

**BERNALILLO COUNTY**

**BOARD OF COUNTY COMMISSIONERS**

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

**CLEAN ENERGY FINANCING ORDINANCE**

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ARTICLE I.

IN GENERAL

§ 1. Purpose

The County finds that facilitating improvements to new and existing commercial buildings, where such improvements involve renewable energy production and distribution, increased energy efficiency will promote the general welfare and help the County to increase renewable energy production, which includes solar energy and underground energy, including, but not limited to geothermal. Therefore, the purpose of this Chapter is to create a "Bernalillo County Commercial Property Assessed Clean Energy (C-PACE) Financing Program," consistent with State statute as may be enacted or amended.

The C-PACE program will facilitate loans made by qualified lenders to commercial property owners to finance renewable energy production and distribution facilities and energy efficiency improvements. Subject to the limitations set forth in this Ordinance and other applicable laws, each such loan, inclusive of principal, interest and any financed fees, costs or expenses, will be (i)

1 repaid through special assessment payments and (ii) secured by a voluntary special  
2 assessment lien on the property that is the subject of such loan.

3 In furtherance of the C-PACE program, the County, through this Ordinance and  
4 subject to the limitations set forth herein and other applicable laws, authorizes each  
5 qualified lender to (i) file and record such liens on behalf of the County, (ii) assign  
6 such liens on behalf of the County, (iii) amend such liens from time to time, and  
7 (iv) administer, in all respects, the loans respectively evidenced by such liens;  
8 provided, however, for the avoidance of doubt, that the County shall have no  
9 obligations with respect to the Program, or any loan, assessment, lien, or  
10 transaction related thereto, other than as expressly set forth in this Ordinance.

11 § 2. Definitions

12 "Administrator" means the person or entity contracted in writing by the County to  
13 assist with the planning and administration of the Program. With prior written  
14 approval from Program Manager that shall be in Program Manager's sole and  
15 absolute discretion, Administrator may, in a writing signed by Administrator,  
16 delegate one or more of its administrative duties specified herein or in the Program  
17 Guide to a person or entity subcontracted by Administrator.

18 "Assessment Payments" means the periodic repayments of the Loan Amount by  
19 Property Owner, due and payable to Lender in such amounts and at such times as  
20 described in the Financing Agreement and the Lien.

21 "Commercial Building" means commercial or residential building, excluding  
22 residential dwellings with fewer than five dwelling units and condominium  
23 projects.

24 "State" means "State of New Mexico."

25 "Contractor" means any person or entity that (i) for a set price, commission, or fee,  
26 undertakes to bid upon, or accepts or offers to accept, any order or contract to  
27 perform or manage, in whole or in part, any Project under this Ordinance, (ii) is  
28 validly licensed or otherwise permitted under applicable law to provide such  
29 service, (iii) has attended Program training provided by Administrator, (iv) has  
30 been approved as a registered contractor by Administrator and (v) is listed in the  
31 Program Guide.

32 "C-PACE" means Commercial Property Assessed Clean Energy.

33 "Eligible Building" means a Commercial Building, whether existing, newly  
34 constructed, under construction, or to be constructed, that is situated upon Eligible  
35 Property, and all existing and future improvements thereupon.

1 "Eligible Improvement" means any improvement, construction, equipping,  
2 installation or modification of or to, as the case may be, an Eligible Building, if  
3 designed to (i) facilitate renewable energy production and distribution, or (ii)  
4 increase energy efficiency.

5 "Eligible Property" means real estate located within the unincorporated area of the  
6 County and subject to, or eligible to be subject to, taxation by the County.

7 "Financing Agreement" means a written agreement, as may be amended, modified,  
8 or supplemented from time to time, between Property Owner and Lender,  
9 regarding matters related to the extension and repayment of a Loan to finance a  
10 Project, including, without limitation, (i) the Loan Amount, (ii) the repayment  
11 schedule, (iii) the interest rate, (iv) Program Fees, and (v) other fees, costs or  
12 expenses charged to Property Owner. Proposed terms and conditions for such  
13 agreement are found in the Draft Financing Agreement to be determined by the  
14 Program Manager. Property Owner and Lender may choose to deviate from such  
15 terms and conditions, or use such other form of financing agreement that Property  
16 Owner and Lender may agree upon; provided, however, that each Financing  
17 Agreement shall include Sections 2.1 (Assignment and Lien), 2.2 (Loan Terms and  
18 Assessment Payments), 5.1 (the Ordinance and the Program Guide), 5.2 (General),  
19 5.10 (Assignment of Lien and Participation Interests), 7.5 (Governing Law), 7.7  
20 (Jurisdiction) and 7.11 (The County) of the Draft Financing Agreement, with  
21 variations permitted to such sections only to the extent that such variations are  
22 minor, non-substantive and stylistic to allow such sections to conform to the  
23 agreement used by Lender and Property Owner. In the case of a conflict between  
24 the terms of a Lien and the terms of the applicable Financing Agreement, the terms  
25 of such Lien shall control.

