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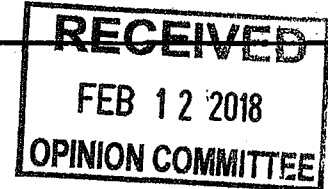
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February 12, 2018



Via Electronic Mail  
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The Honorable Ken Paxton  
Attorney General of Texas  
ATTN: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

FILE # ML-48313-18  
I.D. # 48313  
RQ-0211-KP

Re: Request for opinion on the character and treatment of assessments under the Texas PACE ("Property Assessed Clean Energy") Act (Tex. Local Gov't Code, Ch. 399) and supporting brief

Dear Attorney General Paxton:

I, the County Attorney of Williamson County whose signature is shown below, ask for an affirmative opinion on the following question of existing law:

Are the contractual assessments imposed by local governments on privately owned commercial or industrial real property or residential real property with five or more dwelling units to secure the owners' financing of permanent energy or water conserving improvements under a program adopted by the local government pursuant to the Texas PACE ("Property Assessed Clean Energy") Act, as provided for in Chapter 399, Texas Local Gov't Code, special assessments by the local government and treated in a similar manner as the real estate taxes on the property?

### Introduction and Background

This opinion request stems from the U.S. Department of Housing and Urban Development's ("HUD") Notice H 2017-01, issued on January 11, 2017, which provides administrative guidance for multifamily residential properties participating in PACE programs throughout the country. The notice includes the requirements that must be met before HUD will consent to participation in a PACE program by multifamily residential properties assisted by HUD and on which it holds or guaranteed the mortgage. One such requirement in Notice H 2017-01 is an opinion from the state's attorney general that the obligations under the PACE program of that state are special assessments and treated in a similar manner as the real estate taxes. A copy of Notice H 2017-01 is attached to this brief as **Exhibit A**.

I ask for the Attorney General's opinion to confirm the conclusion that I believe to be self-evident in the text of the Texas PACE Act and in the terms of Williamson County's local PACE program so that our local program and other local programs across the State can be fully utilized to promote economic development and the conservation of energy and water resources in our community.

### Supporting Brief

#### 1. The Texas PACE Act

The Texas Property Assessed Clean Energy Act ("PACE Act") was passed in the 83<sup>rd</sup> regular legislative session through Senate Bill 385 and became effective on May 15, 2013. *See generally* Tex. Local Gov't Code Ch. 399. A copy of the PACE Act is attached to this brief as **Exhibit B**.

Under the terms of the PACE Act, a local government, defined as a municipality or county, is authorized to establish a program for the financing of permanent improvements of privately owned commercial or industrial real property or residential real property with five or more dwelling units intended to decrease water or energy consumption or demand. *See* Tex. Local Gov't Code §§ 399.002(3), (5), 399.006. The financing is secured by a contractual assessment imposed on the real property by the local government under a written contract with the owner and with the written consent of the holder of any mortgage on the property. *See* Tex. Local Gov't Code §§ 399.005, 399.010.

Under the PACE Act, the financing may be provided by public funds of the local government or private funds advanced by a third-party lender under a written contract with the local government. *See* Tex. Local Gov't Code § 399.006. In Texas, a model toolkit has been developed for local PACE programs by the non-profit organization, Keeping PACE in Texas, to facilitate an "orderly, consistent, state-wide approach to PACE design and implementation." *See* Keeping Pace in Texas, *Pace in a Box*, <https://www.keepingpaceintexas.org/pace-in-a-box>. This "PACE-in-a-Box" model provides for third-party lender financing. *Id.* The PACE program in Williamson County, like all of those that follow the PACE-in-a-Box model, does not use any public funds and relies exclusively on private financing.

Before a PACE assessment can be imposed, each project must have a review of baseline energy or water use conditions by an independent third-party expert and a projection of the energy or water savings expected. *See* Tex. Local Gov't Code § 399.011. The local government must receive verification that the improvements were properly completed and operate as intended. *See* Tex. Local Gov't Code § 399.011(b). The term of a PACE assessment may not exceed the useful life of the improvements. *See* Tex. Local Gov't Code § 399.009(a)(8).

Importantly, when a notice of a PACE assessment is filed in the real property records of the county, the assessment becomes a first lien against the property that "has the same priority status as a lien for any other ad valorem tax." *See* Tex. Local Gov't Code §§ 399.013, 399.014(a). The lien runs with the land and does not accelerate in maturity in the event of a default but transfers to any new owner. *See* Tex. Local Gov't Code § 399.014(b). Further, "[t]he assessment lien may be enforced by the local government in the same manner that a property tax lien against real property may be enforced by the local government to the extent the enforcement is consistent with Section 50, Article XVI, Texas Constitution." *See* Tex. Local Gov't Code § 399.014(c).

