated to, obtain such required insurance in amounts and limits sufficient to protect Lender's interest, and charge back the cost to Borrower. Required insurance includes:

[INSERT specific insurance requirements to be negotiated between Borrower and Lender].

3.10 Energy Audit. An energy audit or renewable energy system feasibility analysis has been performed on the Property that assesses the expected energy cost savings of the energy improvements over the useful life of such improvements.

3.11 Proper Purpose. The Project consists only of an "Eligible Improvement" to an "Eligible Building" situated on "Eligible Property," all within the meaning of the Ordinance, and is consistent with the requirements of the Act, the Ordinance and the Program Guide.

3.12 Required Disclosure. Borrower has received from [Administrator / Lender] information and disclosure on the costs and risks associated with participating in the Program, including risks related to the failure of Borrower to pay the Assessment Payments and remedies related thereto. Borrower acknowledges that [Administrator / Lender] has disclosed to Borrower the Program Fees and the effective interest rate on the Loan.

3.13 Incorporation of Representations and Warranties. The request by Borrower for disbursement of the Loan shall constitute a certification by Borrower that the representations and warranties contained herein are true and correct as of the date of such request.

3.14 Utilities. All utility services, including gas, water, sewage, electrical and telephone, that are necessary to develop the Project and occupy the Property are available or Borrower has taken all steps necessary to assure that all utility services will be available upon completion of the Project.

3.15 Other Obligations. Borrower is not in default on any obligation for borrowed money, any purchase money obligation or any other material lease, commitment, contract, instrument or obligation, except as have been disclosed in writing to Lender.

3.16 Tax Matters. Borrower has no knowledge of any pending assessments or adjustments of its income tax for any year and all taxes due have been paid, except as have been disclosed in writing to Lender.

3.17 Unconditional Obligation. Borrower acknowledges that Borrower's obligation to repay the Loan is non-cancelable, absolute and unconditional in all circumstances.

3.18 Special Requirements of the Act. Borrower represents that (i) Borrower is current on payments on all loans or debts secured by a Mortgage on the Property and is current on property tax payments to the County, (ii) Borrower is not insolvent or subject to bankruptcy proceedings and (iii) Borrower's title to the Property is not in dispute.

#### **ARTICLE IV - DISBURSEMENT OF LOAN**

##### **4.1 Conditions Precedent to Lender's Performance.**

(a) After the execution of this Agreement and upon receipt of evidence satisfactory to Lender that (i) the Lien has been validly Recorded and (ii) the County has validly assigned the Lien to Lender, as a prerequisite to the performance by Lender of any of its obligations under this Agreement, Borrower shall deliver to Lender the following:

(i) A Secretary's Certificate executed by the Secretary of Borrower, in form and substance satisfactory to Lender;

(ii) An opinion from Borrower's counsel to Lender, in form and substance satisfactory to Lender;

(iii) Evidence of insurance as required by Section 3.9;

(iv) All documents, including financing statements, affidavits, notices and similar instruments, in form and substance satisfactory to Lender, which Lender deems necessary or appropriate at that time;

(v) A written subordination agreement duly executed by each Holder of an existing Mortgage on the Property, in a form and substance acceptable to each in each's sole discretion (each such subordination agreement, a "**Consent**");

(vi) Evidence, in each case in a form and substance satisfactory to Lender, that: (A) Borrower is current on payments on all loans or debts secured by a Mortgage on the Property and

is current on property tax payments to the County, (ii) Borrower is not insolvent or subject to bankruptcy proceedings and (iii) Borrower's title to the Property is not in dispute;

(vii) Evidence satisfactory to Lender that Borrower has obtained and complied with all required Permits, each of which is final (i.e. not subject to any appeal periods and not subject to any pending appeals), valid and in full force and effect;

(viii) Evidence satisfactory to Lender that no order or notice shall have been given by any governmental agency stopping construction or stating that the work or construction is in violation of any law, ordinance, code or regulation, unless such order or notice has been rescinded and a copy of such rescission has been delivered to and shall be satisfactory to Lender; and

(x) Such other items reasonably required by Lender.

(b) In addition, the performance by Lender of any of its obligations under this Agreement shall be subject to no Event of Default having occurred and continuing.

#### **ARTICLE V - COVENANTS**

Borrower hereby covenants and agrees as follows:

5.1 The Act, the Ordinance and the Program Guide. A copy of each of the Act and the Ordinance is attached to this Agreement as Exhibit [ ], and the Program Guide is available on the Program website. Borrower has read each and will comply in all respects with the provisions of each, including, without limitation, the following:

- (a) Borrower covenants that it will not contest the amount or the validity of the Loan, the Assessment Payments, the Lien or the Program Fees;
- (b) Borrower will provide written notice, not less than [ ] ([ ]) days prior to the recording of the Lien, to each existing Holder of a Mortgage on the Property, of Borrower's intent to finance the Project pursuant to the Act and the Ordinance; and
- (c) Borrower will deliver to Lender, not less than [ ] ([ ]) days prior to the recording of the Lien, a Consent from each existing Holder of a Mortgage on the Property.

