

**OPERATING AGREEMENT BETWEEN
CONTRA COSTA COUNTY AND PACE PROVIDER FOR
PROPERTY ASSESSED CLEAN ENERGY (PACE) FINANCING**

This agreement ("Agreement"), dated as of _____, 2015 ("Effective Date"), is by and between Contra Costa County, a political subdivision of the State of California (the "County"), and _____, a California limited joint powers authority established pursuant to Chapter 5 of Division 7, Title 1 of the Government Code of the State of California (Section 6500 and following (the "PACE Provider").

RECITALS

A. Property Assessed Clean Energy (PACE) financing is a method of providing loans to property owners to finance permanent energy efficiency improvements on real property. A property owner who obtains a PACE loan repays the loan by entering into an agreement that allows an assessment to be levied on the property. These assessments are known as voluntary contractual assessments.

B. Voluntary contractual assessments that are utilized to finance the installation of energy efficiency improvements on real property are authorized by (1) the Improvement Act of 1911, as amended by AB 811 (Streets and Highways Code Section 5898.10 et seq.) ("Improvement Act") and (2) the Mello-Roos Community Facilities Act of 1982, as amended by SB 555 (Government Code Section 53311 et seq. ("Mello-Roos Act").

C. The PACE Provider is a joint exercise of powers authority that was created to establish a PACE financing program. The PACE Provider has established the _____ Program ("PACE Program") to allow the financing of certain renewable energy, energy efficiency and water efficiency improvements that are permanently affixed to real property through the levy of assessments voluntarily agreed to by property owners participating in the PACE Program. Under the PACE Program, the PACE Provider accepts applications from eligible property owners, conducts assessment proceedings, and levies assessments.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants contained herein, the parties agree as follows:

AGREEMENT

1. Definitions. As used in this Agreement, the following terms have the following meanings:

- a. "PACE Administrator" means an independent contractor of the PACE Provider that markets, administers and carries out the PACE Program on behalf of the PACE Provider.

- b. "Eligible Improvement" is a renewable energy improvement, energy efficiency improvement or other improvement authorized by the Improvement Act, the Mello-Roos Act or other state law pertaining to voluntary contractual assessments.
- c. "Participating Contractor" is any contractor that installs Eligible Improvements that are funded by a PACE Provider.
- d. "Program Participant" is a property owner who enters into a voluntary contractual assessment with the PACE Provider.
- e. "Property Assessed Clean Energy (PACE) Financing" is a means of financing Eligible Improvements as authorized by the Improvement Act, the Mello-Roos Act, or other state law pertaining to voluntary contractual assessments.

2. General Requirements.

- a. PACE Provider's Specified Services. The PACE Provider may offer and provide Property Assessed Clean Energy Financing to property owners in the unincorporated areas of the County. The PACE Provider is solely responsible for the formation, operation and administration of the PACE Program, including the conduct of assessment proceedings, the levy and collection of assessments, and the offer, sale and administration of any bonds issued by the PACE Provider on behalf of the PACE Program.
- b. Cooperation with County. The PACE Provider shall independently operate its program and cooperate with the County and County staff as described in this Agreement.
- c. Performance Standard. The PACE Provider shall provide PACE Financing in a manner consistent with the level of competency and standard of care normally observed by an organization providing PACE Financing pursuant to the Improvement Act or Mello-Roos Act.

3. Disclosure Requirements.

The PACE Provider shall do all of the following:

- a. Disclose in writing to potential Program Participants the financial risks associated with PACE Financing, including the risks associated with federal regulation and administration of mortgage financing and the position of the Federal Housing Finance Agency (FHFA) on PACE lending. The disclosure materials must include a copy of the August 20, 2014 FHFA letter to Santa Clara County regarding PACE lending, which is attached and incorporated herein as Attachment A.

- b. Require potential Program Participants to sign a written acknowledgment of the Federal Housing Finance Agency (FHFA) position on PACE liens.
- c. Require Program Participants who own non-residential properties to obtain written consent to participate in the PACE Program from any lender that has outstanding loans to the Program Participant.
- d. Provide federal Truth in Lending Act disclosure details to the applicant specific to the requested amount of the financing.
- e. Advise potential Program Participants of available state or federal rebate or incentive programs.
- f. Require each Program Participant to obtain from the County all building permits for improvements.

