

City Council Agenda Items  
and  
Contracts, Leases or Agreements

10/15/2013

City Council Meeting Date  
Agenda Items Only

Peter Nierengarten

Submitted By

Sustainability & Strategic Planning

Department

Action Required:

An ordinance that creates an Energy Improvement District for the City of Fayetteville that manages innovative financing programs for renewable energy, energy efficiency and water conservation improvements on residential, commercial, industrial and other real properties at the request of the owner. This financing program includes property assessed clean energy (PACE) as a financing option.

N/A

Cost of this request

N/A

Category / Project Budget

N/A

Program Category / Project Name

N/A

Account Number

N/A

Funds Used to Date

N/A

Program / Project Category Name

N/A

Project Number

N/A


Remaining Balance

N/A

Fund Name

Budgeted Item

Budget Adjustment Attached



Department Director

9/25/13  
Date

Previous Ordinance or Resolution #

Original Contract Date:

Original Contract Number:




City Attorney

9/30/13  
Date

  
Finance and Internal Services Director

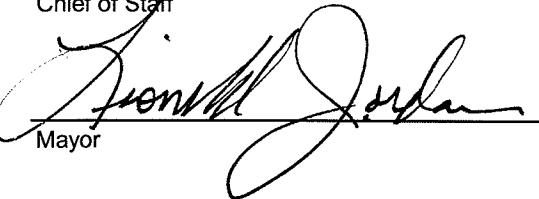
10-1-2013  
Date

Received in City Clerk's Office 09-25-13 A 11:38 RCVD  


  
Chief of Staff

10-1-13  
Date

Received in Mayor's Office  


  
Mayor

10/1/13  
Date

Comments:

**ORDINANCE NO. \_\_\_\_\_**

AN ORDINANCE CREATING A PROPERTY ASSESSED ENERGY IMPROVEMENT DISTRICT COEXTENSIVE WITH THE CITY OF FAYETTEVILLE NAMED “ENERGY IMPROVEMENT DISTRICT NO. 1” TO FACILITATE A PACE PROGRAM AND ADOPTING CERTAIN PROVISIONS RELATED THERETO

WHEREAS, pursuant to the authority granted by Arkansas Code Annotated § 8-15-101 *et seq.* (the “Property Assessed Clean Energy Act”), the City of Fayetteville may create a Property Assessed Energy Improvement District, either solely or in combination with one or more other governmental entities; and

WHEREAS, such a district, once created, has independent legal and financial authority, including the authority to issue bonds; and

WHEREAS, such districts were authorized to permit the creation and implementation of, among other things, a property assessed clean energy (PACE) program under which a real property owner may finance an energy efficiency improvement, a renewable energy project, or a water conservation improvement for their property on a voluntary basis, with loan repayment tied to collection of real property taxes,

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:**

Section 1. That the City Council of the City of Fayetteville, Arkansas hereby enacts ARTICLE XXVI ENERGY IMPROVEMENT DISTRICT NO. 1 to the Code of Fayetteville, which shall read as follows:

**“ARTICLE XXVI ENERGY IMPROVEMENT DISTRICT NO. 1**

**33.380 Establishment and Purpose**

There is hereby created an Energy Improvement District No. 1 which territorial jurisdiction shall be coextensive with the City of Fayetteville and the territory of any other agreeing and participating governmental entity that may hereafter join. Energy Improvement District No. 1 shall exercise such authority and power as

granted by the Property Assessed Clean Energy Act, Ark. Code Ann. § 8-15-101, *et seq.* within the boundaries of the District.

**33.381 Board of Directors, Membership, Terms of Office**

- (A) Energy Improvement District No. 1 shall be governed by a Board of Directors consisting of seven (7) members. One member shall be the Mayor or the Mayor's designee. Should the Mayor designate a member, said member shall serve at the pleasure of the Mayor. The remaining six (6) members shall be qualified electors of the District chosen by the Fayetteville City Council, each to serve a term of two (2) years. In making its Board appointments, the City Council shall give due consideration to candidates with connections to or relations with local utility companies, lending or bonding institutions and the advanced energy industry. City Council appointed members shall be subject to the term limit provisions of Section 33.329(B).
- (B) Should additional governmental entities enter into an agreement with the City of Fayetteville for participation in and addition to Energy Improvement District No. 1, the composition and terms of members of the Board of Directors shall be as agreed between the City of Fayetteville and other participating and agreeing governmental entities.

**33.382 Legal and Financial Independence**

In the operation of its business, Energy Improvement District No. 1 is legally and financially independent of the City of Fayetteville. No debt entered into by the District shall ever be construed as an obligation of the City of Fayetteville or of any other governmental entity which may participate in the District.”

