

November 9, 2015

ASSEMBLY BILL NO. 2579
(Third Reprint)

To the General Assembly:

Pursuant to Article V, Section I, Paragraph 14 of the New Jersey Constitution, I am returning Assembly Bill No. 2579 (Third Reprint) with my recommendations for reconsideration.

I have long been a supporter of energy efficiency and renewable-energy programs. I have also been an aggressive proponent of proposals that would help our citizens rebuild after Superstorm Sandy and prepare for future natural disasters. This bill seeks to expand the State's existing Property Assessment Clean Energy ("PACE") program to help further both of those goals. While I appreciate the intent of this legislation and support its overall aim, I have concerns about the manner in which it seeks to achieve its ends.

PACE as a concept is still very much in the experimental phase, and states across the country continue to grapple with the issues that such programs present. Foremost among those issues is what role PACE should have in residential construction. The Federal Housing Finance Agency ("FHFA"), the conservator of Fannie Mae and Freddie Mac, has expressed grave concerns about PACE liens being placed on any property in which it has an interest. Fannie Mae and Freddie Mac are thus forbidden from purchasing mortgages where the property has a PACE priority lien attached to it. FHFA has threatened legal action to prevent its loans from being subordinated under PACE programs, and it has already begun successfully to challenge certain lien-subordination provisions in court. Although the Federal Housing Administration has promised to publish guidance on the subordination of PACE loans, that information is not yet firmly resolved.

While I appreciate that PACE loans offer a unique opportunity for homeowners to finance worthwhile improvements, I have serious reservations about exposing the State to unnecessary litigation where the entire foundation for a program could dissolve beneath our feet. In light of these very serious risks and uncertainties within the federal policy, many states have wisely chosen to place certain residential PACE programs on hold so that the less controversial aspects of the programs can proceed. At least until these significant federal issues are resolved, New Jersey should do the same. I therefore recommend that PACE loans be limited to commercial and industrial properties, and residential properties with five or more dwelling units.

I am also concerned about the bill's provisions that would result in existing lienholders seeing their liens subordinated without their consent. When, for example, a lender issues start-up funds to a small business for a new facility, that lender takes on substantial risk mitigated by a lien placed on the property. If the business ultimately succeeds and the lender begins to see a return on its investment, it would be unjust to allow a subsequent private lender unilaterally to subordinate that first lien merely because the loan is for solar panels. As much as the State may wish to encourage renewable-energy projects, it should not do so in a manner that will punish prior lenders and thus discourage them from making loans in the first place.

To address this issue of fundamental fairness, and to avoid potential state and federal constitutional challenges, many states require that a prior lender consent before its lien is subordinated. If, as the bill's findings assert, the proposed

project will reduce the property's energy costs or harden the building against future storms, thereby making it easier for the owner to make the mortgage payments, then consent may be forthcoming. And if the prior lender does not consent for some reason, the PACE construction can still proceed -- the PACE lender would simply take its place in the normal hierarchy of lenders.

Even with these amendments and a few other minor alterations, the bill still represents a dramatic reimagining of an already novel experiment. PACE continues to evolve across the country, as evidenced by the forthcoming federal guidance and the fact that other states continue to amend their statutes to address new challenges. Rather than diving headfirst into these murky waters, New Jersey should take a more cautious approach. For the time being, the new program should proceed on a pilot basis with no more than ten willing municipalities. The results experienced by those first ten municipalities will enable the State to gauge the strengths and weaknesses of the program, and thus better determine whether any further expansion would be appropriate.