4. Financial Requirements.

- a. The PACE Provider shall administer and review Program Participant eligibility and determine the Eligible Improvement costs to be financed.
- b. The PACE Provider shall establish its own interest rates, payback terms and fees.
- c. The PACE Provider shall participate in the State of California's PACE Loss Reserve Program, administered by the California Alternative Energy and Advanced Transportation Financing Authority (CAEATFA), and provide evidence of current participation and copies of all application materials submitted to CAEATFA. If the State discontinues the PACE Loss Reserve Program, or if the County determines that the State's PACE Loss Reserve Program does not provide adequate coverage, then the County may terminate this Agreement unless the County is satisfied with coverage by an alternative loan loss reserve program.
- d. For residential properties with an assessed value of less than \$700,000, the PACE Provider will ensure that the loan amount to a Program Participant does not exceed 15% of the assessed value of the property. For residential properties with an assessed value greater than \$700,000, the PACE Provider will ensure that the loan amount does not exceed 10% of the assessed value of the property.
- e. For non-residential properties, the PACE Provider will ensure that the loan amount does not exceed 20% of the assessed value of the property.
- f. The PACE Provider shall ensure that any loans existing prior to the proposed PACE lien have an aggregate amount of no more than 90% of the

assessed value of the property, including all mortgage-related debt as determined as of the date the assessment contract is executed.

- g. The PACE Provider shall ensure that the total property taxes and assessments for each property that will have PACE Financing will not exceed 5% of the assessed value of the property as determined as of the date the assessment contract is executed.
- h. The PACE Provider shall verify that each Program Participant is current on all property taxes and has not made late payments in the past three years, and verify that each Program Participant has not filed for bankruptcy in the past three years.
- i. It is the PACE Provider's obligation to coordinate with the Auditor-Controller's Office each year regarding delinquent assessments.

5. Reports.

For each property that has entered into a voluntary contractual assessment through the PACE Provider, the PACE Provider shall provide project information and data in an accessible electronic format to the County on a monthly and annual basis and upon request, including but not limited to the following:

- a. The Assessor's Parcel Number (APN) and property type (residential or non-residential) of the property.
- b. The amount of the contractual assessment.
- c. All installed Eligible Improvements financed through PACE Financing.
- d. The solar STC-DC rating in watts or kilowatts of each Eligible Improvement.
- e. The expected financial and energy savings associated with each Eligible Improvement.

6. Participating Contractor Obligations. The PACE Provider shall ensure that each Participating Contractor agrees to and abides by the following terms and conditions:

- a. Each Participating Contractor shall have all required California State License Board licenses and all other required State and County licenses.
- b. Each Participating Contractor's bonding must be in good standing.
- c. Each Participating Contractor shall hold harmless, indemnify and defend the County as set forth in Section 9 (c).
- d. Each Participating Contractor shall have insurance as required in Section 12 (b).

- e. Participating Contractors and their representatives, employees, and agents shall not represent themselves as agents, representatives, contractors, subcontractors, or employees of the County or the Department of Conservation and Development or claim association or affiliation with the County or Department of Conservation and Development.
7. Agreement with County Auditor-Controller. The PACE Provider will enter into a separate agreement with the Contra Costa County Auditor-Controller for the administration of property tax assessments placed on properties through the PACE Financing program.
8. Agreement with Program Participant. Each voluntary contractual assessment between the PACE Provider and a Program Participant shall require the Program Participant to hold harmless, indemnify and defend the County in accordance with the terms set forth in Attachment B, attached hereto. The terms set forth in Attachment B shall be incorporated into the PACE Provider's voluntary contractual assessment with each Program Participant for PACE Financing.
9. Indemnification and Release.
 - a. Indemnification Obligation of the PACE Provider. To the fullest extent not prohibited by applicable law, the PACE Provider shall defend, indemnify, protect, save, and hold harmless the County, the County Auditor-Controller, the County Treasurer-Tax Collector, their respective employees, agents, attorneys, officers, divisions, related agencies and entities, affiliates, successors and assigns (collectively and individually the "Indemnitees"), from any and all claims, cost, loss, liability, expense, damage (including consequential damages), or other injury, claim, action or proceeding (collectively "Liability") arising out of or connected with this Agreement or activities taken by the parties pursuant to this Agreement, including: (i) any claim, action or proceeding to attack, set aside, void, abrogate, rescind or annul this Agreement or the actions of either party under this Agreement; (ii) the placement or collection of assessments on participating properties; or (iii) the acts, errors or omissions of the PACE Provider, its officers, employees, agents, contractors, subcontractors, or any person under its direction or control in connection with this Agreement; and will make good to and reimburse Indemnitees for any expenditures, including reasonable attorney's fees, the Indemnitees may make by reason of such matters. If requested by any of the Indemnitees, the PACE Provider will defend any such suits at the sole cost and expense of the PACE Provider with counsel selected or approved by the Contra Costa County Counsel.

