

New Castle County D-PACE Participation Agreement

THIS COUNTY D-PACE PARTICIPATION AGREEMENT (the “**Agreement**”) is made and entered into as of the tenth day of September, 2019, by and between **NEW CASTLE COUNTY**, a body corporate and politic of the State of Delaware (the “**County**”), and **SUSTAINABLE ENERGY UTILITY, INC.**, a non-profit corporation created by Delaware statute, d/b/a Energize Delaware (“**DESEU**”), which is responsible for the program administration of the Delaware Voluntary Clean Energy Financing Program Based on Property Assessments or other Local Assessments (the “**Commercial Property Assessed Clean Energy Program**” or “**D-PACE Program**”) established under Delaware Code Title 29, Chapter 80, Subchapter II (known as the Delaware Energy Act) (the “**Statute**”) (County and DESEU each a “**Party**” and collectively the “**Parties**”).

RECITALS

WHEREAS, the Statute establishes commercial property assessed clean energy financing in the State of Delaware; and

WHEREAS, D-PACE is a program to facilitate financing for eligible clean energy improvements to qualifying commercial, industrial, agricultural, and multifamily housing (containing five or more dwelling units), non-profit and agricultural properties by using a voluntary benefit assessment to provide security for repayment of the financing; and DESEU may delegate its powers under this chapter to a third party to assist in administration of the D-PACE Program; and

WHEREAS, the Statute directs DESEU to establish and administer the D-PACE Program but stipulates that the D-PACE Program may only operate if the County has adopted a resolution authorizing DESEU to conduct projects in their jurisdiction; and

WHEREAS, the Statute requires the County to enter into a written agreement, approved by its legislative body, with the D-PACE Program pursuant to which the County has agreed to levy benefit assessments for qualifying energy improvements for benefitted commercial property owners within the County; and

WHEREAS, the County has adopted a resolution in a form previously approved by DESEU, authorizing DESEU to conduct the D-PACE Program within the County and authorizing the County to enter into this Agreement with DESEU.

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:

Section 1. Definitions

(a) **“Benefit Assessment”** means a voluntary property assessment or other government service fee assessment under the Statute, which is the mechanism through which a commercial property owner repays the financing for qualifying energy improvements.

(b) **“Commercial Property”** means any real property other than a residential dwelling containing less than five dwelling units.

(c) **“Qualifying Energy Improvements”** means any construction, renovation or retrofitting of energy efficient technology, clean energy systems, or qualifying waste heat recovery technologies that are permanently fixed to qualifying commercial real property.

(d) **“Qualifying Commercial Real Property”** means any commercial property located in New Castle County, State of Delaware, regardless of ownership, that meets the qualifications established for the D-PACE Program.

(e) **“Program Guide”** means the document promulgated by DESEU containing the terms and conditions to implement the D-PACE Program pursuant to the Statute, as the same may be amended or supplemented from time to time.

(f) **“Tax Sale”** means an action brought by the applicable Capital Provider (defined below) using the method of sale pursuant to 9 Del. C. § 8741 et seq. (“Collection of Delinquent Taxes”). “Tax Sale” shall not be deemed to include a monition sale pursuant to 9 Del. C. § 8721 et seq.

Section 2. Obligations of DESEU.

(a) Program Requirements.

Pursuant to the Statute, DESEU:

- (1) shall develop a Program Guide that governs DESEU’s administration of the D-PACE Program; which provides recommended best practices to D-PACE stakeholders;
- (2) may serve as a facilitator for the purpose of securing state or private third-party financing for Qualifying Energy Improvements pursuant to the Statute; and
- (3) shall receive and review applications submitted by property owners within the County for financing of Qualifying Energy Improvements, and approve or disapprove such applications in accordance with the Statute and Program Guide.

(b) Project Requirements.

If a property owner requests financing through the D-PACE Program for improvements under the Statute, DESEU shall review the project application against the requirements in the Statute and Program Guide.

(c) Assessment and Financing Agreement for Project.