**PASSED and APPROVED** this 15<sup>th</sup> day of October, 2013.

APPROVED:

ATTEST:

By: \_\_\_\_\_  
**LIONELD JORDAN**, Mayor

By: \_\_\_\_\_  
**SONDRA E. SMITH**, City Clerk/Treasurer



www.accessfayetteville.org

THE CITY OF FAYETTEVILLE, ARKANSAS  
DEPARTMENT CORRESPONDENCE

## **CITY COUNCIL AGENDA MEMO**

**To:** Mayor Lioneld Jordan

**Thru:** Don Marr, Chief of Staff

**From:** Peter Nierengarten, Sustainability & Strategic Planning Director *PW*

**Date:** September 25, 2013

**Subject:** Fayetteville Energy Improvement District

### **RECOMMENDATION**

Staff recommends adoption of an ordinance that creates an Energy Improvement District for the City of Fayetteville that manages innovative financing programs for renewable energy, energy efficiency and water conservation improvements on residential, commercial, industrial and other real properties at the request of the owner. This financing program includes property assessed clean energy (PACE) as a financing option.

### **BACKGROUND**

PACE is a creative financing mechanism that allows property owners to borrow money for weatherization, energy efficiency, renewable energy or water conservation improvements to their property. The security of tying the repayment of loans to property tax assessments combined with low default rates allow PACE to offer very low and extremely attractive interest rates for these improvement loans. PACE is a completely voluntary program that enables private investment for the purpose of energy savings.

PACE enabling legislation was passed by the Arkansas Legislature in the 2013 session and signed by the Governor in April 2013. That legislation allows Cities, Counties or the State to create Energy Improvement Districts within the State of Arkansas. The Arkansas Legislature noted that Energy Improvement Districts would benefit Arkansas by:

- Creating jobs and stimulating the economy
- Generating significant economic development
- Protecting citizens from the rising cost of electricity and non-renewable fuels
- Providing citizens with options for financing improvements that are otherwise not available
- Providing a positive cash flow on energy improvements
- Increasing the value of real property
- Improving the state's air quality and conserving natural resources
- Promoting energy independence and security for the nation and state

### **ENERGY IMPROVEMENT DISTRICT**

The Energy Improvement District should manage innovative financing programs for renewable energy, energy efficiency and water conservation improvements on residential, commercial, industrial and other real properties at the request of the owner. This financing program includes property assessed clean energy (PACE) as a financing option.

According to Arkansas' PACE enabling legislation the district should be managed and controlled by a board of directors. The board should be composed of a minimum of seven directors and should at a minimum meet quarterly. The board must

have one member appointed by the Mayor. Staff recommends that the remaining six at-large members be appointed by the City Council and be made up of representatives of local utility companies, lending or bonding institutions and the advanced energy industry.

The district board will establish procedures by which they will operate and may work with a third-party administrator to create program guidelines. The board should have all other powers and duties granted in Arkansas' PACE enabling legislation and should meet annual reporting requirements.

### **DISCUSSION**

Staff recommends that the Energy Improvement District develop a third party administered program that manages innovative financing for renewable energy, energy efficiency and water conservation projects in the City of Fayetteville. This program could manage multiple types of renewable energy, energy efficiency and water conservation financing mechanisms including PACE, and would allow flexible financing options for the greatest number of improvement projects in Fayetteville. Third party administration of the program provides a replicable model for other municipalities in Arkansas and the most long-term sustainable financing program for Fayetteville due to the reduced municipal program development and operational cost and the reduced workload for City Staff in managing the program. Steps necessary for the Energy Improvement District Board to implement a third party administered program include:

1. Advertise a Request for Proposals (RFP) for third party program development and administration of the Energy Improvement District.
2. District board evaluates RFP's and selects the program administrator.
3. Work with selected program administrator to create clean energy, energy efficiency and water conservation financing programs, which would include PACE as a financing option.

### **BUDGET IMPACT**

Under this recommended program there is no budget impact to establish the Energy Improvement District.



## **PACE ARKANSAS INITIATIVE (SB 640)**

### **What is PACE?**

A Property Assessed Clean Energy (PACE) bond or lien is a debt device where proceeds are lent to interested property owners to finance energy efficiency improvements, water conservation improvements, and renewable energy projects that reduce their energy costs.

### **Why do Arkansans need access to PACE loans?**

- Property owners can finance for up to 20 years the costs of energy and water efficiency improvements and renewable energy projects. There are no upfront costs.
- Energy cost savings from PACE-eligible improvements exceed the loan payments which are assessed annually on the property owner's property tax bill. For business owners, this means that PACE improvements increase their company's cash flow.
- Cities, counties, and even the state have the opportunity to create jobs with no added credit risk.
- PACE improvements increase property values.