The PACE Provider's obligations under this section will exist regardless of concurrent negligence or willful misconduct on the part of any Indemnatee or any other person; provided, however, that the PACE Provider will not be required to indemnify Indemnitees for the proportion of Liability a court determines is attributable to the sole negligence or willful misconduct of the County, its

governing body, officers or employees. This indemnification clause shall survive the termination or expiration of this Agreement.

b. PACE Provider's Release. To the fullest extent not prohibited by applicable law, the PACE Provider hereby releases and forever discharges the County, the County Auditor-Controller, the County Treasurer-Tax Collector, their respective employees, agents, attorneys, officers, divisions, related agencies and entities, affiliates, successors and assigns (collectively "Released Parties"), from any and all claims, cost, loss, liability, expense, damage (including consequential damages), or other injury, claim, action or proceeding (including without limitation, attorneys fees and expenses), which the PACE Provider now has or could assert in any manner arising out of or connected with this Agreement, the subject matter of this Agreement, or activities taken by the parties pursuant to this Agreement, including any claim, action or proceeding to attack, set aside, void, abrogate, rescind or annul this Agreement or the actions of either party under this Agreement. The PACE Provider knowingly waives the right to make any claim against the Released Parties for such damages and expressly waives all rights provided by section 1542 of the California Civil Code, which provides as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

The rights and obligations contained in this paragraph will survive termination of this Agreement.

c. Indemnification and Release Obligations of Participating Contractors and PACE Administrator. The PACE Provider must require each Participating Contractor and PACE Administrator to release, defend, indemnify, protect, save, and hold harmless the County, the County Auditor-Controller, the County Treasurer-Tax Collector, their respective employees, agents, attorneys, officers, divisions, related agencies and entities, affiliates, successors and assigns, to the same extent as the indemnity and release provided by the PACE Provider to the County in sections 9(a) and 9(b) of this Agreement.

10. Term of Agreement. The term of this Agreement shall be from the Effective Date until termination in accordance with the provisions of Section 11, Termination.

11. Termination.

a. Termination without Cause. Notwithstanding any other provision of this Agreement, at any time and without cause, the County or PACE Provider shall have the right, in its sole discretion, to terminate this Agreement by

giving 30 days' written notice to the other Party of this Agreement. This Agreement may be cancelled immediately by written mutual consent.

- b. Termination for Cause. Notwithstanding any other provision of this Agreement, if the PACE Provider fails to uphold any of its obligations under this Agreement, or otherwise violates any of the terms of this Agreement, the County may immediately terminate this Agreement by giving the PACE Provider written notice of such termination, stating the reason for termination.
- c. Discontinuation of PACE Program. Upon 24 hours' notice from the County, the PACE Provider shall immediately discontinue its residential PACE Program in the County's unincorporated area if the Federal Housing Finance Authority (FHFA) takes any action in California pertaining to PACE Financing, as it relates to Fannie Mae and Freddie Mac mortgages, that the County determines will create an undue liability to the County or Program Participants.
- d. Delivery of Data and Information upon Termination. In the event of termination and within 14 days following the date of termination, the PACE Provider must deliver to County all data and information for all properties with contractual assessments, as specified in Section 5, Reports.
- e. Effect of Termination. If the Board of Supervisors terminates this agreement pursuant to this Section 11, the PACE Provider may not solicit new assessment contracts within the unincorporated areas of the County.
- f. Upon termination of this Agreement or the discontinuance of the PACE Program, the PACE Provider shall continue to administer all voluntary assessment contracts that exist at the time of the termination.

12. Insurance.

- a. The PACE Provider is self-insured, and shall provide the County with a letter of self-insurance within 30 days after the effective date of this Agreement.
- b. The PACE Provider will ensure that the following insurance requirements are incorporated into all contracts entered into by the PACE Provider with each PACE Administrator and Participating Contractor, or their respective contractors, subcontractors or assigns, in connection with this Agreement: (1) each PACE Administrator and Participating Contractor must maintain workers' compensation insurance pursuant to state law; (2) each PACE Administrator and Participating Contractor must maintain commercial general liability insurance, including contractual liability (or blanket contractual) coverage, owners' and contractors' protective coverage, and

broad form property damage coverage, with a minimum of \$2 million per occurrence; (3) each Participating Contractor must maintain builders' risk insurance in an amount equal to the construction contract amount, with a waiver of subrogation for the County, and naming the County as additional insured; (4) each PACE Administrator and Participating Contractor must maintain vehicle liability insurance with a minimum combined single-limit coverage of \$500,000 per occurrence; and (5) each PACE Administrator shall maintain Professional Liability Errors and Omissions Insurance coverage at \$1,000,000 per occurrence or aggregate limit. Each PACE Administrator and Participating Contractor shall provide certificates of insurance to the County, copies of policies, or endorsements evidencing the above insurance coverage and requiring at least 30 days' written notice to the County of policy lapse, cancellation, or material change in coverage. The commercial general liability insurance and vehicle liability insurance shall include endorsements naming the County, and its governing body, officers, agents and employees, as additional insured. The aforementioned insurance policies shall contain a provision that the insurance afforded thereby to the additional insureds shall be primary insurance to the full limits of the policy and that, if any of the additional insureds has other insurance or self-insurance against a loss covered by such policy, such insurance or self-insurance shall be excess insurance only.