The party providing the financing (the “**Capital Provider**”) may enter into an Assessment and Financing Agreement with the owner of the Qualifying Commercial Real Property (the “**Assessment & Financing Agreement**”). The Assessment & Financing Agreement shall clearly state the amount of the voluntary Benefit Assessment to be levied against the Qualifying Commercial Real Property. The Capital Provider shall disclose to the property owner the costs and risks associated with participating in the D-PACE Program, including risks related to the failure of the property owner to pay the voluntary Benefit Assessment provided for in the Assessment & Financing Agreement. The Capital Provider shall disclose to the property owner the effective interest rate on the voluntary Benefit Assessment, including other fees and charges imposed by DESEU to administer the D-PACE Program as well as any fees charged by the Capital Provider or the County. The property owner must be informed that each Qualifying Energy Improvement, regardless of its useful life, may be bundled with other such improvements on the Qualifying Commercial Real Property for purposes of assessment and paid for over the assessment term.

(d) Establish Voluntary Benefit Assessments and Assessment Units.

Promptly upon receipt of each executed Assessment and Financing Agreement from each Capital Provider, DESEU shall determine from the Capital Provider and property owner the amount of the voluntary Benefit Assessment for such financing and instruct the County to levy such voluntary Benefit Assessment on the applicable Qualifying Commercial Real Property on the property owner’s next tax bill. DESEU shall approve the specifics of the applicable voluntary Benefit Assessment including, without limitation, the amount of the voluntary Benefit Assessment, term, interest rate and repayment dates in accordance with the Statute and Program Guide. In no event shall the amount of any voluntary Benefit Assessment exceed the value of: (a) the voluntary Benefit Assessment benefit provided to the Qualifying Commercial Real Property, or (b) the Qualifying Commercial Real Property. Costs incurred for any property not approved to participate shall not be included in a certified assessment roll.

(e) Assignment of Liens to DESEU.

Pursuant to 29 Del. C. § 8061(d)(7)a., by this Agreement the County hereby assigns to DESEU all liens for Benefit Assessments now existing and hereafter arising from time to time with respect to all Qualifying Commercial Real Property levied by operation of 29 Del. C. § 8061(d)(6); including without limitation all its rights or remedies, including any powers of enforcement or collection to which the County, by virtue of its status as a local governing body of the State of Delaware, is entitled or empowered to exercise under applicable laws of the State of Delaware with respect to Benefit Assessments.

(f) Filing Notice of Assessment with Office of the Recorder of Deeds.

Upon the execution of an Assessment & Financing Agreement, DESEU will cause the Capital Provider to file and record a notice of such Benefit Assessment lien in the Office of the Recorder of Deeds in and for the County substantially in the form of Exhibit A attached hereto as a part hereof, and (ii) assign such lien to the Capital Provider for no additional consideration pursuant to an assignment that may to be recorded at Capital Provider's option substantially in the form of Exhibit B attached hereto as a part hereof. The County hereby agrees not to object to or challenge the recordation of such notice and assignment.

(g) Extension of Benefit Assessment Liens.

The Benefit Assessment lien established pursuant to 29 Del. C. § 8061(d)(6) shall not be subject to expiration pursuant to 9 Del. C. § 8705.

(h) Deadline for Submission of List of Benefit Assessments

DESEU shall provide the County a list of Benefit Assessments, including the property owner's name, address, parcel number, and the amount to be billed, by June 15th preceding the tax billing year. In addition, the list shall provide a contact person to address any questions for the owner or third party not related to billing. The list shall be provided in electronic (.xlsx) format. The County will bill Benefit Assessments for the following tax billing year based on such list provided by DESEU. Failure to provide such list by the June 15th deadline may result in exclusion of the Benefit Assessments from the next year's tax bill or additional charges for including the Benefits Assessments in the next year's tax bill.

Section 3. Obligations of the County.

(a) Promotion of Program; Assistance for D-PACE Financing.

The County may, if it chooses to do so, use good faith efforts to assist DESEU in marketing efforts and outreach to the local business community to encourage participation in the D-PACE Program, such as including D-PACE Program information on the County's website.

