C-PACE Governing Body Participation Agreement

THIS C-PACE GOVERNING BODY PARTICIPATION AGREEMENT (the "**Agreement**") is made and entered into as of the ____ day of _____, 2018, by and between _____, a body corporate and politic of the State of Utah (the "**Governing Body**"), and the **GOVERNOR'S OFFICE OF ENERGY DEVELOPMENT (OED)**, an independent body corporate and politic of the State of Utah responsible for the C-PACE District established under Utah Code Ann. § 11-42a (2017) (the "**Statute**") (each a "**Party**" and collectively the "**Parties**").

RECITALS

WHEREAS, Section 11-42a-103 of the Utah Code established commercial property assessed clean energy financing in the State of Utah; and,

WHEREAS, Section 11-42a-106 of the Utah Code established the "**C-PACE District**," and OED, through the C-PACE District facilitates financing for eligible building improvements to commercial, mining, manufacturing, public/private club, lodging, industrial, agricultural, and multifamily properties (with five or more rentable units) by using an Assessment to provide security for repayment of the financing. OED may delegate its powers under this chapter to a third party to assist in administering and directing the operation of the C-PACE District; and,

WHEREAS, Section 11-42a-106 of the Utah Code directs OED to "establish and administer" the C-PACE District, but stipulates that the C-PACE District may only operate within the jurisdiction of the Governing Body if the _____ Council (the "**Council**"), acting in its capacity as the Governing Body, has made a written request to OED authorizing OED to create energy assessment areas, as defined in Section 11-42a-102(10) of the Utah Code, and to finance improvements within each energy assessment area (the "**Request**"); and,

WHEREAS, the Request takes the form of a resolution authorizing OED to conduct the C-PACE District within the Governing Body and authorizing the Governing Body to enter into this Agreement with OED; and,

WHEREAS, the Council has formally made a Request through the adoption of the resolution set forth in Exhibit A, which is attached hereto and incorporated into this Agreement by this reference;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements set forth herein and in order to effectuate the purposes of the Statute, it is hereby agreed as follows:

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Section 1. Definitions

(a) "**Assessment**" means a voluntary energy assessment, as defined in Section 11-42a-102 of the Utah Code.

(b) "**Energy Assessment Lien**" means a lien on property within an energy assessment area authorized by the Statute, as further defined in Section 11-42a-102 of the Utah Code.

(c) "**Commercial Building**" means any commercial or industrial real property, including residential buildings containing five or more dwelling units for rent, as further defined in Section 11-42a-102 of the Utah Code.

(d) "**Eligible Improvements**" means one or more publicly or privately owned energy efficiency upgrade, renewable energy system, battery storage system, electric vehicle charging infrastructure, vertical transport device, and/or seismic upgrade, made to Participating Property, as specified in the Statute.

(e) "**Owner**" means the owner of the Participating Property.

(f) "**Participating Property**" means a Commercial Building that (a) directly benefits from Eligible Improvements, (b) whose owner has voluntarily consented to its inclusion within the energy assessment area, and (c) is located within an energy assessment area.

(g) "**Program Guide**" means the rules and regulations promulgated by OED to implement the C-PACE District pursuant to the Statute, as the same may be amended or supplemented from time to time.

Section 2. Obligations of OED.

(a) Program Requirements.

Pursuant to the Statute, OED:

(1) shall develop a Program Guide that governs OED's administration of the C-PACE District. OED may serve as a facilitator for the purpose of securing third-party financing for Eligible Improvements pursuant to the Statute; and

(2) shall receive and review applications submitted by Owners of Participating Properties for financing of Eligible Improvements, and approve or disapprove such applications in accordance with the Statute.

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(b) Application Requirements.

If an Owner makes an application for financing through the C-PACE District for Eligible Improvements under the Statute, OED shall review the application against the requirements in Statute.

(c) Assessment and Financing Agreement.

The party providing the financing (the "**Capital Provider**") may enter into an Assessment and Financing Agreement with the Owner of Participating Property (the "**Assessment & Financing Agreement**"). The Assessment & Financing Agreement shall clearly state the amount of the Assessment to be levied against the Participating Property. OED and the Capital Provider shall disclose to the Owner the costs and risks associated with participating in the C-PACE District, including risks related to the failure of the Owner to pay the Assessment provided for in the Assessment & Financing Agreement. The Capital Provider shall disclose to the Owner the effective interest rate on the Assessment, including other fees and charges imposed by OED to administer the C-PACE District as well as any fees charged by the Capital Provider. The Owner must be informed that each Eligible Improvement, regardless of its useful life, may be bundled with other such improvements on the Participating Property for purposes of Assessment and paid for over the Assessment term.