5.2 General. Borrower will:

- (a) Use the Loan proceeds solely to pay or reimburse the costs of acquiring the components of, installing (including the performance of renovations) and constructing the Project;
- (b) Promptly pay when due the Assessment Payments and all other fees and charges due under the Transaction Documents;
- (c) At all times while any indebtedness under the Transaction Documents remains outstanding, (i) preserve and keep in full force and effect the existence of each Transaction Document and (ii) retain clear title to the Property; provided, that

Borrower may transfer title to the Property strictly in accordance with Section 5.2(d) hereof;

- (d) Borrower shall not sell, assign, pledge, transfer or otherwise alienate, all or any portion of the Property or the Project unless (i) Borrower has promptly notified Lender, in writing, of any such sale, assignment, pledge, transfer or other alienation and (ii) the transferee agrees in writing to assume and fully perform all of Borrower's obligations under the Transaction Documents;
- (e) Pay when due all taxes, assessments, water charges, sewer charges and all other charges levied on or against the Property, and upon written request, submit to Lender official receipts evidencing such payments;
- (f) Obtain and maintain in force the insurance reasonably required by Lender, and described in Section 3.9 hereof, at all times while any indebtedness under the Transaction Documents remains outstanding, and promptly provide Lender with evidence satisfactory to Lender of any renewal of any such required policies;
- (g) Notify Lender in writing at least [ \_\_\_\_\_ ] ([ \_\_\_ ]) days before changing Borrower's legal name, state of organization, chief executive office location or organizational identification number;
- (h) Maintain its good standing in its state of organization and all other jurisdictions where legally required in order to carry on its business, and conduct its businesses and manage its properties (and cause each of its affiliates to conduct its businesses and manage its properties) in compliance with all applicable laws, rules or regulations binding, in any jurisdiction, on Borrower and its affiliates including, without limitation, all anti-money laundering laws and regulations; and
- (i) Not consent to any restriction, agreement or order for any environmental land use restriction without the prior written consent of Lender, which may be granted or withheld in Lender's sole and unfettered discretion.

5.3 Protection against Liens. Borrower shall promptly pay and discharge all claims for labor performed and material and services furnished in connection with construction of the Project, and take all other steps necessary to prevent the assertion of claims or liens either against the Property or the Project, other than the claims and lien provided herein.

5.4 Notice of Claims. Borrower shall promptly notify Lender in writing of all pending or threatened litigation that may materially adversely affect the Property, the Project or Borrower's ability to meet its obligations under the Transaction Documents.

5.5 Damage or Destruction. Borrower shall promptly notify Lender if the Project or Property is damaged or destroyed from any cause whatsoever. Upon the occurrence of such casualty, Lender will determine, in its sole and absolute discretion, either to apply the insurance proceeds to the restoration of the Project, or to repayment of the outstanding balance of the Loan, including principal, accrued interest and fees. In the event restoration of the Project is permitted, Borrower shall immediately proceed with the restoration thereof. If, in Lender's judgment, said proceeds are insufficient to complete the restoration, Borrower shall deposit with Lender such amounts as are necessary, in Lender's judgment, to complete the restoration. If Lender, in its sole and absolute discretion, does not permit the restoration of

the Project, then all insurance proceeds received on account of such casualty (less any fees, costs or expenses incurred by Lender in collecting the same) shall be forthwith paid to Lender and Lender may apply the net amount so received, in such manner as Lender may determine, toward the reduction of the outstanding balance of the Loan, including principal, whether then matured or to mature in the future, accrued interest and fees.

5.6 Condemnation. Borrower shall promptly notify Lender if the Project or Property is taken by condemnation or subject to an imminent threat of condemnation. Subsequent to a taking by condemnation or imminent threat thereof, all condemnation awards received on account of such taking (less any fees, costs or expenses incurred by Lender in collecting the same) shall be forthwith paid to Lender and Lender will determine, in its sole and absolute discretion, either to apply the condemnation proceeds to the restoration of the Project, or toward the reduction of the outstanding balance of the Loan, including principal, whether then matured or to mature in the future, accrued interest and fees. If Lender so decides that the Project can be so restored, then the rights and obligations of Lender and Borrower subsequent to a taking by condemnation or imminent threat thereof and the disbursement of any condemnation proceeds actually paid to Lender, shall be the same as described in Section 5.5 with regard to insurance proceeds. If Lender, in its sole and absolute discretion, determines that the Project cannot be restored as aforesaid, then all condemnation awards received on account of such taking (less any fees, costs or expenses incurred by Lender in collecting the same) shall be forthwith paid to Lender and Lender may apply the net amount so received, in such manner as Lender may determine, in its sole and absolute discretion, toward the reduction of the outstanding balance of the Loan, including principal, whether then matured or to mature in the future, accrued interest and fees.

5.7 Environmental Protection and Remediation.

- (a) Borrower covenants and agrees that: (i) Borrower will not release any Polluting Substance in, on, over or under the Property or on any properties adjacent to the Property, (ii) Borrower will not become involved, and will not permit any tenant or occupant of the Property to become involved, in operations at the Property involving unlawful use of Polluting Substances, (iii) Borrower, at its sole cost and expense, will comply strictly and in all respects with the requirements of all Environmental Laws, (iv) Borrower will notify Lender promptly in the event of the presence or release of any Polluting Substance at or affecting the Property and give to Lender a copy of any warning letters or notice of violations of any Environmental Law received by Borrower, (v) in the event any Polluting Substance is found at the Property in violation of any Environmental Law, Borrower will immediately contain and remove the same in compliance with all Environmental Laws and pay immediately when due the cost of removal of such Polluting Substance, (vi) Borrower will keep the Property free and clear of any lien imposed pursuant to any Environmental Law and (vii) Borrower will include in all future leases of any portion of the Property provisions requiring compliance with all Environmental Laws and reporting of information regarding such compliance to Borrower and Lender.
- (b) Borrower agrees to permit Lender, at its election and in its reasonable discretion but with notice to Borrower, at any time and from time to time, if Lender has reason to suspect the presence of a Polluting Substance, to cause one or more environmental site assessments of the Property to be undertaken. An environmental site assessment may include a detailed visual inspection of the Property, including, without limitation, all storage areas, storage tanks, drains, dry wells, and leaching areas, as well as the taking of samples of soil, surface