### **How does a PACE program work?**

- PACE legislation authorizes voluntary creation of energy improvement districts which will be certified to issue general revenue bonds. Proceeds from these bonds will fund loans to interested property owners for energy efficiency improvements, water conservation improvements, and renewable energy projects.
- Energy Improvement Districts may consist of individual cities and counties, or a combination of the various jurisdictions. A district could be organized statewide.
- PACE program assessments only affect property owners who obtain loans for energy improvements.
- Loans or liens stay attached to the property until the loan/lien is repaid.
- Energy and water improvement work must be performed by qualified and certified providers thus protecting property owners and PACE districts.

### **Why does the AAEA endorse the PACE Initiative?**

- An effective PACE program can be an economic boost for the entire state. PACE will reduce energy costs for participating consumers and create jobs in the energy efficiency and renewable energy sectors.

**March 2013**

Stricken language would be deleted from and underlined language would be added to present law.  
Act 1074 of the Regular Session

1 State of Arkansas As Engrossed: S3/5/13 S3/14/13 S3/20/13

2 89th General Assembly

# A Bill

3 Regular Session, 2013

SENATE BILL 640

4

5 By: Senators D. Johnson, J. Woods

6 By: Representatives Leding, Barnett, C. Armstrong, Hawthorne, McGill, B. Overbey, T. Thompson, Sabin,

7 D. Whitaker

8

9

## For An Act To Be Entitled

10 AN ACT TO CREATE JOBS, RETAIN WEALTH, AND GROW  
11 ARKANSAS'S ECONOMY BY ENABLING PROPERTY ASSESSED  
12 CLEAN ENERGY FINANCING; TO AUTHORIZE THE  
13 ESTABLISHMENT OF ENERGY IMPROVEMENT DISTRICTS TO FUND  
14 LOANS FOR ENERGY EFFICIENCY IMPROVEMENTS, RENEWABLE  
15 ENERGY PROJECTS, AND WATER CONSERVATION IMPROVEMENTS;  
16 AND FOR OTHER PURPOSES.

17

18

19

## Subtitle

20 TO AUTHORIZE THE ESTABLISHMENT OF ENERGY  
21 IMPROVEMENT DISTRICTS TO FUND LOANS FOR  
22 ENERGY EFFICIENCY IMPROVEMENTS, RENEWABLE  
23 ENERGY PROJECTS, AND WATER CONSERVATION  
24 IMPROVEMENTS.

25

26

27 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

28

29 SECTION 1. Arkansas Title 8 is amended to add a new chapter to read as  
30 follows:

31

### Chapter 15 – Energy Efficient Facilities

32

33 8-15-101. Title.

34

This chapter shall be known and may be cited as the “Property Assessed  
35 Clean Energy Act”.

36



As Engrossed: S3/5/13 S3/14/13 S3/20/13

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1 8-15-102. Definitions.

2 As used in this chapter:

3 (1)(A) "Bond" means a revenue bond or note issued under this  
4 chapter.

5 (B) "Bond" includes any other financial obligation  
6 authorized by this chapter, the laws of this state, or the Arkansas  
7 Constitution;

8 (2) "District" means a property assessed energy improvement  
9 district established in this state by law for the express purpose of managing  
10 the PACE program;

11 (3) "Governmental entity" means a municipality, county,  
12 combination of cities or counties or both, or statewide district;

13 (4) "Owner" means an individual, partnership, association,  
14 corporation, or other legal entity that is recognized by law and has title or  
15 interest in any real property;

16 (5) "PACE program" means a property assessed clean energy  
17 program under which a real property owner can finance an energy efficiency  
18 improvement, a renewable energy project, and a water conservation improvement  
19 on the real property; and

20 (6) "Person" means an individual, partnership, association,  
21 corporation, or other legal entity recognized by law as having the power to  
22 contract.

23  
24 8-15-103. Legislative findings.

25 The General Assembly finds that:

26 (1) It is in the best interests of the state to authorize  
27 districts that make available to citizens one (1) or more financing programs,  
28 including without limitation a PACE program, to fund energy efficiency  
29 improvements, renewable energy projects, and water conservation improvements  
30 on residential, commercial, industrial, and other real properties at the  
31 request of the owner;

32 (2) The programs described in subdivision (1) of this section  
33 will benefit the citizens of this state by:

34 (A) Decreasing the cost of providing funds to  
35 participating citizens and lowering the aggregate issuance and servicing  
36 costs of loans; and



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1                   (B) Making funds available to rural communities throughout  
2 the state that might not otherwise create and finance the programs described  
3 in subdivision (1) of this section; and

4                   (3) The programs described in subdivision (1) of this section  
5 will further the public purpose of:

6                   (A) Creating jobs and stimulating the state's economy;

7                   (B) Generating significant economic development through  
8 the investment of the proceeds of loans in local communities, including  
9 increased sales tax revenue;

10                  (C) Protecting participating citizens from the financial  
11 impact of the rising cost of electricity produced from nonrenewable fuels;

12                  (D) Providing positive cash flow in which the costs of the  
13 improvements are lower than the energy savings on an average monthly basis;

14                  (E) Providing the citizens of this state with informed  
15 choices and additional options for financing improvements that may not  
16 otherwise be available;

17                  (F) Increasing the value of the improved real property for  
18 participating citizens;

19                  (G) Improving the state's air quality and conserving  
20 natural resources, including water;

21                  (H) Attracting manufacturing facilities and related jobs  
22 to the state; and

23                  (I) Promoting energy independence and security for the  
24 state and the nation.