The high statutory priority can make PACE assessments attractive to private lenders, who are then willing to finance such projects at lower interest rates and for longer periods of time than they would using conventional financing. This can enable the financing cost to be substantially or completely balanced by the utility cost savings, allowing the improvements to be installed without impairing the property owner's cash flow and encouraging both conservation and economic development in our communities without any investment of public funds.

## **2. Local PACE Program**

Williamson County adopted a local PACE program pursuant to the PACE Act and following the PACE-in-a-Box model. A copy of the resolution adopted by the Williamson County Commissioners Court creating the local program is attached to this brief, along with the Owner Contract form and Lender Contract form used in the program, as Exhibits C, C-1, and C-2 respectively.

Under the terms of the local PACE program, after funding by the lender, the local government maintains and continues an assessment for the benefit of the lender until the government either releases the lien upon payment in full or sues to foreclose the lien in the event of a default. The local government mails an annual notice of assessment to the property owner along with the annual property tax notice each year that there is a PACE lien balance. Delinquent installments of an assessment incur penalties and interest in the same manner and in the same amount as a delinquent tax, in accordance with Section 399.014(d) of the Texas Local Government Code.

In the event an owner fails to pay an installment of an assessment, the lender will mail at least two notices of delinquency to the owner. After the notices, if the owner fails to cure the delinquency, the lender may notify the local government of a default. Upon receipt of such notice and after doing its own due diligence, the local government enforces the assessment lien for the benefit of the lender in the same manner as a delinquent property tax, as provided in Section 399.014(c) of the Texas Local Government Code. Upon collection, the lender is repaid the amount due on the financing, and the local government recovers any penalties, interest, and attorney's fees due for the default, as in the collection of a delinquent tax.

A local government is authorized by Section 399.015 of the PACE Act to contract with the governing body of another taxing unit or another entity, including a county tax assessor-collector, to perform the duties related to the collection of the assessments. *See* Tex. Local Gov't Code § 399.015. Williamson County has contracted with the Texas PACE Authority, a non-profit organization, to be the independent administrator of our local program.

## **3. HUD Requirements for Consent to PACE Assessments**

HUD has issued its requirements for giving consent to a PACE assessment as a lienholder. These requirements, or procedures as they are referred to by HUD, are provided in HUD Notice H 2017-01. *See* Exhibit A. The PACE Program Assessment Procedures can be found in Part IV of the HUD Notice. One of the required procedures is "[a]n opinion from the state's attorney general that the obligations are special assessments and treated in a similar manner as the real estate taxes." I

believe that our local PACE program, as well as any other program adopted under the Texas PACE Act and following the PACE-in-a-Box model, meets this requirement.

The PACE Act and the resolution establishing Williamson County's PACE program describe the assessments imposed on the property as "contractual assessments" because they can only be imposed under written contracts executed between the lender, owner, and the authorized official of the local government. The Act is clear, however, that these assessments are imposed by the local government and create a lien on the property from the date that the notice of assessment is recorded until the amount due on the financing is paid. They are "special assessments," as distinguished from annual or recurring obligations, because the entire amount is imposed when the notice is recorded.

Throughout the PACE Act and the resolution establishing our local program, the phrase "in the same manner as a property tax" or similar language is used to describe the administration, billing, and collection of the assessments. Under the Lender Contract, the owners are mailed annual notices along with their tax bills of the amounts due on the assessments during the coming year. Per Section 399.014 of the PACE Act, the lien securing the assessments has the same priority as an ad valorem tax lien and may be enforced by the local government in the same manner as a property tax lien. *See* Tex. Local Gov't Code § 399.014(a)(2), (c). Delinquent installments of an assessment incur penalties and interest in the same manner as delinquent property taxes, and a local government may recover its costs and expenses in a suit to collect a delinquent installment in the same manner as in a suit to collect a delinquent tax. *See* Tex. Local Gov't Code § 399.014(d), (e). The clear intent of the PACE Act and our local PACE program is to align the administration, billing, collection, and enforcement of the assessments with that of property taxes.

#### 4. Conclusion

In order to satisfy one of HUD's requirements for giving its consent to a PACE assessment on a property in Williamson County, and in other participating municipalities and counties in the state, on which it holds the mortgage, I ask the Opinion Committee to confirm that the assessments imposed under the Texas PACE Act are special assessments and treated in a similar manner as the real estate taxes on the property.

I will be glad provide any further information that you require. Thank you for your attention to this question.

Respectfully submitted,



Doyle "Dee" Hobbs  
Williamson County Attorney

- Enc. Exhibit A – HUD Notice: H 2017-01
- Exhibit B – Texas PACE Act
- Exhibit C – Williamson County Resolution Establishing PACE Program
- Exhibit C-1 – Owner Contract Form
- Exhibit C-2 – Lender Contract Form