water, and ground water and such other investigation or analysis as is necessary or appropriate for a complete assessment of the compliance of the Property and the use and operation thereof with all Environmental Laws.

5.8 Indemnification. Without limitation of any other obligation or liability of Borrower or any right or remedy of Lender contained herein, Borrower agrees to indemnify, defend and hold harmless Lender, as well as its respective directors, officers, employees, agents, subsidiaries and affiliates (each an "**Indemnified Person**"), from and against all damages, losses, settlement payments, obligations, liabilities, claims, suits, penalties, assessments, citations, directives, demands, judgments, actions or causes of action, whether statutorily created or under the common law, including all costs and expenses (including, without limitation, fees and disbursements of attorneys, engineers and consultants), fines, charges, fees, response costs (including cleanup, removal or mitigation), diminutions in value and all other liabilities whatsoever (including, without limitation, liabilities under any applicable Environmental Laws, regulations or rules) which shall at any time or times be incurred, suffered, sustained or required to be paid by any such Indemnified Person (except any of the foregoing which result from the gross negligence or willful misconduct of the Indemnified Person) on account of or in relation to or in any way connected with (i) any of the arrangements or transactions contemplated by, associated with or ancillary to the Transaction Documents or any other documents executed or delivered in connection herewith or therewith, including, without limitation, each Construction Contract, all as the same may be amended from time to time, regardless of whether any of the foregoing or the transactions contemplated thereby are ultimately consummated, (ii) resulting from any conduct, act or failure to act by Borrower or its affiliates or related parties, (iii) any presence, or any release, of any Polluting Substance at or affecting the Property, (iv) any application, or any claim of application, of any Environmental Law to the Property or the operation thereof, including any requirement for clean-up of any Polluting Substance or the assertion of any lien because of any release; (v) any failure by Borrower to comply with the terms of any order of the Virginia Department of Environmental Quality, Virginia Department of Mines, Minerals and Energy or any other federal, state, or municipal governmental authority under any Environmental Law, (vi) any losses as a result of a lien in favor of any person or entity having priority over the Lien or (vii) any taxes required to be paid by Lender in respect of the Assessment Payments, the Lien or the assignment or amendment thereof. In any investigation, proceeding or litigation, or the preparation therefor (whether or not Lender is a party thereto), Lender shall select its own counsel and, in addition to the foregoing indemnity, Borrower agrees to pay promptly the fees and expenses of such counsel. In the event of the commencement of any such proceeding or litigation, Borrower shall be entitled to participate in such proceeding or litigation with counsel of its choice at its own expense, provided that such counsel shall be reasonably satisfactory to Lender. This Section shall survive the execution, delivery, performance and repayment of the Transaction Documents, the Assessment Payments and the Loan, and the extinguishment of the Lien.

5.9 Further Assurances. Upon request of Lender, Borrower will take any actions and execute any further documents as Lender deems reasonably necessary or appropriate to carry out the purposes of this Agreement. Without limiting the generality of the foregoing, at any time and from time to time, including upon the request of Lender, Borrower will, at Borrower's expense, execute and deliver and file such further documents, amendments and instruments and do such other acts as are in each case necessary or required by applicable law (as determined by Lender) in order to create, perfect, maintain and preserve the Lien in favor of Lender and, upon the occurrence and during the continuation of an Event of Default, to facilitate any sale of or other realization upon the Property, to make any sale of or other realization upon the Property valid, binding and in compliance with applicable law, and to provide for the payment of the obligations in accordance with the terms hereof. Borrower shall pay all filing, registration and recording fees or re-filing, re registration and rerecording fees, and all expenses incident to the execution and acknowledgment of this Agreement, and any instruments of further assurance, and all federal, state, county and municipal stamp taxes and other taxes, duties, imports, assessments and charges arising out of

or in connection with the execution and delivery of this Agreement, any agreement supplemental hereto and any instruments of further assurance.