26 "Lender" means a source of financing that has been approved, by Administrator, as  
27 a qualified lender in accordance with the criteria set forth in the Program Guide.  
28 Each such qualified lender may make Loans to eligible Property Owners to finance  
29 Projects under the Program.

30 "Lien" means a voluntary special assessment lien duly Recorded against an  
31 Eligible Property to secure Assessment Payments. Each Lien (i) shall run with the  
32 land, and those portions of Assessment Payments secured by such Lien that have  
33 not yet become due are not eliminated by foreclosure of a property tax lien, and (ii)  
34 shall have the same priority status as a real property tax lien as provided by state  
35 law, except that such Lien shall have priority over any previously recorded  
36 mortgage or deed of trust lien on the Property only if a written subordination  
37 agreement is executed by the holder of each such previously recorded lien. Such  
38 subordination agreement shall be recorded with the Lien, and shall be in a form

1 and substance acceptable to the prior lienholder in its sole and exclusive discretion.  
2 Prior to the Recording of any Lien, Property Owner must submit to Lender  
3 evidence that: (i) Property Owner is current on payments on all loans secured by a  
4 mortgage or deed of trust lien on the Eligible Property and on property tax  
5 payments to the County, (ii) Property Owner is not insolvent or subject to  
6 bankruptcy proceedings, and (iii) Property Owner's title to the Eligible Property is  
7 not in dispute.

8 "Loan" means a loan from Lender to Property Owner to finance a Project, as  
9 described in a Financing Agreement.

10 "Loan Amount" means the aggregate amount of a Loan, inclusive of principal,  
11 interest and any financed fees, costs or expenses, all as provided for in the  
12 Financing Agreement.

13 "Loan Document" means a Financing Agreement, a Lien, or any amendment  
14 thereof, or any other document, agreement or instrument executed in connection  
15 with a Loan, a Financing Agreement, a Lien, or any amendment thereof.

16 "Program" means the C-PACE program established by the County, through this  
17 Ordinance, in accordance with State statute.

18 "Program Fees" means those fees and expenses that shall be published in the  
19 Program Guide; provided, however, that the County reserves the right to revise the  
20 nature or amount of such fees at any time; provided further, however, that any such  
21 revision shall not apply to any Program Fees subject to an executed Financing  
22 Agreement.

23 "Program Guide" means the detailed description of Program requirements from  
24 time to time published by Administrator upon approval by Program Manager,  
25 which requirements shall include, without limitation, (i) examples of Eligible  
26 Improvements, (ii) criteria or requirements for the designation of Contractors and  
27 Lenders, (iii) criteria or requirements for the eligibility of Property Owners and  
28 Projects, (iv) all fees, costs and expenses of the Program, including those of  
29 Administrator, and (v) certain disclosures to Property Owners regarding the  
30 Program.

31 "Program Manager" means County Manager or such person designated in writing  
32 by County Manager to run the Program and act as liaison with Administrator;  
33 provided, however, that only County Manager shall be authorized to enter into any  
34 contract on behalf of the County in respect of the Program, unless such  
35 authorization is specifically included in such written designation.

1 "Project" means the development of Eligible Improvements on an Eligible  
2 Building.

3 "Property Owner" means the person or entity that holds title to Eligible Property,  
4 together with its successors and permitted assigns, as further defined in a Financing  
5 Agreement.

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

7 "Savings-to-Investment Ratio" means the total estimated (or projected) energy cost  
8 savings, as [calculated in good faith / certified] by Administrator, over the effective  
9 useful life of the Eligible Improvements, divided by the Loan Amount.

10 § 3. Effective Date

11 This Ordinance shall become effective as of [\_\_\_\_\_].

12 ARTICLE II.

13 PROGRAM STRUCTURE

14 § 4. Project Eligibility

15 4.1 Prioritization: Administrator will process Project applications on a first come,  
16 first served basis; provided, however, that all successful applicants must meet the  
17 income or property value eligibility requirements established under the Program  
18 Guide.