(b) Billing and Collection of Benefit Assessments.

The County shall levy the Benefit Assessments and assign its lien rights to the Benefit Assessments only to DESEU. The County shall bill the Benefit Assessments in the same manner and at the same time as it bills its annual real property taxes. For each tax year, the County shall only be required to bill Benefit Assessments for which the County has received instructions from DESEU (as program administrator) to levy the Benefit Assessments prior to June 15th immediately preceding such tax year. The Benefit Assessments shall be a separate clearly-defined line item and shall be due on the same date as the County's annual real property taxes.

Benefit Assessment amounts shall be collected in the same manner and at the same time as the annual property taxes of the County on real property, including, in the event of default or delinquency, with respect to any penalties, fees and remedies, and lien priorities. To the extent the full amount of Benefit Assessments, County taxes, and school taxes are not received, the amounts received shall be applied in accordance with policy of the Office of Finance and in accordance with the priority provisions of 29 Del. C. § 8061(d)(6)a.

The County shall remit to DESEU all amounts collected with respect to the Benefit Assessments by the thirtieth (30th) of the month following the month in which the Benefit Assessment was collected, less any County collection fees. DESEU shall be responsible for remitting the Benefit Assessment collections to the appropriate Capital Providers. The County will provide periodic collection reports to DESEU as agreed to by the Parties.

DESEU will reimburse the County for any reasonable, one-time expenses that are incurred by the County to participate in the D-PACE Program. An example of such expenses may include the modification to the County's property tax billing and collections software to enable processing of D-PACE assessment billing and collections.

(c) Fees for Billing and Collection of Benefit Assessments.

The County shall receive a one-time servicing fee, as defined in the fee schedule attached hereto as Exhibit C, for each Qualifying Commercial Real Property that the County maintains

responsibility for Benefit Assessment billing and collections.

(d) Collection of Delinquent Payments.

In the event that any property owner fails to make a Benefit Assessment payment when due in any property tax billing cycle, the County shall provide written notice to DESEU of such delinquency in a reasonably timely manner. After providing such notice to DESEU, the County has no obligation to collect the delinquent Benefit Assessment payment. The County shall not interfere with or challenge a Tax Sale in the name of the Capital Provider as assignee of the Benefit Assessment lien pursuant to 29 Del. C. § 8061(d)(7)c.

(e) Notice of Real Estate Tax Sale.

The County will provide written notice to DESEU of any institution of a tax monition sale pursuant to 9 Del. C. § 8721 et seq. or other proceeding against any Qualifying Commercial Real Property for delinquent real property taxes and/or sewer service charges only. The County hereby acknowledges and agrees that a foreclosure pursuant to a tax monition sale brought for delinquent real property, school taxes, sewer charges and/or code liens shall not extinguish the lien of the Benefit Assessment, pursuant to 29 Del. C. § 8061(d)(6)b, and the Benefit Assessment shall have priority over all other liens when petitioning the Superior Court for payment of any surplus proceeds.

Section 4. 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 voluntary Benefit Assessments have been paid in full or deemed no longer outstanding.

Section 5. 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.

Section 6. Miscellaneous Provisions.

(a) Amendment and Termination.

After a Capital Provider provides funds to finance the costs of any D-PACE project, this Agreement may not be amended or terminated by the Parties without the prior notification of the holders of the assignable lien. Any amendment to any provision of this Agreement must be in writing and mutually agreed to by DESEU and the County.

(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 will not affect the remaining clauses, provisions or sections, and this Agreement will be construed and enforced as if the illegal or invalid clause, provision or section has not been contained in it.

(c) Counterparts; Electronic Signature.

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. Electronic signatures and photocopies or facsimile copies of signatures shall be deemed to have the same force and effect as originals.

