



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

February 1, 2019

Leo P. Rogers, Esquire
Loudoun County Attorney
1 Harrison Street, S.E.
Post Office Box 7000
Leesburg, Virginia 20177-7000

Dear Mr. Rogers:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issues Presented

You ask two questions relating to Property Assessed Clean Energy (PACE) loans. You first ask whether § 15.2-958.3(B) of the Code requires a locality to assume responsibility for billing and collecting PACE loan payments on behalf of a private capital provider making the loan, or whether the local PACE ordinance may authorize these functions to be handled by the private capital provider or a third party administrator. You further ask whether, in the event of default, the private capital provider may enforce a voluntary special assessment lien on its own behalf, or whether § 15.2-958.3(E)(3) requires that such enforcement be taken only by the locality.

Background

You state that Loudoun County is considering the adoption of an ordinance to create a PACE loan program under the authority given in § 15.2-958.3. The proposed ordinance would i) allow private lending institutions ("private capital providers") to participate in the program by making loans directly to eligible property owners; ii) authorize the County to place a voluntary special assessment lien to secure each PACE loan; and iii) authorize the County to contract with third parties for professional services to administer the loan program and collect loan payments. No County funds would be used for the program, and all administrative costs would be passed to the borrowers.

Applicable Law and Discussion

Section 15.2-958.3 authorizes localities, by ordinance, to approve contracts providing PACE loans for "the initial acquisition and installation of clean energy improvements with free and willing

property owners of both existing properties and new construction.”¹ The statute requires that certain provisions be included in the ordinance but otherwise gives localities broad discretion in drafting such an ordinance.²

In construing Virginia law, “[a] principal rule of statutory interpretation is that courts will give statutory language its plain meaning.”³ Additionally, “[r]ules of statutory construction prohibit adding language to or deleting language from a statute.”⁴

1. Whether § 15.2-958.3(B) of the Code requires a locality to assume responsibility for billing and collecting PACE loan payments on behalf of a private capital provider making the loan, or whether the local PACE ordinance may authorize these functions to be handled by the private capital provider or a third party administrator.

Section 15.2-958.3(C) requires those localities that adopt PACE ordinances to “offer private lending institutions the opportunity to participate in local loan programs established pursuant to this section.”⁵ Under this unrestricted statutory direction, a local ordinance may authorize private capital providers to make PACE loans directly to qualifying property owners, secured by a financing agreement, and to service and enforce such loans through billing and collection activities. In addition, § 15.2-958.3(A)(5) expressly provides that a “locality may contract with a third party for professional services to administer [the] loan program.”⁶ Administration of the loan program by a third party administrator may include a myriad of services, as dictated by the local ordinance or agreed upon by the local governing body and the third party, such as determining whether an applicant qualifies for a PACE loan, working with such applicants to secure the loan from the private capital provider, keeping records on behalf of the local government, and if so assigned, billing and collection of the loan payments. Thus, I am of the opinion that either the private capital provider or the “third party” referenced in § 15.2-958.3(A)(5) may be directed by the local ordinance to collect a PACE loan.

2. Whether, in the event of default, the private capital provider may enforce a voluntary special assessment lien on its own behalf, or whether § 15.2-958.3(E)(3) requires that enforcement be taken only by the locality?

Section 15.2-958.3(D) allows the use of voluntary special assessment liens to secure PACE loans.⁷ The statute further provides that a voluntary special assessment lien “[m]ay be enforceable by the local government in the same manner that a property tax lien against real property may be enforced by the

¹ VA. CODE ANN. § 15.2-958.3(A) (2018). Notably, § 15.2-958.3 does not refer to clean energy improvement loans as PACE loans; however, the Virginia Department of Mines, Minerals and Energy frequently uses the term “PACE loans” in its publication entitled *Final uniform statewide financial underwriting guidelines for clean energy loans made by localities under §15.2-958.3 of the Code of Virginia*.

² Section 15.2-958.3 (“Such an ordinance shall include *but not be limited to* the following”) (emphasis added).

³ *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

⁴ *Appalachian Power Co. v. State Corp. Comm’n*, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012) (citing *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007)).

⁵ Section 15.2-958.3(C).

⁶ Section 15.2-958.3(A)(5).

⁷ Section 15.2-958.3(D).

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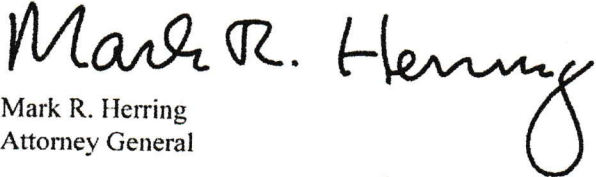
local government.”⁸ While the authority to record and enforce a special lien is granted to the local government, § 15.2-958.3 does not prohibit a locality from adopting an ordinance to allow the assignment of the special assessment lien to the private capital provider. Thus, I am of the opinion that a reasonable interpretation of the statute would allow the local governing body to assign to the private capital provider its right to record and enforce the voluntary special assessment lien, subject to such terms, conditions and restrictions the local governing body deems appropriate.

Conclusion

Accordingly, it is my opinion that localities are not required to assume responsibility for billing and collecting PACE loan payments and may contract with third party administrators or private capital providers to service PACE loans. It is my further opinion that localities may, by ordinance, assign to private capital providers the right to record and enforce the voluntary special assessment liens securing such PACE loans in the event of default.

With kindest regards, I am,

Very truly yours,


Mark R. Herring
Attorney General

⁸ Section 15.2-958.3(E)(3) (but excluding from the scope of the subsection any voluntary special assessment lien on “a residential dwelling with fewer than five dwelling units or a condominium project as defined in § 55-79.2”).