5.10 Assignment of Lien and Participation Interests.

- (a) Lender shall have the unrestricted right at any time or from time to time, and without Borrower's consent, to assign all or any portion of its rights and obligations hereunder to one or more banks, lenders, institutional investors, or other financial institutions (each, an "**Assignee**"), and Borrower agrees that it shall execute, or cause to be executed, such documents, including without limitation, amendments to this Agreement and to any other documents, instruments and agreements executed in connection herewith as Lender shall deem necessary to effect the foregoing. Upon the execution and delivery of appropriate assignment documentation, amendments and any other documentation required by Lender in connection with such assignment, and the payment by Assignee of the purchase price agreed to by Lender and such Assignee, such Assignee shall be a party to this Agreement and shall have all of the rights and obligations of Lender hereunder (and under any and all other guaranties, documents, instruments and agreements executed in connection herewith) to the extent that such rights and obligations have been assigned by Lender pursuant to the assignment documentation between Lender and such Assignee, and Lender shall be released from its obligations hereunder and thereunder to a corresponding extent.
- (b) Lender shall have the unrestricted right at any time and from time to time, and without the consent of or notice of Borrower, to grant to one or more banks, lenders, institutional investors, or other financial institutions (each, a "**Participant**") participating interests in Lender's obligation to lend hereunder. In the event of any such grant by Lender of a participating interest to a Participant, whether or not upon notice to Borrower, Lender shall remain responsible for the performance of its obligations hereunder and Borrower shall continue to deal solely and directly with Lender in connection with Lender's rights and obligations hereunder.
- (c) In furtherance of the foregoing, Lender may furnish any information concerning Borrower in its possession from time to time to prospective Assignees and Participants.
- (d) The rights conferred upon Lender by this Agreement shall be automatically extended to and vested in any Assignee or Participant upon Borrower's receipt of notice of such assignment, participation or other transfer; provided, however, that no such assignment, participation or other transfer shall increase or expand the obligations of Borrower hereunder.
- (e) Notwithstanding anything in this Section to the contrary, each Assignee or Participant (i) must meet the definition of "Lender" under the Ordinance, (ii) shall be subject to the Program Guide and applicable law, including, without limitation, the Act and the Ordinance and (iii) shall, prior to accepting any assignment or participation interest described in this Section, agree in writing to comply with the Program Guide, the Act and the Ordinance.

5.11 Integrity of the Property as a Single Parcel. Borrower shall not, without the express prior written consent of Lender, which consent Lender may grant or withhold in its sole and absolute discretion, by act or omission impair the integrity of the Property as a single, separate, subdivided, separately taxed and zoned lot separate and apart from all other property.

5.12 Partial Release. If Lender has provided its written consent to a subdivision or lot split relating to the Property in accordance with Section 5.11, Lender agrees to release the Lien on one or more of the lots or parcels comprising the Property provided that (i) no Event of Default has occurred or is continuing, (ii) such lot or parcel that Borrower is requesting be released from the Lien (the "**Release Parcel**") has been lawfully subdivided from the remaining property of Borrower (including, without limitation, evidence satisfactory to Lender that such Release Parcel and the remaining parcel(s) of Borrower are taxed and treated separately), (iii) the Release Parcel does not contain and is not serviced by the Project, or any part thereof, (iv) Lender has determined, in its sole discretion, that the form of partial release of the Lien for the Release Parcel is satisfactory in all respects to Lender and (v) Borrower pays all of Lender's expenses incurred in connection with reviewing and documenting such partial release, which amounts must be paid by Borrower whether or not the proposed partial release is approved or executed. The intent of this Section is that Lender shall not consent to or provide any partial release if Lender shall determine in its sole and absolute discretion that the prospect of repayment is impaired or threatened by reason of a requested partial release by Borrower.

5.13 Covenant to Prepay. Borrower agrees that if (i) an Event of Unenforceability occurs, (ii) Borrower fails to insure the Property or Project in accordance with the terms of this Agreement and the Property or Project is damaged or destroyed from any cause whatsoever at a time of such failure, (iii) Borrower sells, assigns, pledges, transfers or otherwise alienates all or any portion of the Property without complying with Section 5.2(d) or (iv) Borrower creates or permits any encumbrance on any portion of the Property, which encumbrance purports to have priority over the Lien, including, without limitation, any restriction, agreement or order for any environmental land use restriction, Borrower shall immediately, upon the written request of Lender, prepay directly to Lender all (but not less than all) of the outstanding amount (principal and accrued and unpaid interest, fees, costs and expenses) owing under the Transaction Documents as of the date of prepayment, [plus a prepayment penalty of [\_\_\_\_\_] percent ([\_]%) of the outstanding principal amount of the Loan that is being prepaid].

5.14 PATRIOT Act Notice. Federal law requires all financial institutions to obtain, verify and record information that identifies each entity that obtains a loan or other financial accommodation. The first time Borrower (and its successors and permitted assigns) requests a financial accommodation from Lender, Lender may ask for the legal name, address, tax ID number and other identifying information of Borrower (and its successors and permitted assigns). Borrower (and its successors and permitted assigns) shall promptly provide copies of business licenses or other documents evidencing the existence and good standing of Borrower (and its successors and permitted assigns).

5.15 ERISA.

(a) Each Plan (other than a multiemployer plan) is in compliance in all material respects with ERISA, the Code and other federal or state law, including all applicable minimum funding standards and there have been no prohibited transactions with respect to any Plan (other than a multiemployer plan), which has resulted or could reasonably be expected to result in a material adverse effect.

(b) With respect to any Plan subject to Title IV of ERISA:

(i) No reportable event has occurred under Section 4043(c) of ERISA which requires notice.

(ii) No action by Borrower or any ERISA Affiliate to terminate or withdraw from any Plan has been taken and no notice of intent to terminate a Plan has been filed under Section 4041 or 4042 of ERISA.

(c) The following terms have the meanings indicated for purposes of this Section:

(i) "Code" means the Internal Revenue Code of 1986, as amended.