25  
26                  8-15-104. Immunity.

27                  (a) The powers and duties of a district conferred by this chapter are  
28 public and governmental functions exercised for a public purpose and for  
29 matters of public necessity.

30                  (b) The district and its personnel are immune from suit in tort for  
31 the performance of its duties under this chapter unless immunity from tort is  
32 expressly waived in writing.

33  
34                  8-15-105. Authority to create.

35                  (a) A governmental entity legally authorized to issue general revenue  
36 bonds may create a district by adoption of an ordinance.

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1           (b) A combination of governmental entities may create a district by  
2 each governmental entity:

3                   (1) Adopting an ordinance that provides for the governmental  
4 entity's participation in the district; and

5                   (2) Entering into a joint agreement with one (1) or more other  
6 participating governmental entities.

7           (c) This section shall not limit additional governmental entities from  
8 becoming members of the district under § 8-15-106.

9

10           8-15-106. Membership in an existing district.

11                   (a) To become a member of an existing district, the governing body of  
12 a governmental entity shall:

13                           (1) Adopt an ordinance that provides for the participation of  
14 the governmental entity in the district; and

15                           (2) Enter into an agreement with the other participating members  
16 of the district.

17                   (b) The agreement between members of a district shall establish the  
18 terms and conditions of the operation of the district with the limitations  
19 provided in this chapter.

20

21           8-15-107. Board of directors.

22                   (a) A district created under this chapter shall be operated and  
23 controlled by a board of directors.

24                   (b) The board of directors shall manage and control each district,  
25 including without limitation the operations, business, and affairs of the  
26 district.

27                   (c) The board of directors shall be solely responsible for selecting  
28 the chair of the board of directors and establishing the procedures by which  
29 the board of directors shall operate.

30                   (d) A director shall not receive compensation in any form for his or  
31 her services as a director.

32                   (e) Each director shall be entitled to reimbursement by the district  
33 for any necessary expenditures incurred in connection with the performance of  
34 his or her general duties as a director.

35

36           8-15-108. Membership on the board of directors.

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1           (a) The board of directors of a district shall consist of at least  
2 seven (7) directors.

3           (b) The board of directors shall include:

4                   (1) For a statewide district, the members specified in the  
5 agreement establishing the district;

6                   (2) For a district composed of a combination of one (1) or more  
7 counties and one (1) or more cities:

8                           (A) The county judge or his or her designated  
9 representative of each county that is a member of the district;

10                           (B) The mayor or his or her designated representative of  
11 each city that is a member of the district; and

12                           (C) If the number of directors is fewer than seven (7)  
13 after fulfilling the requirements of subdivisions (b)(2)(A) and (B) of this  
14 section, additional members shall be appointed as specified in the agreement  
15 establishing the district until a total of seven (7) directors has been  
16 appointed;

17                   (3) For a district composed of one (1) or more counties:

18                           (A) The county judge or his or her designated  
19 representative of each county that is a member of the district; and

20                           (B) If the number of directors is fewer than seven (7)  
21 after fulfilling the requirements of subdivision (b)(3)(A) of this section,  
22 additional members shall be appointed as specified in the agreement  
23 establishing the district until a total of seven (7) directors has been  
24 appointed; and

25                   (4) For a district composed of one (1) or more cities:

26                           (A) The mayor or his or her designated representative of  
27 each city that is a member of the district; and

28                           (B) If the number of directors is fewer than seven (7)  
29 after fulfilling the requirements of subdivision (b)(4)(A) of this section,  
30 additional members shall be appointed as specified in the agreement  
31 establishing the district until a total of seven (7) directors has been  
32 appointed.

33           (c) The designated representative of a county judge or mayor under  
34 subsection (b) of this section shall be a qualified elector of the  
35 jurisdiction that the designated representative is appointed to represent.  
36

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1           8-15-109. Terms of directors.

2           (a) A director who is a public official may serve on the board of  
3 directors of a district during his or her term of office as the county judge  
4 or mayor of a member of a district.

5           (b) A director who is the designated representative of the mayor or  
6 county judge of a member of the district serves at the pleasure of the mayor  
7 of the city or the county judge of the county that is a member of the  
8 district.

9  
10           8-15-110. District boards of directors – Meetings.

11           (a) The board of directors of a district shall hold quarterly meetings  
12 and special meetings, as needed, in the courthouse or other location within  
13 the district.

14           (b) The time and place of the quarterly meetings shall be on file in  
15 the office of the district board of directors.