Accordingly, I herewith return Assembly Bill No. 2579 (Third Reprint) and recommend that it be amended as follows:

<u>Page 2, Section 1, Line 21:</u>	Delete "homeowners" and insert "property owners"
<u>Page 2, Section 2, Line 33:</u>	Delete ", county,"
<u>Page 2, Section 2, Line 36:</u>	Insert ""Director" means the Director of the Division of Local Government Services in the Department of Community Affairs."
<u>Page 4, Section 2, Line 6:</u>	Delete "residential"
<u>Page 4, Section 2, Line 7:</u>	After "property" insert ", or a residential property with five or more dwelling units,"

- Page 4, Section 3, Line 33: Delete "The" and insert "Upon application to and approval by the Director of the Division of Local Government Services in the Department of Community Affairs, who shall approve applications from no more than ten municipalities according to the order in which such applications are submitted, the"
- Page 4, Section 3, Line 41: After "program." insert "The Director shall evaluate the proposed PACE program, the ability of each municipal applicant to effectively administer its responsibilities under the PACE program, and the municipal applicant's capacity to oversee and monitor any third party that operates the program on the applicant's behalf or is engaged in financing the PACE program. An introduced ordinance to establish a PACE program shall not be adopted without the Director's approval."
- Page 5, Section 3, Line 2: Delete "or"
- Page 5, Section 3, Line 4: After "al.)" delete "." and insert ", or (4) are disqualified from the system of local budget examination authorized pursuant to subsection b. of N.J.S. 40A:4-78,"
- Page 5, Section 3, Line 10: Delete "unless the municipality designates," and insert "."
- Page 5, Section 3, Lines 11-16: Delete in their entirety
- Page 5, Section 3, Line 34: Delete ", or county or county improvement"
- Page 5, Section 3, Line 35: Delete in its entirety
- Page 5, Section 3, Line 36: Delete "section,"
- Page 6, Section 4, Line 44: After "desirable" insert "and be subject to the provisions of sections 1 through 5 of P.L.1999, c.440 (C.40A:11-4.1 - 40A:11-4.5) applicable to competitive contracting except that the five-year limitation for competitive contracts of section 2 of P.L.1999, c.440 (C.40A:11-4.2) shall not apply, and except that an agreement between a municipality and

another local unit to administer, finance, or implement a PACE program may be negotiated and executed as a shared services agreement pursuant to the provisions of the Uniform Shared Services and Consolidation Act, P.L.2007, c.63 (C.40A:65-1 et seq.)"

- Page 7, Section 4, Line 13: Delete "county, or to a"
- Page 7, Section 4, Line 18: Delete "county or"
- Page 7, Section 4, Line 31: Delete "county or"
- Page 7, Section 4, Line 35: Delete "county,"
- Page 7, Section 4, Line 39: Delete "No review" and insert "Review"
- Page 7, Section 4, Line 40: After "bonds" insert "by a county improvement authority"
- Page 7, Section 4, Line 40: After "required" insert "pursuant to the Local Authorities Fiscal Control Law, P.L.1983, c.313 (C.40A:5A-1 et seq.)"
- Page 8, Section 4, Line 32: Delete "county,"
- Page 8, Section 4, Line 34: Delete "county,"
- Page 8, Section 4, Line 38: After "costs." insert "The Director of the Division of Local Government Services in the Department of Community Affairs shall coordinate efforts with the Board of Public Utilities to ensure that local programs to fund projects categorized as renewable energy systems and energy efficiency improvements further the goals of the Office of Clean Energy in the Board of Public Utilities."
- Page 10, Section 5, Line 16: Delete "county,"
- Page 11, Section 5, Line 7: Delete "A" and insert "Subject to the written consent of all prior lienholders, a"
- Page 12, Section 5, Lines 43-44: Delete ", county"
- Page 13, Section 5, Line 21: Delete "Notwithstanding any other law to the contrary, a" and insert "The Director of the Division of Local Government Services in the Department of Community Affairs may adopt rules and regulations pursuant to the

provisions of the Administrative Procedure Act, P.L.1968, c.410 (C.52:14B-1 et seq.), as deemed necessary to implement this Act."

Page 13, Section 5, Lines 22-28: Delete in their entirety

Page 18, Section 8, Line 21: After "effect" insert "on the first day of the fourth month next following enactment."

Page 18, Section 8, Line 26: Delete in its entirety

Respectfully,

/s/ Chris Christie

Governor

[seal]

Attest:

/s/ Thomas P. Scrivo

Chief Counsel to the Governor