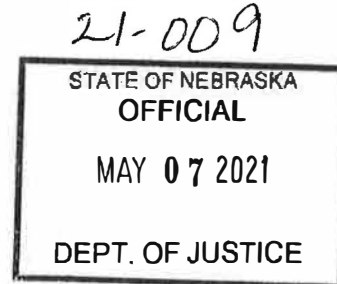




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DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: LB 228 – Whether the Property Assessed Clean Energy Act authorizes retroactive financing of eligible energy projects which have been completed.

REQUESTED BY: Senator Adam Morfeld
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Joshua E. Dethlefsen, Assistant Attorney General

INTRODUCTION

You have requested an opinion from this office about whether the current language of the Property Assessed Clean Energy (“PACE”) Act prohibits a property owner from receiving PACE financing after an otherwise eligible energy project has been completed. This relates to LB 228, which you introduced to specifically authorize PACE financing for projects that have already been completed. After a review of the current language of the PACE Act, it appears that PACE financing is not available for projects that have already been completed because the current language of the PACE Act provides for financing costs before the project begins. Our analysis supporting this conclusion is set forth below.

THE PROPERTY ASSESSED CLEAN ENERGY ACT AND LB 228

The PACE Act, Neb. Rev. Stat. § 13-3201 *et seq.*, was enacted as LB 1012 in 2016. The Act provides a mechanism by which municipalities can encourage property owners to install energy efficient projects or improvements on their property through financing that is repaid as an assessment that runs with the land. Under the PACE Act, a municipality may, after public hearing, pass a resolution or ordinance to create a clean

energy assessment district. Neb. Rev. Stat. § 13-3204. After a clean energy assessment district has been formed, the municipality may enter into an assessment contract with the owner of qualifying property within that district, as well as with a third-party lender, to finance energy projects. Neb. Rev. Stat. § 13-3205. The costs financed may include “the cost of materials and labor necessary for installation, permit fees, inspection fees, application and administrative fees, bank fees, and all other fees incurred by the owner pursuant to the installation.” Neb. Rev. Stat. § 13-3205(1). The financing is repaid through annual assessments on the property benefited by the energy project. *Id.* The annual assessments cannot exceed the weighted average useful life of the project. Neb. Rev. Stat. § 13-3204(3)(i).

Once a project has received PACE financing, a PACE lien against the qualifying property may be established. For qualifying property that is a single-family residential property, a PACE lien is automatically established. For qualifying property that is not a single-family residential property, a PACE lien may be filed once an annual assessment becomes delinquent. The owner of qualifying property must obtain “an acknowledged and verified written consent and subordination agreement executed by each mortgage holder or trust deed beneficiary stating that the mortgagee or beneficiary consents to the imposition of the annual assessment and that the priority of the mortgage or trust deed is subordinated to the PACE lien.” Neb. Rev. Stat. § 13-3205(2)(a).

The PACE Act was subsequently amended in 2017 by LB 625 and LB 23 in 2019. Notably, LB 23 originally sought to make retroactive financing available for PACE projects but those provisions were removed by a committee amendment.

LB 228, introduced by you, would make explicit that PACE financing is authorized for projects that have already been completed.

DISCUSSION

Statutory Analysis

You have asked whether the current language of the PACE Act allows for retroactive financing of otherwise eligible projects. “In discerning the meaning of a statute, a court determines and gives effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.” *Farmers Coop. v. State*, 296 Neb. 347, 354, 893 N.W.2d 728, 735 *opinion modified on denial of reh’g*, 297 Neb. 132, 898 N.W.2d 674 (2017).

There is no specific language in the PACE Act authorizing retroactive financing for eligible projects. There are, however, indications from the text that the purpose of the Act is to provide an incentive for property owners to use energy efficient options in situations where the cost might otherwise be prohibitive. Neb. Rev. Stat. § 13-3202, which contains the legislative findings for the PACE Act, provides that “[t]he upfront costs for energy efficiency improvements and renewable energy systems prohibit many property owners from making improvements. Therefore, it is necessary to authorize municipalities to

implement an alternative financing method through the creation of clean energy assessment districts.” *Id.* at (3). If the PACE Act is meant to address these prohibitive upfront costs, PACE financing would necessarily have to be made available prior to the project beginning. Making PACE financing available for projects that have already been completed would not further the purpose of the Act because those upfront costs were presumably already financed in some other way.