16  
17           8-15-111. District boards of directors – Powers and duties.

18           (a) The board of directors of a district may:

19                   (1) Issue revenue bonds on behalf of the district;

20                   (2) Make and adopt all necessary bylaws for its organization and  
21 operation;

22                   (3) Elect officers and employ personnel necessary for its  
23 operation;

24                   (4) Operate, maintain, expand, and fund a PACE project;

25                   (5) Apply for, receive, and spend grants for any purpose under  
26 this chapter;

27                   (6) Enter into agreements and contracts on behalf of the  
28 district;

29                   (7) Receive property or funds by gift or donation for the  
30 finance and support of the district;

31                   (8) Reimburse a governmental entity for expenses incurred in  
32 performing a service for the district;

33                   (9) Assign assessments to a private lending institution; and

34                   (10) Do all things necessary or appropriate to carry out the  
35 powers expressly granted or duties expressly imposed under this chapter.

36           (b) The board of directors shall:

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1                   (1) Allow a commission of:

2                   (A) One and five-tenths percent (1.5%) for the extension  
3 of district assessments by the county assessor or county clerk;

4                   (B) One and five-tenths percent (1.5%) for the collection  
5 of district assessments by the county collector; and

6                   (C) One-eighth percent (0.125%) for services of a county  
7 treasurer in disbursing the moneys collected for district assessments; and

8                   (2) Adopt rules consistent with this chapter or with other  
9 legislation that in its judgment may be necessary for the property  
10 enforcement of this chapter.

11  
12                   8-15-112. Reporting requirement – Collection of assessments.

13                   (a)(1)(A) By March 1 of each year or upon the creation of a district  
14 that uses or intends to use the county collector for collection of district  
15 assessments shall file an annual report with the county clerk in any county  
16 in which a portion of the district is located.

17                   (B) The annual report required under this section shall be  
18 available for inspection and copying by assessed landowners in the district.

19                   (C) The county clerk shall not charge any costs or fees  
20 for filing the annual report required under this section.

21                   (D) The district shall deliver a filed copy of the annual  
22 report required under this section to the county collector within five (5)  
23 days of filing.

24                   (2) The annual report required under this section shall contain  
25 the following information as of December 31 of the current calendar year:

26                   (A) A list of contracts, identity of the parties to the  
27 contracts, and obligations of the district;

28                   (B) Any indebtedness, including bonded indebtedness, and  
29 the reason for the indebtedness, including the following:

30                   (i) The stated payout or maturity date of the  
31 indebtedness, if any; and

32                   (ii) The total existing delinquent assessments and  
33 the party responsible for the collection;

34                   (C) Identification of each member of the board of  
35 directors of the district and each member's contact information;

36                   (D) The date, time, and location for any scheduled meeting

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1 of the district for the following year;

2 (E) The contact information for the district assessor;

3 (F) Information concerning to whom the county treasurer is  
4 to pay district assessments;

5 (G) An explanation of the applicable statutory penalties,  
6 interest, and costs;

7 (H) The method used to compute district assessments; and

8 (I) A statement itemizing the income and expenditures of  
9 the district, including a statement of fund and account activity for the  
10 district.

11 (b)(1) A district that does not comply with subsection (a) of this  
12 section commits a violation punishable by a fine of not less than one hundred  
13 dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense.

14 (2) A fine recovered under subdivision (b)(1) of this section  
15 shall be deposited into the county clerk's cost fund.

16 (c)(1) On or before December 31, the district shall file its list of  
17 special assessments for the following calendar year with the county clerk.

18 (2)(A) After filing the list of special assessments under  
19 subdivision (c)(1) of this section, the district shall deliver a copy of the  
20 filed list of special assessments to the preparer of the tax books.

21 (B) If the county collector is not the designated preparer  
22 of the tax books, the district shall deliver a copy of the filed list of  
23 special assessments to the county collector.

24 (3) The list of special assessments required under subdivision  
25 (c)(1) of this section shall contain:

26 (A) A list of each parcel with an assessment levied  
27 against it within the district; and

28 (B) The contact information for the district assessor.

29 (4) The list of special assessments required under subdivision  
30 (c)(1) of this section shall not include assessments on parcels that  
31 otherwise would not appear on the tax books for the following year.

32 (5) After the December 31 deadline to file the list of special  
33 assessments required under subdivision (c)(1) of this section, the county  
34 collector may reject an assessment submitted by the district for inclusion in  
35 the list of special assessments.

36 (d)(1) After the district files the list of special assessments

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1 required under subsection (c), the county collector shall collect the  
2 assessments at the same time the county collector collects the other taxes on  
3 the property.

4 (2) The county collector shall pay the funds collected under  
5 subdivision (d)(1) of this section to the county treasurer at the same time  
6 that the county collector pays all other taxes to the county treasurer.