(d) Establish Assessments and Assessment Units.

With respect to each Assessment placed on a Participating Property, OED shall determine from the Capital Provider and Owner the amount of the Assessment. OED shall approve the specifics of the applicable Assessment including, without limitation, the amount of the Assessment, term, interest rate, and repayment dates in accordance with the Statute. In no event shall the amount of any Assessment exceed the value of: (a) the Assessment benefit provided to the Participating Property, or (b) the Participating Property, as provided in the Statute. Costs incurred for any property not approved to participate in the C-PACE District may not be included in a certified Assessment roll.

(e) Filing Assessment with Applicable County Clerk or Recorder.

Upon the execution of an Assessment & Financing Agreement, the Capital Provider shall be responsible, in collaboration with the County, to (i) file and record such Energy Assessment Lien in the public land records of the County, (ii) assign such lien, and (iii) amend such lien from time to time.

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Section 3. Obligations of the Governing Body.

(a) Promotion of Program; Assistance to the C-PACE District.

The Governing Body shall use good faith efforts to assist OED in marketing efforts and outreach to the local business community to encourage participation in the C-PACE District, such as including C-PACE District information on the Governing Body's website, distributing an informational letter from appropriate Governing Body officials to local businesses regarding the program, and conducting one or more business roundtable events.

Section 4. Obligations of the Capital Provider.

(a) Billing and Collection of Assessments.

Upon assignment of the Energy Assessment Lien to the Capital Provider, the Owner shall make all Assessment payments directly to the Capital Provider pursuant to the Assessment & Financing Agreement, and the Capital Provider shall be responsible, subject to and in accordance with the terms of the Assessment & Financing Agreement, for all billing, collection, enforcement, and administrative duties with respect to each of the Assessment payments and the Energy Assessment Lien.

Section 5. Term and Termination.

The term of this Agreement shall commence upon the date first written above. This Agreement shall be in full force and effect until all of the Assessments have been paid in full or deemed no longer outstanding. As authorized by the Statute, the Council may adopt a resolution de-authorizing OED from administering the C-PACE District within its jurisdiction. If the Council adopts a de-authorizing resolution, the Governing Body shall continue to meet all of its obligations under this Agreement and the Statute, as to all Assessment obligations existing on the effective date of the de-authorizing resolution until any and all outstanding Assessments have been paid in full and remitted to the Capital Provider.

Section 6. Default.

Each Party shall give the other Party written notice of any breach of any covenant or term of this Agreement and shall allow the defaulting Party thirty (30) calendar days from the date of its receipt of such notice within which to cure any such default or, if it cannot be cured within the thirty (30) days, to commence and thereafter diligently pursue to completion, using good faith efforts to effect such cure and to thereafter notify the other Party of the actual cure of any such default. The Parties shall have all other rights and remedies provided by law, including, but not limited to, specific performance.

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Section 7. Miscellaneous Provisions.

(a) Amendment and Termination.

After a Capital Provider provides funds to finance the costs of any Eligible Improvement, this Agreement may not be amended or terminated by the Parties without the prior notification of the holders of the Energy Assessment Lien.

(b) Severability.

If any clause, provision or section of this Agreement is held to be illegal or invalid by any court, the invalidity of the clause, provision, or section shall not affect the remaining clauses, provisions or sections, and this Agreement shall be construed and enforced as if the illegal or invalid clause, provision, or section had not been contained in it.

(c) Counterparts.

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which together shall constitute but one and the same instrument.

(d) Notices.

All notices, requests, consents and other communications shall be in writing and shall be delivered, mailed by first class mail, postage prepaid, or overnight delivery service, to the Parties, as follows:

If to the Governing Body:

_____ Governing Body
c/o Board of Governing Body Commissioners
_____
_____

With a Copy to:

Governing Body Attorney
_____ Governing Body
_____
_____

If to OED:

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C-PACE District
c/o Utah Governor's Office of Energy Development
P.O. Box 144845
Salt Lake City, UT 84114
Attention: Shawna Cuan

With a Copy to:
Brian McCarter, Sustainable Real Estate Solutions, Inc. (SRS)
100 Technology Drive, Suite 209
Trumbull, CT 06611
bmccarter@paceworx.com

(e) Amendment.

Except as otherwise set forth in this Agreement, any amendment to any provision of this Agreement must be in writing and mutually agreed to by OED and the Governing Body.

(f) Applicable Law and Venue.

This Agreement and its provisions shall be governed by and construed in accordance with the laws of the State of Utah. In any action, in equity or law, with respect to the enforcement or interpretation of this Agreement, venue shall be in the district court of the Governing Body, the State of Utah.

(g) Entire Agreement.