(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 County:

**Chief Financial Officer
New Castle County
87 Reads Way
New Castle, DE 19720**

With a Copy to:

**County Attorney
New Castle County
87 Reads Way
New Castle, DE 19720**

If to DESEU:

D-PACE Program Administrator
c/o Delaware Sustainable Energy Utility, Inc.
500 West Loockerman Street, Suite 400
Dover, DE 19904
Attention: Anthony (Tony) DePrima, Ph.D.
Executive Director

With a Copy to:

Brent C. Shaffer, Esquire
Young Conaway Stargatt & Taylor, LLP
Rodney Square
1000 N. King Street
Wilmington, DE 19801

(e) Applicable Law and Venue.

This Agreement and its provisions shall be governed by and construed in accordance with the laws of the State of Delaware. In any action, in equity or law, with respect to the enforcement or interpretation of this Agreement, venue shall be in the courts of the State of Delaware located in the County.

(f) Entire Agreement.

This instrument constitutes the entire agreement 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.

(g) 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.

(h) Changes in Law or Regulation.

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

(j) 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.

(k) 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 County or to DESEU, their officials, employees, contractors, or agents, or any other person acting on behalf of the County or DESEU.

(l) 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.

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

NEW CASTLE COUNTY

By:  _____

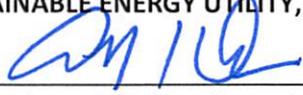
Matthew Meyer, County Executive

APPROVED AS TO FORM ONLY:

/s Sanjay Bhatnagar _____

Assistant County Attorney

SUSTAINABLE ENERGY UTILITY, INC.

By:  _____

Anthony DePrima, Executive Director

EXHIBIT A

Tax Parcel No: _____

Prepared by and return to:

NOTICE OF COUNTY D-PACE BENEFIT ASSESSMENT LIEN

NOTICE IS HEREBY GIVEN by New Castle County, a body corporate and politic of the State of Delaware (the "County") that it has levied a Delaware Voluntary Property Assessed Clean Energy Program benefit assessment lien by operation of 29 Del. C. § 8061(d)(6) on that certain property located in New Castle County known as _____ and further identified as New Castle County tax parcel _____ and described more particularly in **Schedule I** attached hereto as a part hereof (the "Property"). The Property is qualifying commercial real property under the Delaware Voluntary Clean Energy Financing Program Based on Property Assessments (D-PACE) or Other Local Assessments established pursuant to 29 Del. C. § 8061 (the "Act"), situated in the County and owned on the date hereof in whole or in part by _____ [and _____] ("Property Owner"). Said levy and lien shall secure the repayment of a loan to finance one or more qualifying energy improvements under the Act, disbursed pursuant to that certain Financing Agreement between Property Owner and _____ (the "Lender") dated as of _____, as it may be amended pursuant to the terms thereof (the "Financing Agreement"). This levy and lien are made in accordance with the Financing Agreement and are subject to the terms and conditions of the Financing Agreement and the Act. Upon the transfer or conveyance of the Property, each subsequent owner of the Property, by accepting title to the Property, assumes and agrees to perform all of the obligations and covenants set forth herein and in the Financing Agreement and each other document referenced therein, including, without limitation, making the installment payments described below, from and after the date such owner acquires title to the Property. The amount and repayment of said levy and lien are as set forth in the attached **Schedule II**, which shall control in the case of any conflict between such exhibit and the Financing Agreement. In the event that any such installment shall remain unpaid after the same shall become due and payable, interest and other charges shall be charged upon the unpaid installment(s) at the lesser of (a) such rate provided for in the Financing Agreement or (b) the maximum per annum rate permitted under Delaware law. At such time as the payments of the special assessment have been satisfied and paid in full, Lender shall file termination of this Notice in the Office of the Recorder of Deeds in and for New Castle County.