7 (3) The county treasurer shall distribute the funds received  
8 under subdivision (d)(2) of this section to the district in the same manner  
9 as he or she distributes funds to other tax entities.

10  
11 8-15-113. Financing projects.

12 (a) A district may establish a PACE program to provide loans for the  
13 initial acquisition and installation of energy efficiency improvements,  
14 renewable energy projects, and water conservation improvements with  
15 consenting real property owners of existing real property and new  
16 construction.

17 (b)(1) The district may authorize by resolution the issuance of bonds  
18 or the execution of a contract with a governmental entity or a private entity  
19 to provide the loans under subsection (a) of this section.

20 (2) The resolution shall include without limitation the  
21 following:

22 (A) The type of renewable energy project, water  
23 conservation improvement, or energy efficiency improvement for which the loan  
24 may be offered;

25 (B) The proposed arrangement for the loan program,  
26 including without limitation:

27 (i) A statement concerning the source of funding  
28 that will be used to pay for work performed under the loan contract;

29 (ii) The interest rate and time period during which  
30 contracting real property owners would repay the loan; and

31 (iii) The method of apportioning all or any portion  
32 of the costs incidental to the financing, administration, and collection of  
33 the arrangement among the consenting real property owners and the  
34 governmental entity;

35 (C) A minimum and maximum aggregate dollar amount that may  
36 be financed per property;

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1                   (D)(i) A method for prioritizing requests from real  
2 property owners for financing if the requests appear likely to exceed the  
3 authorization amount of the loan program.

4                   (ii) Priority shall be given to those requests from  
5 real property owners that meet the eligibility requirements on a first come,  
6 first served basis.

7                   (E) Identification of a local official authorized to enter  
8 into loan contracts on behalf of the district; and

9                   (F) A draft contract specifying the terms and conditions  
10 proposed by the district.

11           (c)(1) The district may combine the loan payment required by the loan  
12 contract with the billing for the real property tax assessment for the real  
13 property where the renewable energy project, water conservation improvement,  
14 or the energy efficiency improvement is installed.

15                   (2) The district may establish the order in which a loan payment  
16 will be applied to the different charges.

17                   (3) The district may not combine the billing for a loan payment  
18 required by a contract authorized under this section with a billing of  
19 another county or political subdivision unless the county or political  
20 subdivision has given its consent by a resolution or ordinance.

21           (d) The district shall offer private lending institutions the  
22 opportunity to participate in local loan programs established under this  
23 section.

24           (e)(1)(A) In order to secure a loan authorized under this section, the  
25 district may place a lien equal in value to the loan against any real  
26 property where the renewable energy project, water conservation improvement,  
27 or the energy efficiency improvement is installed.

28                   (B) The lien shall attach to the real property when it is  
29 filed in the county recorder's office for record.

30                   (2)(A)(i) The priority of the lien created under this chapter is  
31 determined based on the date of filing of the lien.

32                   (ii) Except as provided in subdivision  
33 (e)(2)(A)(iii) of this section, the priority of the lien shall be determined  
34 in the same manner as the priority for other real property tax and assessment  
35 liens.

36                   (iii) A lien created under this chapter shall be



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1 subordinate to any real or personal property tax liens.

2 (iv) A district shall discharge the lien created  
3 under this chapter upon full payment of the lien.

4 (B) If the real property is sold, the lien shall stay  
5 attached to the real property, and the loan created under this chapter will  
6 be owed by the new real property owner.

7 (C) If the real property enters into default or  
8 foreclosure:

9 (i) Payment of the assessment shall not be sought  
10 from a member of the district who does not own the real property that entered  
11 into default or foreclosure;

12 (ii) Repayment of the assessment shall not be  
13 accelerated automatically; and

14 (iii) The balance of the assessment shall be repaid  
15 according to the terms of the agreed-upon schedule.

16 (3) The district may bundle or package the loans for transfer to  
17 private lenders in a manner that would allow the liens to remain in full  
18 force to secure the loans.

19 (f)(1) Before the enactment of an ordinance under this section, a  
20 public hearing shall be held at which interested persons may object to or  
21 inquire about the proposed loan program or any of its particulars.

22 (2) The public hearing shall be advertised one (1) time per week  
23 for two (2) consecutive weeks in a newspaper of general circulation in the  
24 district.

25  
26 8-15-114. Program guidelines.

27 The board of directors, together with any third-party administrator it  
28 may select, shall determine:

29 (1) The guidelines of the PACE program, including without  
30 limitation that:

31 (A) The base energy performance evaluation shall be  
32 completed by a certified and qualified energy evaluation professional to  
33 determine existing energy use and options for improved energy efficiency;

34 (B) The approved improvements create a positive cash flow;

35 (C) Work shall be performed by qualified and certified  
36 contractors in the field of energy efficiency and methods of renewable energy

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1 installation;

2 (D) Performance testing and verification shall be  
3 performed by a qualified professional after the work is completed;

4 (E) Adequate consumer protections are in place; and

5 (F) The applicable underwriting standards for the  
6 participants in the program are established;

7 (2) The qualifications of the vendors performing installations  
8 under this chapter;

9 (3) The mechanisms by which the district will remit the received  
10 special assessment payments and any cost reimbursement; and

11 (4) Any other matters necessary to implement and administer the  
12 PACE program.