19 4.2 Project Eligibility Notification: Administrator shall prepare and deliver to  
20 Property Owner a project eligibility notification and a project finance report that  
21 includes the Project's Savings-to-Investment Ratio.

22 4.3 Size Thresholds: The minimum Loan Amount that may be financed for each  
23 Project is fifty thousand dollars (\$50,000). The maximum Loan Amount that may  
24 be financed for each Project is [twenty five million] dollars (\$[25,000,000]).

25 § 5. Loan; Program Fees; Reporting

26 5.1 Source of Loan; Financing Agreement: Loans may only be financed by  
27 Lenders. Each Loan must be made pursuant to a Financing Agreement.

28 5.2 Repayment and Administration of Loan: Loans granted under this Ordinance  
29 will be repaid by Property Owner through Assessment Payments. Upon assignment  
30 of the Lien to Lender, as described in Section 6.2 hereof, Property Owner shall  
31 make all such Assessment Payments directly to Lender pursuant to the Financing  
32 Agreement, and Lender shall be responsible, subject to and in accordance with the  
33 terms of the Financing Agreement, for all billing, collection, enforcement and

1 administrative duties in respect of each of the Loan, the Assessment Payments and  
2 the Lien.

3 5.3 Program Fees: The Program will be self-financed through Program Fees  
4 charged to participating Property Owners that are designed to cover the costs to  
5 design and administer the Program, including the compensation of Administrator.  
6 Lender shall collect the Program Fees from Property Owner at Loan closing, and  
7 shall remit any such Program Fees so collected to Administrator within ten (10)  
8 days of the date of such closing, without requiring demand or notice from  
9 Administrator.

10 5.4 Reporting: No less frequently than semi-annually, each Lender shall provide  
11 the County a written report with summary information regarding the Loan portfolio  
12 performance of such Lender, including the (i) types and amounts of Eligible  
13 Improvements financed, (ii) locations of Projects, (iii) number of Loans  
14 outstanding, (iv) overall aggregate dollar amount outstanding under such Loans,  
15 (v) average initial Loan Amount, (vi) number of Loans with delinquent  
16 Assessment Payments and (vii) number of Loans foreclosed upon to date and the  
17 number of pending foreclosures.

18 § 6. Assessment; Recordation of Lien; County Expenses

19 6.1 Notification of Closing: Upon the financial closing of a Project, Lender will  
20 promptly provide notice thereof to [Program Manager / Administrator], which  
21 notice shall include: (i) a statement of the Loan Amount, (ii) a copy of the  
22 Financing Agreement executed by Property Owner and Lender, (iii) a written  
23 subordination agreement with each holder of a prior mortgage or deed of trust lien  
24 on the Eligible Property, and (iv) evidence that (A) Property Owner is current on  
25 payments on loans secured by a mortgage or deed of trust lien on the Property and  
26 on property tax payments to the County, (B) Property Owner is not insolvent or  
27 subject to bankruptcy proceedings, and (C) Property Owner's title to the Eligible  
28 Property is not in dispute.

29 6.2 Recordation of Lien; Assignment: Upon receipt of such notice in Section 6.1  
30 hereof, Lender, as authorized by the County for such purposes, shall promptly  
31 Record the Certificate of Levy and Lien of Special Assessment on behalf of the  
32 County, a form of which is attached to, and made part of, Section 8.2 of this  
33 Ordinance. Promptly thereafter, Lender, as authorized by the County for such  
34 purposes, shall assign the Lien from the County to Lender, to cause Lender to be  
35 named as the holder of the Lien in the land records of the County, by Recording an  
36 Assignment of Special Assessment Lien, a form of which is attached to, and made  
37 part of, Section 8.3 of this Ordinance. Such assignment shall include only the

1 County's right, title and interest in and to the Assessment Payments and the Lien,  
2 and the County shall retain all of its other rights and remedies, including any  
3 special powers of enforcement or collection to which the County, by virtue of its  
4 status as a political subdivision of the State, is entitled or empowered to exercise  
5 under applicable laws of the State.

6 6.3 Amendment of Lien: The Lien may, in Lender’s sole discretion, be amended,  
7 after Lender disburses the Loan. To effect such amendment, Lender will Record a  
8 Confirmation and Amendment of Special Assessment Lien, a form of which is  
9 attached to, and made part of, Section 8.4 of this Ordinance; provided, however,  
10 that such amendment shall be permitted only to the extent amendments are  
11 permitted under the applicable Financing Agreement.