(ii) "ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

(iii) "ERISA Affiliate" means any trade or business (whether or not incorporated) under common control with Borrower within the meaning of Section 414(b) or (c) of the Code.

(iv) "Plan" means a plan within the meaning of Section 3(2) of ERISA maintained or contributed to by Borrower or any ERISA Affiliate, including any multiemployer plan within the meaning of Section 4001(a)(3) of ERISA.

5.16 Change in Law. Borrower will pay Lender, on demand, for Lender's costs or losses arising from any Change in Law which is allocated to this Agreement or any credit outstanding under this Agreement. The allocation will be made as determined by Lender, using any reasonable method. The costs include, without limitation, the following:

(a) any reserve or deposit requirements (excluding any reserve requirement already reflected in the calculation of the interest rate in this Agreement); and

(b) any capital requirements relating to Lender's assets and commitments for credit.

For purposes of this Section, "Change in Law" means the occurrence, after the date of this Agreement, of the adoption or taking effect of any new or changed law, rule, regulation or treaty, or the issuance of any request, rule, guideline or directive (whether or not having the force of law) by any governmental authority; provided that (i) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives issued in connection with that Act and (ii) all requests, rules, guidelines or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor authority) or the United States regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a "Change in Law," regardless of the date enacted, adopted or issued.

5.17 Taxes Imposed on Lender. Borrower shall pay to Lender, the amount of any and all sales or use taxes or similar taxes, if any, that may be imposed by any federal, state or local government authority on Lender arising from Lender's performance under this Agreement, including, without limitation any taxes on remittances made by the County to Lender, within thirty (30) days of receipt of a written request from Lender for such payment.

5.18 Reimbursement of Costs of Lender. Borrower shall pay to Lender all other costs, fees and charges imposed on Lender as a result of its performance under this Agreement, including, without limitation, amounts paid by Lender to the County pursuant to this Agreement or the Ordinance, within thirty (30) days of receipt of a written request from Lender for such payment.

## ARTICLE VI- DEFAULT AND REMEDIES

6.1 Events of Default. The occurrence of any of the following events shall constitute an "Event of Default" hereunder:

- (a) Failure to make any Assessment Payment;
- (b) Failure to make any other payment required under this Agreement, the Lien, or any amendment thereof, or any other document executed in connection with the Loan or any of the foregoing documents (collectively, the "**Transaction Documents**"), when due or beyond any stated and applicable cure period;
- (b) Any breach by Borrower beyond any applicable notice or cure periods of any covenant, condition or any other term of the Transaction Documents or an Event of Default as defined in any of the Transaction Documents shall occur, including, without limitation, a failure to maintain insurance as required by any of the Transaction Documents;
- (c) Any written representation, warranty or disclosure made to Lender by Borrower proves to be materially false or misleading, or omits to state any material fact necessary in order to make the representation, warranty or disclosure not misleading, as of the date when made (or deemed to be made in accordance with Article 3), whether or not such representation or disclosure appears in the Transaction Documents;
- (d) A petition in bankruptcy or insolvency or similar law affecting creditors' rights or for a receiver or trustee for any of Borrower's assets is filed by or against Borrower or if Borrower makes an assignment for the benefit of creditors or becomes insolvent or unable to pay its debts as they mature;
- (e) There occurs any event which in Lender's judgment materially and adversely affects (i) the ability of Borrower to perform any of its obligations under any of the Transaction Documents, (ii) the business or financial condition of Borrower or (iii) the timely repayment of the Loan;
- (f) Any encumbrance on any portion of the Property is created, which encumbrance purports to have priority over the Lien, including, without limitation, any restriction, agreement or order for any environmental land use restriction;
- (g) The loss of any governmental approval, license or permit necessary for the construction or operation of the Project or any governmental license for the operation of the business operated or to be operated on the Property for a period exceeding sixty (60) days;
- (h) The existence of any liens for taxes past due with respect to the Property, or carrier's, warehousemen's, mechanics', materialmen's, repairmen's or other liens which have not been dismissed, escrowed (subject to Lender sole approval) or bonded for thirty (30) days after the filing or recording thereof;
- (i) Any Transaction Document shall, for any reason (excluding the actions of Lender), cease to be in full force and effect (other than pursuant to the terms

thereof) or cease to be valid and binding on any party thereto, or Borrower shall so assert in writing;

- (j) Failure of Borrower to make a requested prepayment, in full, pursuant to Section 5.13 hereof;
- (k) Any default occurs under any other agreement between Borrower and Lender or any affiliate thereof; or
- (l) Any default occurs under any agreement in connection with any indebtedness of (i) Borrower, (ii) Borrower's affiliates or (iii) any person or entity that Borrower or its affiliate has guaranteed.

6.2 Remedies. Upon the occurrence of an Event of Default, Lender may in addition to any other remedies which it may have, at its option and without prior demand or notice, take any or all of the following actions in any order selected by Lender:

- (a) Immediately terminate any pending disbursement of the Loan (and Lender shall have no further obligation to make such Loan);
- (b) Declare immediately due and payable all or any portion of (i) the unpaid Assessment Payments (less any interest portion not yet accrued) and (ii) any other accrued and unpaid fees, costs or expenses under the Transaction Documents;
- (d) Exercise any remedies available to the Lender under the Transactions Documents;
- (f) Exercise any other rights and remedies available to Lender or at law or in equity.