This Agreement constitutes the entire understanding between the Parties and supersedes all previous discussions, understandings, and agreements between the Parties relating to the subject matter of this Agreement. In the event of any conflict between the Program Guide and this Agreement, the terms of this Agreement shall control.

(h) Headings.

The headings in this Agreement are solely for convenience, do not constitute a part of this Agreement and do not affect its meaning or construction.

(i) Changes in Law or Regulation.

This Agreement is subject to such modifications as may be required by change in federal or Utah

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state law, or their implementing regulations. Any such required modification shall automatically be incorporated into and made a part of this Agreement on the effective date of such change, as if fully set forth herein.

(j) Third-Party Beneficiaries.

It is specifically agreed among the Parties executing this Agreement that it is not intended by any of the provisions of any part of this Agreement to create a third-party beneficiary hereunder, or to authorize anyone not a party to this Agreement to maintain any claim under this Agreement. The duties, obligations and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed by law.

(k) No Waiver of Rights.

A waiver by any Party to this Agreement of the breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by either Party.

(l) No Waiver of Governmental Immunity.

Nothing in this Agreement shall be construed to waive, limit, or otherwise modify any governmental immunity that may be available by law to the Governing Body or to OED, their officials, employees, contractors, or agents, or any other person acting on behalf of the Governing Body or OED.

(m) Independent Entities.

The Parties shall perform all services under this Agreement as independent entities and not as an agent or employee of the other Party. It is mutually agreed and understood that nothing contained in this Agreement is intended, or shall be construed as, in any way establishing the relationship of co-partners or joint ventures between the Parties hereto, or as construing either Party, including its agents and employees, as an agent of the other Party. Each Party shall remain an independent and separate entity. Neither Party shall be supervised by any employee or official of the other Party. Neither Party shall represent that it is an employee or agent of the other Party in any capacity.

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IN WITNESS WHEREOF, the Governing Body and OED have each caused this Agreement to be executed and delivered as of the date indicated above:

GOVERNING BODY OF _____

By: _____

_____

Chair

Governing Body Council

Attest:

_____

Clerk to the Board

APPROVED AS TO FORM:

_____

Governing Body Attorney

UTAH GOVERNOR'S OFFICE OF ENERGY DEVELOPMENT

By: _____

Laura Nelson, Executive Director

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Exhibit A

Governing Body Resolution

RESOLUTION 2018

A Resolution Concerning the Authorization of OED to Conduct the Commercial Property Assessed Clean Energy District (C-PACE District), within _____ Governing Body ("Governing Body")

RECITALS

A. Utah Code Ann. § 11-42a (2017) (the "**Statute**") establishes the **GOVERNOR'S OFFICE OF ENERGY DEVELOPMENT (OED)**, an independent body corporate and politic of the State of Utah and establishes the "**C-PACE District**" and further provides for the creation of new energy improvement financing, which OED has named "C-PACE" or Commercial Property Assessed Clean Energy.

B. Pursuant to Section 11-42a-106 of the Utah Code, OED may only "establish and administer" the C-PACE District in each jurisdiction upon a request by the Governing Body of that jurisdiction to EOD To create an energy assessment area and finance an improvement within that energy assessment area.

C. The Governing Body Council (the "**Council**"), acting as the Governing Body of _____, wishes to request and authorize OED to administer projects through the C-PACE District in the Governing Body.

D. OED and the Governing Body have agreed on the terms of the C-PACE Governing Body Participation Agreement in the form attached hereto (the "**Participation Agreement**").

NOW, THEREFORE, BE IT RESOLVED, by the Council of the Governing Body, as follows:

Section 1. The Council hereby authorizes OED to create within the Governing Body energy assessment areas in accordance with Title 11, Chapter 42(a) of the Utah Code to enable the financing by third-party lenders of eligible improvements within designated energy assessment areas.

Section 2. The Council hereby authorizes OED to establish and administer the C-PACE District within the Governing Body in accordance with the Participation Agreement.

Section 3. The Governing Body hereby: (a) adopts the above recitations as findings of the Council; (b) authorizes the Governing Body Attorney, in consultation with the Council Chair, to make such changes as may be needed to the Participation Agreement in order to correct any nonmaterial errors or language that do not materially increase the obligations of the Governing Body; (c) authorizes the Council Chair to execute the Participation Agreement following review and approval by the Governing Body Attorney; and (d) authorizes the Chair, Vice Chair, or designee to execute any and all other necessary letters, orders, or documents as may be required to facilitate the successful implementation of the C-PACE District in the Governing Body.

ADOPTED on this ___ day of _____, 2018.

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GOVERNING BODY of _____:

_____

Chair

_____

Vice Chair

_____

Commissioner

ATTEST:

_____

Clerk to the Board

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