13

14 8-15-115. Payment by special assessments.

15 The credit and taxing power of the State of Arkansas will not be  
16 pledged for the debt evidenced by the bonds, which will be payable solely  
17 from the revenues received from the special assessments on the participants'  
18 real property under this chapter.

19

20 8-15-116. Bonds.

21 (a) A district may:

22 (1) Issue bonds to provide the PACE program loans authorized by  
23 this chapter; and

24 (2) Create a debt reserve fund of legally available moneys from  
25 nonstate sources as partial security for the bonds.

26 (b) Bonds issued under this chapter and income from the bonds,  
27 including any profit made on the sale or transfer of the bonds, are exempt  
28 from taxation in this state.

29 (c) Bonds issued under this chapter shall:

30 (1)(A) Be authorized by a resolution of the board of directors.

31 (B) The authorizing bond resolution may contain any terms,  
32 covenants, and conditions that the board of directors deems to be reasonable  
33 and desirable; and

34 (2) Have all of the qualities of and shall be deemed to be  
35 negotiable instruments under the laws of the State of Arkansas.

36

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1           8-15-117. Sale.

2           The bonds may be sold in such a manner, either at public or private  
3 sale, and upon such terms as the board of directors of a district shall  
4 determine to be reasonable and expedient for effectuating the purposes of  
5 this chapter.

6  
7           8-15-118. Revolving fund.

8           (a) A district may maintain a revolving fund to be held in trust by a  
9 banking institution chosen by the board of directors separate from any other  
10 funds and administered by the board of directors.

11           (b) A district may transfer into its revolving fund money from any  
12 permissible source, including:

- 13                   (1) Bond revenues;  
14                   (2) Contributions; and  
15                   (3) Loans.

16  
17           8-15-119. Notice to mortgage lender.

18           At least thirty (30) days before the execution of an agreement with a  
19 district, an owner shall provide written notice to each mortgage lender  
20 holding a lien on the owner's property of the owner's application to  
21 participate in a PACE program.

22  
23                                   */s/D. Johnson*

24  
25  
26                                   **APPROVED: 04/11/2013**

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Kit Williams  
 City Attorney

 Jason B. Kelley  
 Assistant City Attorney

TO: MAYOR & CITY COUNCIL  
 FROM: JASON KELLEY, ASST. CITY ATTORNEY JK  
 THRU: KIT WILLIAMS, CITY ATTORNEY  
 DATE: SEPTEMBER 30, 2013  
 RE: ENERGY IMPROVEMENT DISTRICTS/ PACE BONDS

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To my knowledge, Fayetteville is the first governmental entity to make use of the new Property Assessed Clean Energy Act. The Act authorizes the creation of "Energy Improvement Districts" which are independent legal entities (akin to other types of improvement districts in the City) authorized to create, finance and manage programs promoting renewable energy, energy efficiency and water conservation improvements on residential, commercial and industrial property.

The districts have the authority to issue bonds, which are characterized in the enabling legislation as revenue bonds. These bonds would provide further funding for loans to be made to individual property owners for purposes of financing energy improvements. Repayment of the loans is tied to the collection of real property taxes and is handled through the normal county property tax collection process.

The enabling legislation is silent on the method of appointment of the board of directors when only one city is creating a district. The Act provides that when "a district is composed of one (1) or more cities . . . members shall be appointed as specified in the agreement establishing the district[.]" Ark. Code Ann. § 8-15-108(b)(4). Obviously, when only one city is participating, there is no one else to enter an "agreement." The Act specifically states that these districts are created "by adoption of an ordinance" and not through an agreement. Ark. Code Ann. § 8-15-105(a). Thus, I have drafted this proposed ordinance to provide for appointment of members to the board of directors. However, the draft also provides that if another governmental entity desires to join, the makeup of the board would be as determined in the agreement between Fayetteville and the joining entity.

It is my opinion that the provision in the draft ordinance clarifying and re-asserting the legal and financial independence of this District from the City is important due to the constitutional prohibition the City must follow restricting it from appropriating money or loaning credit for the benefit of any corporation or private individual. Ark. Const. Art. 12, § 5 & Art. 16, § 1. State created improvement districts have greater leeway in this area. *See generally Fitzgerald v. Walker*, 55 Ark. 148, 17 S.W. 702 (1891), *Nakdimen v. Fort Smith & Van Buren Bridge Dist.*, 115 Ark. 194, 172 S.W. 272 (1914), *Ray v. City of Mountain Home*, 228 Ark. 885, 311 S.W.2d 163 (1958); *Bell v. Fulkerson*, 291 Ark. 604, 727 S.W.2d 141 (1987). Protecting this legal distinction is important for the future viability of the potential future bonds, both for the District and for the City.