13. Miscellaneous Provisions.

- a. Independent Contractor Status. The parties intend that the PACE Provider, in implementing and operating the PACE Program, is an independent contractor, and that the PACE Provider will control the work and the manner in which it is performed. This Agreement is not to be construed to create a relationship between the parties of agent, servant, employee, partnership, joint venture, or association. The PACE Provider is not a County employee. This Agreement does not give the PACE Provider any right to participate in any pension plan, workers' compensation plan, insurance, bonus, or similar benefits County provides to its employees.
- b. Compliance with the Law. The PACE Provider is subject to and must comply with all applicable federal, state, and local laws and regulations with respect to its performance under this Agreement, including but not limited to, licensing, employment, and purchasing practices; and wages, hours, and conditions of employment, including nondiscrimination.
- c. Authorization. The PACE Provider represents and warrants that it has full power and authority to enter into this Agreement and to perform the obligations set forth herein.
- d. Assignment and Delegation. Neither party hereto shall assign, delegate, sublet, or transfer any interest in or duty under this Agreement without the

prior written consent of the other, and no such transfer shall be of any force or effect whatsoever unless and until the other party shall have so consented. This Agreement binds the heirs, successors, assigns and representatives of the PACE Provider.

- e. Method and Place of Giving Notice. All notices shall be made in writing and shall be given by personal delivery or by U.S. Mail or courier service. Notices shall be addressed as follows:

TO COUNTY: Contra Costa County
 Department of Conservation and Development
 Deputy Director, Building Inspection Division
 30 Muir Road
 Martinez, CA 94553

TO PACE PROVIDER:

The effective date of notice is the date of deposit in the mail or other delivery, except that the effective date of notice to the County is the date of receipt by the Deputy Director, Building Inspection Division, Department of Conservation and Development. Changes may be made in the names and addresses of the person to whom notices are to be given by giving notice pursuant to this paragraph.

- f. Inspection. Upon the County's request, the County or its designee shall have the right at reasonable times and intervals to inspect the PACE Provider's financial and program records at the premises of the PACE Provider and the PACE Administrator. The PACE Provider or the PACE Administrator shall maintain all PACE Program records for a period of four years following termination of the Agreement, and shall make them available for copying upon the County's request at the County's expense.
- g. No Waiver of Breach. The waiver by the County of any breach of any term or promise contained in this Agreement shall not be deemed to be a waiver of such term or provision or any subsequent breach of the same or any other term or promise contained in this Agreement.
- h. Construction. To the fullest extent allowed by law, the provisions of this Agreement shall be construed and given effect in a manner that avoids any

violation of statute, ordinance, regulation, or law. The parties agree that in the event that any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby. The PACE Provider and the County acknowledge that they have each contributed to the making of this Agreement and that, in the event of a dispute over the interpretation of this Agreement, the language of the Agreement will not be construed against one party in favor of the other.

- i. Consent. Wherever in this Agreement the consent or approval of one party is required to an act of the other party, such consent or approval shall not be unreasonably withheld or delayed.
- j. No Third Party Beneficiaries. Nothing contained in this Agreement shall be construed to create, and the parties do not intend to create, any rights in third parties.
- k. Choice of Law. This Agreement is made in Contra Costa County and is governed by, and must be construed in accordance with, the laws of the State of California.
- l. Captions. The captions in this Agreement are solely for convenience of reference. They are not a part of this Agreement and shall have no effect on its construction or interpretation.
- m. Survival of Terms. All express representations, waivers, indemnifications, and limitations of liability included in this Agreement will survive its completion, expiration or termination for any reason.
- n. Time of Essence. Time is and shall be of the essence of this Agreement and every provision hereof.
- o. Entire Agreement. This Agreement contains all the terms and conditions agreed upon by the parties. Except as expressly provided herein, no other understanding, oral or otherwise, regarding the subject matter of this Agreement will be deemed to exist or to bind any of the parties hereto.
- p. Duplicate Counterparts. This Agreement may be executed in duplicate counterparts. The Agreement shall be deemed executed when it has been signed by both parties.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date.