Further, the process to obtain PACE financing seems to envision the process taking place prior to the project beginning. One part of this process is the assessment contract between the municipality and the property owner. The statutory requirements for the assessment contract indicate that the assessment contract was meant to be in place prior to the project beginning. Neb. Rev. Stat. § 13-3205(3)(a) provides that an assessment contract must include, “[a] description of the energy project, including the estimated cost of the energy project and a description of the estimated savings in accordance with standards acceptable to the municipality.” (emphasis added). In addition, the assessment contract must include “[a] mechanism for . . . [v]erifying the final costs of the energy project upon its completion.” *Id.* at (b)(1). Because the statute requires that the assessment contract include “estimated costs” and “estimated savings,” as well as a mechanism for future verification of the costs of the project, the assessment contract is clearly meant to be entered into before the costs and savings are known and before verification of final costs is possible.

A municipality that creates a clean energy assessment district is also required to report to the Urban Affairs Committee of the Legislature “[t]he total dollar amount of energy projects undertaken pursuant to the act.” Neb. Rev. Stat. § 13-3211(1)(b). The language “undertaken pursuant to the act” seems to refer to projects that were entered into because of the act, rather than projects that were already completed but retroactively financed by the act. Given the legislative findings, as well as the phrasing in various parts of the act, it appears that PACE financing was meant to be used before the project was completed.

It is also important to consider what is not found in the statute. “The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.” *Stewart v. Nebraska Dept. of Revenue*, 294 Neb. 1010, 1019-20, 885 N.W.2d 723, 730 (2016). If retroactive financing were envisioned by the PACE Act, it would be reasonable to expect that the provisions would specifically provide for retroactive financing of projects. As stated, there is no specific authorization for retroactive financing of PACE eligible projects. There are also no broader provisions regarding how financing would work if the project were already completed, particularly with regard to how the financing would be adjusted to account for the shorter life span of the project. Although not in itself determinative, the PACE Act’s silence on these questions is indicative that retroactive financing was not intended by the PACE Act.

For these reasons, we do not believe PACE financing is currently authorized for projects that have already been completed.

Legislative History

Based on the foregoing analysis, we do not believe the plain language of the PACE Act is ambiguous. However, if a court were to determine it was ambiguous, a court may look to legislative history to ascertain its meaning. See *State v. McColery*, 301 Neb. 516, 522, 919 N.W.2d 153, 158 (2018) (“An appellate court can examine an act’s legislative history if a statute is ambiguous or requires interpretation.”). An examination of the legislative history supports our opinion that retroactive financing is not authorized by the PACE Act.

As stated, the PACE Act was originally enacted by LB 1012 in 2016 and was subsequently amended in 2017 and 2019. The legislative history of LB 1012 appears to support the idea that the PACE program was originally meant as an upfront incentive.

The Urban Affairs Committee Statement provides, in relevant part:

LB 1012 would adopt the Property Assessed Clean Energy (PACE) Act. PACE is a financing mechanism that allows municipalities to finance the up-front costs of energy efficiency and renewable energy improvements on commercial, industrial, and residential properties.

Committee Records on LB 1012, 104th Neb. Leg., 2nd Sess. (Committee Statement) (February 9, 2016). In introducing the bill at the committee hearing, Senator Mello stated that:

While energy efficient improvements can significantly decrease a property’s energy use, and therefore the owner’s utility bills, they often require high upfront costs to install. This is a significant hurdle for many families and many business owners in Omaha but across cities across the state [sic].

Committee Records on LB 1012, 104th Neb. Leg., 2nd Sess. 18 (Transcript of the Urban Affairs Committee Hearing) (February 9, 2016). During the hearing, Senator Mello offered similar comments in response to a question from Senator Ebke:

SENATOR EBKE: I have a question. Let’s say that this goes into place and somebody wants to put \$10,000 of new windows into their home. Where does the money come from, because I would think that the contractors would want the money up front. So where does that money come from?