**TO: Mayor Jordan**  
**Don Marr**, Chief of Staff  
**Paul Becker**, Finance Director  
**Peter Nierengarten**, Sustainability & Strategic Planning

**Kit Williams**  
*City Attorney*  
**Jason B. Kelley**  
*Assistant City Attorney*

**FROM: Kit Williams**, City Attorney

**DATE: January 28, 2013**

**RE: Energy Improvement Districts Bill**  
**Priority Status of Property Assessed Clean Energy Bonds**

You asked me to answer Kenton Smith's e-mail questions about the draft bill establishing Property Assessed Clean Energy (PACE) bonds. §8-15-112 *Financing projects* (e) (2) (A) refers to the priority to be given to PACE bonds.

“(2) (A(i)) The priority of the lien created under this chapter is determined based on the date of filing of the lien.

(ii) The priority of the lien shall be determined in the same manner as the priority for other real property tax and assessment liens.”

This language is not perfectly clear. Priority for real estate taxes is very clear: “Taxes assessed upon real and personal property shall bind them and be entitled to preference over all judgments, executions, encumbrances, or liens whensoever created.” A.C.A. §26-34-101 (a).

Real estate taxes are owned to a governmental entity and will be paid during a sale or foreclosure BEFORE all other liens and mortgages. Will PACE bonds receive such preferential status? Not during a sale.

As opposed to a tax lien, the lien supporting a PACE bond does not become fully due upon the sale, but transfers through the sale to remain a lien on the property to be paid by the purchaser (new owner). This appears to be the case upon default or foreclosure also.

However, A.C.A. §80-50-108 **Effect of sale** in the **Statutory Foreclosure** subchapter states: “A sale made by a mortgagee or trustee shall foreclose and terminate all interest in the trust property of all persons to whom notice is given under §18-50-104 ....”

A.C.A. §18-50-104 requires that notice be given to “(a)ny person having a lien or interest subsequent to the interest of the mortgage or trustee ....” All such normal liens would be revoked and invalidated by the statutory foreclosure action in favor of a mortgage entered into prior to the filing of these other liens.

Tax liens and apparently PACE bond liens will not be cut off, but will survive a statutory foreclosure sale. The tax lien would have to be paid off, while the PACE bond lien would simply still attach to the property and not be extinguished by the foreclosure of the property despite §18-50-108 (a).

This is further bolstered by the proposed §8-15-112 (e)(2)(B) & (E) subsections:

“(B) If the real property is sold, the lien shall stay attached to the real property, and the loan created under this chapter will be owed by the new real property owner.

(C) If the real property enters into default or foreclosure:

(i) Repayment of the assessment shall not be accelerated automatically; and

(ii) The balance of the assessment shall be repaid according to the terms of the agreed-upon schedule.”

## **CONCLUSION**

All this proposed language appears to give a qualified preference for PACE bond liens. I believe these liens will remain attached to the real property’s title until they are fully paid. A sale, default, or statutory foreclosure does not require PACE bonds to be paid during these events (as taxes would be). However, it appears the PACE bonds will survive any of these events so that the new owner will still have to pay off the PACE bonds pursuant to the original terms of the bonds.

## **POSITIVE CASH FLOW**

A positive cash flow from sufficient savings of utility or other costs must be established by the PACE Board of Directors before bonds can be sold or funds loaned to a property owner desiring to use PACE funds for improved energy efficiency. §8-15-113 (1)(B). There is no definition of “positive cash flow” in the proposed statute nor any description or requirements about how to determine that a “positive cash flow” would exist. Most of the “positive cash flow” analysis will be determined by how long the payback period would be (10 years to 30 years?) and what percentage will be applied to repay the loan. If a thirty year payback period at a very low interest rate is used (as was for our new Energy Efficiency Code requirements), a “positive cash flow” could likely be achieved. More realistic assumptions would make a positive cash flow determination less likely to be achieved.

We also remain concerned that a PACE program established under this statute by City Ordinance should not be allowed to run afoul of Article 16 §1 of the Arkansas Constitution:

“Neither the State nor any city ... shall ever lend its credit for any purpose whatsoever, nor shall any county, city or town or municipality ever issue any interest bearing evidences of indebtedness ....”

The proposed statute does not appear to violate Article 16 §1 of the Constitution. However, the PACE District Board of Directors is authorized to issue bonds whose “resolution may contain any terms, covenants, and conditions that the board of directors deem reasonable and desirable.” {§8-15-115 (c)(1)} Such terms and conditions must not pledge tax revenue, nor any revenue not derived from repayment of bonds, non-city “contributions” or bond revenue.

