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May 12, 2009

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1567, "Clean Energy Loan Programs." We write to address several issues raised by the bill.

HB 1567 amends Article 24 of the Annotated Code of Maryland to add a new subtitle authorizing counties and municipalities to establish, by ordinance or resolution, a Clean Energy Loan Program within their respective jurisdictions. The program would allow the county or municipality to provide loans to residential and commercial property owners for the financing of energy efficiency and renewable energy projects. The bill also authorizes the county or municipality to issue bonds to finance the loans made through the Program. The Program must require a property owner to repay a loan made under the Program through a surcharge on the owner's property tax bill. This surcharge is limited to an amount that allows the county or municipality to recover the costs associated with issuing bonds and administering the Program. The bill also provides that a person who acquires property subject to a surcharge under the Program, whether by purchase or other means, assumes the obligation to pay the surcharge.

If the surcharge constitutes a lien on the property, the process by which the lien is created must satisfy constitutional due process standards, including notice of the establishment of the lien and an opportunity to contest the validity and amount of the lien. On the other hand, if the surcharge is not classified as a lien, it

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need not satisfy due process, but normally will not transfer to the new property owner in the event of a transfer.¹

It is our view that the surcharge under HB 1567 does not constitute a lien against the property under State law. The Tax-Property Article (TP) prescribes the process by which the counties and municipalities may sell property at a tax sale if the property taxes are in arrears. TP § 14-808, *et seq.* TP § 14-801(c) defines "tax," in part, as "any tax, or charge of any kind due to the State or any of its political subdivisions, or to any other taxing agency, that *by law is a lien against the real property* on which it is imposed." (emphasis added). "An unpaid tax or fee does not constitute a lien on real property unless the lien is expressly provided by law," and "[a]bsent a statutory lien, an unpaid charge may not be collected through a tax sale process ... [a] provision creating a lien must be explicit." 92 *Opinions of the Attorney General* 3 (2007). A provision in HB 1567 as introduced, that would have expressly provided that a surcharge under the Program, including any interest and penalties, constitutes a lien against the property was removed by amendment. Because HB 1567 does not explicitly state that it is creating a lien against the property, it does not.

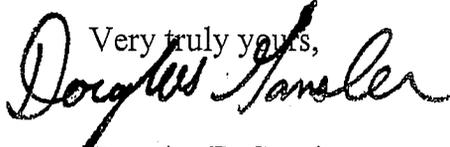
A local law, however, that explicitly establishes a lien on real property for any additional charges collected by the billing authority, could create a lien with respect to unpaid surcharges under the Program authorized by HB 1567. If the surcharge imposed by local law authorized under HB 1567 is determined to constitute a lien against property that is subject to a mortgage or deed of trust, an issue may arise as to whether the lien was created without due process because of lack of notice to the mortgagee or trustee. Additionally, mortgages and deeds of trust often include covenants that prohibit the mortgagor from encumbering the property with a lien that could take priority over the mortgagee's or trustee's interest in the property. Therefore, local governments acting under this new authority, must be careful to ensure that their liens are constitutional.

Finally, we write to bring to your attention a provision added to the bill by amendment which, as drafted, appears to limit the surcharge to an amount that allows the county or municipality to recover the costs associated with issuing

¹ The bill is silent on whether a subsequent purchaser is required to receive notice of the surcharge before closing and whether refusal to assume the obligation to pay the surcharge is a breach of a contract of sale. Such disclosure is not required under current law. This should be addressed in future legislation.

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bonds and administering the Program. *See* page 3, lines 15-18. This provision includes no allowance for the actual repayment of the loan. In our view, this is clearly not what the General Assembly intended. It appears that the General Assembly wished to authorize, but limit, any amounts over and above the loan repayment amount, charged for the costs of issuing bonds and administering the Program. This should be corrected during next year's legislative session.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/BK/mlb

cc: The Honorable Sue Hecht
The Honorable John P. McDonough
Joseph Bryce
Karl Aro