12 6.4 Preparation of Documentation; Expenses: Lender shall be responsible for (i)  
13 preparing all documentation in respect of the Loan, the Financing Agreement, the  
14 Lien, and any assignment or amendment of the Lien, (ii) presenting such  
15 documentation to the County prior to the Recording of any Lien or any assignment  
16 or amendment thereof, and (iii) reimbursing the County for any reasonable out-of  
17 pocket expenses incurred by the County in connection with the review, preparation  
18 or Recording of such documentation. Lender shall make such reimbursement  
19 within ten (10) days upon written demand from the County. Lender may recover  
20 any reimbursements paid to the County from Property Owner pursuant to the  
21 Financing Agreement.

22 § 7. Role of the County; Limitation of Liability

23 By executing a Financing Agreement or any other Loan Document, or otherwise  
24 participating in the Program, each Property Owner, Lender, Contractor or other  
25 party or participant acknowledges and agrees, for the benefit of the County and as  
26 a condition of participation in the Program, that: (i) the County undertakes no  
27 obligation under or in respect of any Loan Document or the Program Guide, and no  
28 implied covenants or obligations of the County shall be read into either, (ii)  
29 regardless of any default by Property Owner, the County has no obligation to make  
30 Assessment Payments to any Lender, or any other payments in respect of any  
31 Loan, including, without limitation, any fees, expenses and other charges described  
32 in any Loan Document, (iii) none of any Loan, Assessment Payment, Lien or other  
33 obligation arising from any Loan Document, the Act, or the Ordinance shall be  
34 backed by (A) any credit of the County, (B) any credit of the State or its political  
35 subdivisions, including, without limitation, the County, or (C) any taxes or  
36 governmental funds, (iv) none of any Loan, Assessment Payment, Lien or other  
37 obligation arising from any Loan Document, the Act, or the Ordinance shall  
38 constitute an indebtedness within the meaning of any constitutional or statutory

1 debt limitation or restriction, (v) the County has not made any representations,  
2 financial or otherwise, in respect of Borrower, the Property or the Project, (vi) the  
3 County makes no representation or warranty as to, and assumes no responsibility  
4 with respect to, the accuracy or completeness of any Lien, or any assignment or  
5 amendment thereof, (vii) the County assumes no responsibility or liability in  
6 respect of any Project, or the planning, construction or operation thereof, (viii)  
7 each Property Owner, Lender and Contractor shall, upon request, provide the  
8 County with any information associated with the Project or the Loan that is  
9 reasonably necessary to confirm that the Project or Loan meets all requirements of  
10 the Act, the Ordinance and the Program Guide and (ix) each Property Owner,  
11 Lender, Contractor and other participant under the Program shall comply with all  
12 applicable requirements of the Act, the Ordinance and the Program Guide.

13 § 8. Additional Provisions

14 8.1 Draft Financing Agreement: Each Financing Agreement shall be in  
15 substantially the form approved by the Program Manager, with such additions,  
16 deletions or alterations as permitted by this Ordinance.

17 8.2 Form of Certificate of Levy and Lien of Special Assessment: Each Certificate  
18 of Levy and Lien of Special Assessment shall be in the form approved by the  
19 Program Manager, with only minor variations permitted to complete the form.

20 8.3 Form of Assignment of Special Assessment Lien: Each Assignment of Special  
21 Assessment Lien shall be in the form approved by the Program Manager, with only  
22 minor variations permitted to complete the form.

23 8.4 Form of Confirmation and Amendment of Special Assessment Lien: Each  
24 Confirmation and Amendment of Special Assessment Lien shall be in the form  
25 approved by the Program Manager, with only minor variations permitted to  
26 complete the form.

27 8.5 Narrow Construction; No Precatory Sections: This Ordinance shall be narrowly  
28 construed. All portions of this Ordinance, including, without limitation, § 1  
29 (Purpose), shall have full regulatory effect and are not precatory.

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32 **BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF**  
33 **BERNALILLO COUNTY, NEW MEXICO** this \_\_\_\_ day of \_\_\_\_\_, 2018.

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1 **APPROVED AS TO FORM**

**BOARD OF COUNTY COMMISSIONERS**

2 \_\_\_\_\_  
3 W. Ken Martinez, County Attorney

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Steven Michael Quezada, Chair

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Lonnie C. Talbert, Vice Chair

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Debbie O'Malley, Member

9 **ATTEST:**

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12 Linda Stover, County Clerk

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Maggie Hart Stebbins, Member  
  
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James E. Smith, Member

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