SENATOR MELLO: The concept, Senator Ebke, is that municipalities have to create essentially a special district. And the municipality helps facilitate the financing for these projects through bond financing with the banking industry. So to some extent, the city is going to help secure the up-front funding for property owners who wish to enter into this program, to pay for those upgrades to the property.

Id. at 19. These statements are consistent with the Legislative Findings that the PACE Act was meant to provide financing before a project began, not after it had been completed.

The legislative history for LB 23 in 2019 is clearer that retroactive financing is not authorized by the PACE Act. LB 23, as introduced by Senator Kolterman, specifically sought to make retroactive PACE financing available. See LB 23, 106th Neb. Leg., 1st Sess. (2016) (Introduced Bill). However, all of the language relating to retroactivity was removed by a committee amendment. See AM 795 to LB 23, 106th Neb. Leg., 1st Sess. (2016); Floor Debate on LB 23, 106th Neb. Leg., 1st Sess. 33-34 (April 8, 2019) (Statement of Sen. Wayne). (“First, the bill originally would have authorized the use of PACE financing to retroactively finance energy improvements and renewable energy systems that were already in place. . . . AM795 makes two primary changes. First, the amendment eliminates the retroactivity of financing provisions of the – from the green copy.”). Before advancing the bill to Enrollment and Review, Senator Kolterman sought clarification of why the provisions relating to retroactive financing were removed.

KOLTERMAN: Senator, this bill is very clean, except I have – I need your opinion just so we get something on the record. Under the PACE Act as we amended it in LB23, when would a developer have to apply for PACE financing on a particular project? And are there specific application deadlines in statute? Are they set by the local government? And how does all that work? I ask this because we’re clarifying that and I want to make sure people understand it.

WAYNE: Thank you, Senator Kolterman. The green copy of LB23 contained provisions that would have authorized the use of PACE to retroactively finance energy efficiency improvements and renewable energy systems that were already in place. Because that provision was specifically removed from LB23 with the adoption of AM795 on General File, I believe the intent of the Legislature is abundantly clear that we do not – or we did not intend to authorize retroactive PACE financing.

Floor Debate on LB 23, 106th Neb. Leg., 1st Sess. 24-25 (April 23, 2019) (emphasis added). The Legislature voted to adopt the committee amendment after Senator Wayne’s initial comments and voted to advance the bill after the exchange between Senator Kolterman and Senator Wayne.

We recognize that legislative history is not always a clear indicator of legislative intent and that the statements of one senator, even the introducing senator, are not necessarily indicative of the intent of the body. In that light, the legislative history of LB 1012 is helpful but not necessarily definitive. The legislative history of LB 23, however, is much stronger – the committee introduced an amendment that specifically removed provisions related to retroactive financing and the Legislature as a whole adopted that amendment after being specifically apprised of the change, ultimately passing the amended bill to change other aspects of the PACE Act. We think this is a clear indication of legislative intent.

CONCLUSION

The PACE Act does not directly address the question of whether retroactive financing is available for otherwise eligible projects that have already been completed. However, the Act indicates that PACE financing is meant to be used as an incentive to choose energy efficient options and the statutory procedure seems to envision the financing taking place before a project begins, rather than after completion. We do not believe the statute is ambiguous. If it were found to be ambiguous, we believe the legislative history is sufficiently clear to conclude that retroactive financing was not authorized by the Legislature.

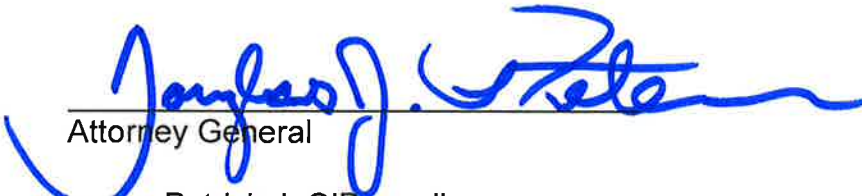
Very truly yours,

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Approved by:



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