The enumeration of the rights and remedies of Lender set forth in this Agreement is not intended to be exhaustive, and the exercise by Lender of any right or remedy shall not preclude the exercise of any other rights or remedies, all of which shall be cumulative, and shall be in addition to any other right or remedy given under the Transaction Documents or that may now or hereafter exist in law or in equity or by suit or otherwise. No delay or failure to take action on the part of Lender in exercising any right, power or privilege shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or privilege preclude other or further exercise thereof or the exercise of any other right, power or privilege or be construed to be a waiver of any Event of Default. No course of dealing between Borrower and Lender or their respective agents or employees shall be effective to change, modify or discharge any provision of any Transaction Document or to constitute a waiver of any Event of Default.

6.3 Power of Attorney. Borrower irrevocably constitutes and appoints Lender and any officer or agent thereof, each with full power of substitution, as its true and lawful attorney-in-fact, in its name or otherwise, and at Borrower's expense, to take any or all of the following actions upon the occurrence and during the continuation of an Event of Default, without notice to or the consent of Borrower:

- (a) take any or all of the actions described in Section 6.2, and exercise any other right or power granted to Lender under any Transaction Document or by law;

- (b) endorse or execute and deliver any check, draft, note, acceptance, or instrument, document, contract, agreement, receipt, release, bill of lading, invoice, endorsement, assignment, bill of sale, deed or instrument of conveyance or transfer constituting or relating to any Transaction Document;
- (c) assert, institute, file, defend, settle, compromise or adjust any claim constituting or relating to any Transaction Document;
- (d) perform or comply with any contractual obligation that constitutes part of any Transaction Document; and
- (e) do any and all things necessary and proper to carry out the purposes of this Agreement.

Borrower recognizes and agrees that the power of attorney granted pursuant to this Section 6.3 is coupled with an interest and is not revocable until the termination of this Agreement in accordance with its terms, at which time the power of attorney shall automatically terminate. Borrower ratifies and confirms all actions taken by Lender or its agents pursuant to this power of attorney in accordance herewith.

**ARTICLE VII - MISCELLANEOUS**

7.1 No Waiver. No waiver of any Event of Default or breach by Borrower hereunder shall be implied from any failure by Lender to take action on account of such Event of Default or breach if the same persists or is repeated, and no express waiver shall affect any Event of Default or breach other than the Event of Default or breach specified in the waiver. Waivers of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition.

7.2 Successors and Assigns. This Agreement is binding upon and made for the benefit of Lender and Borrower, their successors and permitted assigns, and no other person or persons shall have any right of action hereunder.

7.3 Notices. All demands, notices, requests, consents, waivers and other communications concerning this Agreement shall be in writing and shall be deemed to have been duly given when received, personally delivered or three (3) business days after being deposited in the mail, first class postage prepaid, or the business day after delivery to an express carrier, charges prepaid, addressed to each party at the address provided below, or at such other address as may hereafter be furnished in writing by such party to the other.

If to Lender:

[\_\_\_\_\_]

[\_\_\_\_\_]

[\_\_\_\_\_]

Attention: [\_\_\_\_\_]

If to Borrower:

[ ]

[ ]

[ ]

Attention: [ ]

Borrower further agrees to provide Lender with copies of any notices, requests, consents, waivers or other communications concerning any Transaction Document or Construction Contract, sent by Borrower, to or received by Borrower from, any third party within seven (7) business days of sending or receiving such notice, request, consent, waiver or other communication.

7.4 Amendments. No amendment, modification, termination or waiver of any provisions of this Agreement shall be effective unless in writing and signed by each of Lender and Borrower.

7.5 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth.

7.6 **WAIVER OF JURY TRIAL. BORROWER HEREBY IRREVOCABLY WAIVES ITS RIGHTS TO TRIAL BY JURY IN ANY ACTION ARISING OUT OF OR RELATING TO THE SPECIAL ASSESSMENT, THE LIEN, THE LOAN OR ANY TRANSACTION DOCUMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (i) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PERSON HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PERSON WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER, (ii) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER THIS AGREEMENT AND THE OTHER DOCUMENTS CONTEMPLATED HEREBY BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION AND (iii) CERTIFIES THAT THIS WAIVER IS KNOWINGLY, WILLINGLY AND VOLUNTARILY MADE.**

7.7 Jurisdiction. Borrower agrees that the execution of each Transaction Document, and the performance of its obligations thereunder, shall be deemed to have a Commonwealth of Virginia situs and Borrower shall be subject to the personal jurisdiction of the state and federal courts of the Commonwealth with respect to any action Lender, its successors or assigns may commence thereunder. Accordingly, Borrower hereby specifically and irrevocably consents to the jurisdiction of the state and federal courts of the Commonwealth with respect to all matters concerning any Transaction Document, or the enforcement thereof. To the extent that Borrower has or hereafter may acquire: (i) any immunity from jurisdiction of the state or federal courts located in the Commonwealth or from any legal process out of any such court (whether through service or notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise) with respect to itself or its property or (ii) any objection to the laying of the venue or of an inconvenient forum or any suit, action or proceeding brought in a state or federal court located in the Commonwealth under process served in accordance with any Transaction Document, Borrower hereby irrevocably waives such immunity or objection in respect of any suit, action or proceeding arising out of or relating to any Transaction Document.