PACE PROVIDER

CONTRA COSTA COUNTY

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

ATTACHMENT B

WAIVER, RELEASE OF LIABILITY AND INDEMNIFICATION PROVISIONS

ASSESSMENT CONTRACT BETWEEN PACE PROVIDER AND PROGRAM PARTICIPANT

1. Waiver of Assessment Proceedings.

Because this Agreement between the PACE Provider and Program Participant reflects the Program Participant's free and willing consent to pay the Assessment, the Program Participant hereby waives any otherwise applicable requirements of Article XIII D of the California Constitution or any other provision of California law for an engineer's report, notice, public hearing, protest or ballot. The Program Participant hereby waives the right to repeal the Assessment by initiative or any other action, or to file any lawsuit or other proceeding to challenge the Assessment or any aspect of the proceedings of the PACE Provider undertaken in connection with the PACE Program.

2. Responsibility for Eligible Improvements.

The Program Participant hereby agrees that the Program Participant and its successors in interest to fee title in the property shall be solely responsible for the installation, operation and maintenance of the Eligible Improvements. The Program Participant hereby acknowledges that the Program Participant and its successors in interest to fee title in the property will be responsible for payment of the Assessment regardless of whether the Eligible Improvements are properly installed, operated or maintained as expected.

The Program Participant hereby agrees that the PACE Provider is entering into this Agreement solely for the purpose of assisting the Program Participant with the financing of the installation of the Eligible Improvements, and that the PACE Provider, PACE Administrator and the County shall have no responsibility of any kind for, and shall have no liability arising out of, the installation, operation, financing, refinancing or maintenance of the Eligible Improvements.

3. Indemnification Obligation of Program Participant.

To the fullest extent not prohibited by applicable law, the Program Participant shall defend, indemnify, protect, save, and hold harmless the PACE Provider, PACE Administrator, Contra Costa County, the County Auditor-Controller, the County Treasurer-Tax Collector, their respective employees, agents, attorneys, officers, divisions, related agencies and entities, affiliates, successors and assigns (collectively and individually the "Indemnitees") from any and all claims, cost, loss, liability, expense, damage (including consequential damages), or other injury, claim, action or proceeding (collectively "Liability") arising out of or connected with this Agreement or activities taken by the parties pursuant to this Agreement, the Operating Agreement between the

PACE Provider and Contra Costa County, or the agreement between the PACE Provider and the PACE Administrator, including: (i) any claim, action or proceeding to attack, set aside, void, abrogate, rescind or annul said Agreements or the actions of either party under said Agreements; (ii) the placement or collection of assessments on participating properties; or (iii) the acts, errors or omissions of the Program Participant, its officers, employees, agents, contractors, subcontractors, or any person under its direction or control in connection with this Agreement or the PACE Program; and will make good to and reimburse Indemnitees for any expenditures, including reasonable attorney's fees, the Indemnitees may make by reason of such matters. If requested by any of the Indemnitees, the Program Participant will defend any such suits at the sole cost and expense of Program Participant with counsel selected or approved by the affected Indemnitees.

The Program Participant's obligations under this section will exist regardless of concurrent negligence or willful misconduct on the part of any Indemnitee or any other person; provided, however, that the Program Participant will not be required to indemnify any Indemnitee for the proportion of Liability a court determines is attributable to the sole negligence or willful misconduct of that Indemnitee. This indemnification clause shall survive the termination or expiration of this Agreement.

4. Release.

To the fullest extent not prohibited by law, the Program Participant hereby releases and forever discharges the PACE Provider, PACE Administrator, Contra Costa County, the County Auditor-Controller, the County Treasurer-Tax Collector, their respective employees, agents, attorneys, officers, divisions, related agencies and entities, affiliates, successors and assigns (collectively "Released Parties") from any and all claims, cost, loss, liability, expense, damage (including consequential damages), or other injury, claim, action or proceeding (including without limitation, attorneys' fees and expenses), which the Program Participant now has or could assert in any manner arising out of or connected with the subject matter of this Agreement, the Operating Agreement between the PACE Provider and Contra Costa County, or the agreement between the PACE Provider and the PACE Administrator, or activities taken by the Released Parties pursuant to said Agreements, including any claim, action or proceeding to attack, set aside, void, abrogate, rescind or annul said Agreements or the placement or collection of assessments on participating properties. The Program Participant knowingly waives the right to make any claim against the Released Parties for such damages and expressly waives all rights provided by section 1542 of the California Civil Code, which provides as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

The waivers, releases and agreements set forth in this document shall survive termination of the Agreement.