This Notice evidences a lien for the energy assessment levied upon the Property for the special benefits conferred upon said Property by the installation of one or more qualifying energy improvements. Pursuant to the Act, this lien shall have the same priority status as a lien for taxes of the County on real property. This Notice and the levy and lien set forth herein shall run with

SCHEDULE I

DESCRIPTION OF PROPERTY

SCHEDULE II

SPECIAL ASSESSMENT PAYMENT SCHEDULE

Exhibit B

Tax Parcel No: _____

Prepared by and return to:

ASSIGNMENT OF ENERGY ASSESSMENT LIEN

KNOW ALL PERSONS BY THESE PRESENTS, that the SUSTAINABLE ENERGY UTILITY, INC., a non-profit corporation created by Delaware statute, d/b/a Energize Delaware (“Energize Delaware”), as duly authorized pursuant to 29 Del. C. § 8061 (d)(7)b., for One Dollar (\$1.00) and other valuable consideration paid to Energize Delaware on behalf of [LENDER NAME] (“Assignee”), the receipt of which is hereby acknowledged, hereby quit-claims, grants, bargains, sells, conveys, assigns, transfers and sets over unto Assignee, without warranty covenants and without recourse, Energize Delaware’s right, title and interest in and to that certain benefit assessment lien levied by New Castle County, a body corporate and politic of the State of Delaware (the “County”) pursuant to 29 Del. C. § 8061(d)(6) on behalf of Assignee, on property owned on the date hereof in whole or in part by [PROPERTY OWNER] and as described on **Schedule I**, and also commonly referred to as [ADDRESS], attached hereto and made a part hereof (the “Lien”), to have and to hold the same unto the said Assignee, its successor and assigns forever. This Assignment includes without limitation all of the rights or remedies, including any powers of enforcement or collection, to which the County, by virtue of its status as a local governing body of the State of Delaware, is entitled or empowered to exercise under applicable laws of the State of Delaware; so that Assignee shall have the same powers and rights as the County and Energize Delaware has to enforce and collect upon the Lien.

This Assignment is made, given and executed pursuant to the authority granted to Energize Delaware in 29 Del. C. § 8061, which enacts the Delaware Voluntary Clean Energy Financing Program Based on Property Assessments (D-PACE) or Other Local Assessments (the “D-PACE Act” or “Act”), and as further enacted by County Resolution No. _____ (the “Ordinance”/the “Resolution”) (collectively, the “PACE Authorization”), and is solely limited to the purposes set forth in the PACE Authorization.

This Assignment by Energize Delaware is absolute and irrevocable and Energize Delaware shall retain no interest, reversionary or otherwise, in the lien.

IN WITNESS WHEREOF, the undersigned has caused this Assignment to be executed and delivered on this ___ of _____, 20__.

SUSTAINABLE ENERGY UTILITY, INC., a non-profit corporation established pursuant to Delaware statute

Witness

By: _____(Seal)
Anthony J. DePrima, Executive Director

STATE OF DELAWARE

:

: ss

NEW CASTLE COUNTY

:

On this ___ day of _____, 2019, before me, the undersigned, a Notary Public in and for the State and County aforesaid, personally appeared Anthony J. DePrima, who acknowledged himself to be the Executive Director of the Sustainable Energy Utility, Inc., a non-profit corporation established pursuant to Delaware statute; and that he, as such Executive Director, being authorized to do so, acknowledged that he executed the foregoing instrument for the purposes therein contained by signing the name of Sustainable Energy Utility, Inc., by himself as such officer.

Given under my Hand and Seal of Office the day year aforesaid.

Notary Public
Print Name: _____
My Commission Expires: _____

SCHEDULE I

DESCRIPTION OF PROPERTY

Exhibit C

Fee Schedule for County Billing and Collection of Benefit Assessments

The County shall receive a one-time servicing fee, as defined in the following fee schedule, for each Qualifying Commercial Real Property that the County maintains responsibility for Benefit Assessment billing and collections.

| Benefit Assessment Finance Term (years) | One-Time County Servicing Fee (\$)* |
|--|--|
| 1 to 10 | \$700 |
| 11 to 15 | \$1,000 |
| 16 to 20 | \$1,250 |
| 21 to 25 | \$1,500 |

*DESEU, or its designee, shall remit to the County the one-time County servicing fee by the thirtieth (30th) of the month following the month in which the County servicing fee was collected from the Qualifying Commercial Real Property owner.