7.8 Execution in Counterparts. This Agreement may be simultaneously executed in any number of counterparts, each of such counterparts shall be an original; and all of such counterparts when taken together shall constitute one agreement binding on all parties, notwithstanding that all parties are not signatories to the same counterpart.

7.9 Limitation of Interest and Other Charges. If, at any time, the rate of interest, together with all amounts which constitute interest and which are reserved, charged or taken by Lender as compensation for fees, services or expenses incidental to the making, negotiating or collection of the Loan evidenced hereby, shall be deemed by any competent court of law, governmental agency or tribunal to exceed the maximum rate of interest permitted to be charged by Lender to Borrower under applicable law, then, during such time as such rate of interest would be deemed excessive, that portion of each sum paid attributable to that portion of such interest rate that exceeds the maximum rate of interest so permitted shall be deemed a voluntary prepayment of principal. For purposes of this Section, the term "applicable law" shall mean the law in effect as of the date hereof; provided, however, that in the event there is a change in the law which results in a higher permissible rate of interest, then this Agreement shall be governed by such new law as of its effective date.

7.10 No Third-Party Beneficiary. This Agreement constitutes a contract solely among the parties by which it has been executed and is enforceable solely by the parties by which it has been executed and no other persons. It is the intention of the parties hereto that this Agreement may not be enforced on a third-party beneficiary or any similar basis.

7.11 The County. Notwithstanding Section 7.10 herein, each of Borrower and Lender 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 Transaction 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 Borrower, the County has no obligation to make Assessment Payments to Lender, or any other payments in respect of the Loan, including, without limitation, any fees, expenses and other charges described in any Transaction Document, (iii) none of any Loan, Assessment Payment, Lien or other obligation arising from any Transaction 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 Transaction 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 the Lien, or any assignment or amendment thereof, (vii) the County assumes no responsibility or liability in respect of the Project, or the planning, construction or operation thereof, (viii) each of Borrower and Lender shall, upon request, provide the County with any information related to 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, (ix) each of Borrower and Lender shall comply with all applicable requirements of the Act, the Ordinance and the Program Guide, and (x) Lender shall reimburse the County, within ten (10) days upon written demand, for any reasonable out-of-pocket expenses incurred by the County in connection with any Transaction Document, including, without limitation, the preparation and Recording of the Lien or any assignment or amendment thereof.

7.12 Entire Agreement. THIS AGREEMENT AND ANY RELATED AGREEMENTS (i) CONSTITUTES THE FINAL AND ENTIRE AGREEMENT BETWEEN THE PARTIES, IN RESPECT OF THE SUBJECT MATTER HEREIN, SUPERSEDING ALL CONFLICTING TERMS OR PROVISIONS OF ANY PRIOR PROPOSALS, APPROVAL LETTERS, TERM SHEETS OR OTHER AGREEMENTS OR UNDERSTANDINGS BETWEEN THE PARTIES, (ii) MAY NOT BE CONTRADICTED BY EVIDENCE OF (A) ANY PRIOR WRITTEN OR ORAL AGREEMENTS OR UNDERSTANDINGS OR (B) ANY CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OR UNDERSTANDINGS BETWEEN THE PARTIES AND (iii) MAY NOT BE

AMENDED, NOR MAY ANY RIGHTS THEREUNDER BE WAIVED, EXCEPT BY AN INSTRUMENT IN WRITING SIGNED BY THE PARTY CHARGED WITH SUCH AMENDMENT OR WAIVER.

7.13 Time of the Essence. Time is of the essence in the payment and performance of all of Borrower's obligations under this Agreement or any related agreement.

7.14 Additional Collateral. Under this Agreement, the security for the Loan consists solely of the Lien on the Property. Any additional collateral, such as any new Mortgage on the Property or other assets of Borrower or a security interest in any Credits or Incentives, shall be addressed in a separate agreement among Borrower, Lender and any other required parties, as applicable.

[Signature page follows]

**IN WITNESS WHEREOF**, Borrower and Lender have executed this Agreement as of the date first written above by and through their duly authorized representatives.

**[LENDER]**

By: \_\_\_\_\_  
Name:  
Title:

**[BORROWER]**

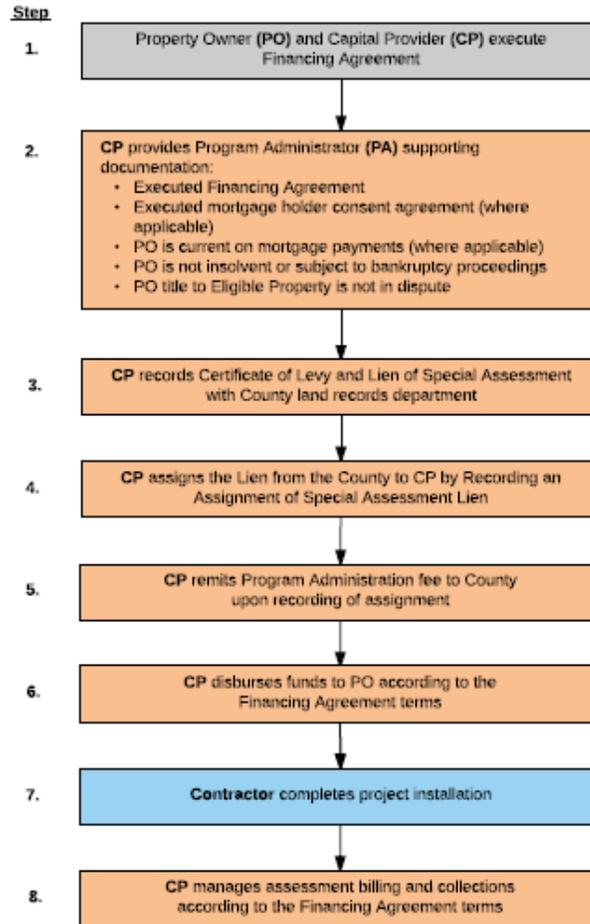
By: \_\_\_\_\_  
Name:  
Title:  
Taxpayer ID:  
Organizational ID (if any):  
Chief Executive Office:  
[ ]  
[ ]  
[ ]

# ATTACHMENT C

## C-PACE PROJECT PROCESSING



### C-PACE Assessment Recording, Assignment, Billing & Collections



**Legend:**



## ATTACHMENT D

### C-PACE PROGRAM RECORDATION DOCUMENTS

#### CERTIFICATE OF LEVY AND LIEN OF SPECIAL ASSESSMENT

The undersigned [TITLE] of [LENDER NAME] ("Lender") with an office at [ADDRESS], acting pursuant to authority granted by the County of Arlington, Virginia (the "County"), under the Property Assessed Clean Energy Program established under Section 15.2-958.3 of the Code of Virginia of 1950, as amended (the "Act"), and [COUNTY ORDINANCE] (the "Ordinance," and together with the Act, the "PACE Authorization"), HEREBY, ON BEHALF OF THE COUNTY, LEVIES A SPECIAL ASSESSMENT AGAINST AND LIEN UPON certain real property commonly referred to as [ADDRESS] and described more particularly in the attached **Schedule I** (the "Property"), constituting an Eligible Property under the Ordinance, situated in the County and owned on the date hereof in whole or in part by [NAME] ("Property Owner"). Said levy and lien shall secure the repayment of a loan to finance one or more Eligible Improvements under the Ordinance, disbursed pursuant to that certain Financing Agreement between Property Owner and Lender dated as of [DATE], as it may be amended pursuant to the terms thereof (the "Financing Agreement"). This levy and lien are made in accordance with the Financing Agreement and are subject to the terms and conditions of the Financing Agreement and the PACE Authorization. Upon the transfer or conveyance of the Property, each subsequent owner of the Property, by accepting title to the Property, assumes and agrees to perform all of the obligations and covenants set forth herein and in the Financing Agreement and each other document referenced therein, including, without limitation, making the installment payments described below, from and after the date such owner acquires title to the Property. The amount and repayment of said levy and lien are as set forth in the attached **Schedule II**, which shall control in the case of any conflict between such exhibit and the Financing Agreement. In the event that any such installment shall remain unpaid for [##] days after the same shall become due and payable, interest and other charges shall be charged upon the unpaid installment(s) at the lesser of (i) such rate provided for in the Financing Agreement or (ii) the maximum per annum rate permitted under the PACE Authorization and other applicable laws. At such time as the payments of the special assessment have been satisfied and paid in full, Lender shall file a release of this Certificate in the Land Records of the County.

This Certificate constitutes a certificate of lien and is filed pursuant to the provisions of the PACE Authorization to evidence a lien for the special assessment levied upon the Property for the special benefits conferred upon said Property by the installation of one or more Eligible Improvements. Pursuant to the PACE Authorization, this lien shall have the same priority status as a lien for taxes of the County on real property. This Certificate and the levy and lien set forth herein shall run with the land and shall be binding upon Property Owner and its heirs, executors, administrators, successors and assigns.

THE LIEN HEREIN SHALL NOT HAVE PRIORITY OVER ANY PREVIOUSLY RECORDED MORTGAGE OR DEED OF TRUST LIEN UNLESS A WRITTEN SUBORDINATION AGREEMENT IS EXECUTED BY THE HOLDER OF EACH EXISTING MORTGAGE OR DEED OF TRUST LIEN ON THE PROPERTY. EACH SUCH SUBORDINATION AGREEMENT IS ATTACHED HERETO AND MADE PART HEREOF, OR HAS OTHERWISE BEEN PREVIOUSLY RECORDED. By recording this Certificate, Lender hereby certifies that it has received evidence from Property Owner that: (i) Property Owner is current on payments on all loans secured by a mortgage or deed of trust lien on the Property, (ii) Property Owner is not insolvent or subject to bankruptcy proceedings, and (iii) Property Owner's title to the Property is not in dispute.

[Continues on following page.]

By order of the County of Arlington, through authority granted to Lender solely for purposes of recording this levy and lien.

Dated at \_\_\_\_\_, Virginia this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Lender

Received for Record: \_\_\_\_\_, 20\_\_ at \_\_\_\_\_ A.M./P.M.

Recorded in the \_\_\_\_\_ Land Records at Volume \_\_\_\_\_, Page \_\_\_\_\_

\_\_\_\_\_  
Clerk

**SCHEDULE I**

**DESCRIPTION OF PROPERTY**

**SCHEDULE II**

**SPECIAL ASSESSMENT PAYMENT SCHEDULE**



**SCHEDULE I**

**DESCRIPTION OF PROPERTY**



**SCHEDULE I**

**SPECIAL ASSESSMENT PAYMENT SCHEDULE**