DOUGLAS F. GANSLER
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

Sandra Benson Brantley
Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 16, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 172 / Senate Bill 106

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 172 and SB 106, identical emergency bills which prohibit the creation of new residential ground rents beginning January 22, 2007 - - the introduction date of the Senate bill.[1]

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[1] Specifically, the legislation provides that:

> On or after January 22, 2007, the owner of a fee simple or leasehold estate in residential property that is used, intended to be used, or authorized to be used for four or fewer dwelling units may not create a reversionary interest in the property under a ground lease or a ground sublease for a term of years renewable forever subject to the payment of a periodic ground rent.

Section 2 of the measure states that:

> "[T]his Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any ground lease or ground sublease created before January 22,

No substantial constitutional question is raised by the measure's prospective operation. In *Marbury v. Mercantile Bldg. Co.,* 154 Md. 438, 441 (1928), the Court of Appeals said that "[i]t has long been recognized as the right of the Legislature to change or limit the character of estates and tenures, provided the legislation did not affect rights which had become vested."[2] In addition, to the extent ground rents have their origin in the common law, the Maryland Constitution (Article 5 of the Declaration of Rights) reserves to the General Assembly the power to revise, amend or repeal the common law.

The legislation does have some retroactive effect, although a very circumscribed one. To the extent a ground rent was established on or after January 22, 2007 and prior to the signing of this legislation, a constitutional issue is raised by the bill's extinguishing of such interests.[3] Whether the issue is couched as an impairment of the obligation of contract in violation of Article I, §10 of the U.S. Constitution, a deprivation of due process in violation of the 14th Amendment to the U.S. Constitution, a taking of property in violation of the 5th Amendment to the U.S. Constitution and Article III, §40 of the Maryland Constitution or an unconstitutional impairment of a "vested" right in violation of Article 24 of the Maryland Declaration of Rights, the bedrock question is whether HB 172 / SB 106 has interfered with reasonable or settled expectations of parties to ground rent arrangements.[4]

For reasons set forth below, it is our view that HB 172 / SB 106 does not interfere with reasonable or settled expectations and advances substantial governmental interests.

In December 2006, a series of articles in the *Baltimore Sun* described a dysfunctional ground rent system where residential property was being seized over missed

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2007."

[2] *Marbury* upheld the constitutionality of State legislation that eliminated irredeemable ground rents.

[3] We have been unable to determine whether in fact new ground rents have been created after that date.

[4] *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411 (1983); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978); Sutherland, *Statutory Construction* at §41:5 (2001)("One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantive interests ought not to be defeated.")

ground rent payments and homeowners were being charged exorbitant fees. In a December 13, 2006 article, the *Sun,* reporting the reaction of legislative leadership, two committee chairmen supported legislation that would eliminate the creation of new ground rents. F. Schulte & J. Arney, *Bills to tackle ground rents, Baltimore Sun* (Dec. 13, 2006).[5] Similar stories appeared on January 5 and January 11, 2007, along with a January 7 editorial urging the "phasing out [of] the arcane system entirely." F. Schulte & J. Arney, *Ground rent at top of agenda, Baltimore Sun,* (Jan. 5, 2007); . J. Arney, *Legislator promise ground rent law, Baltimore Sun* (Jan. 11, 2007); Opinion, *Baltimore Sun: The Annapolis agenda* (Jan. 7, 2007). In light of these pronouncements, it would have been unreasonable for those contemplating ground rent transactions to believe that the law would remain unchanged. In addition, this reliance was further undermined because it is "common practice" for Legislatures to enact retroactive statutes "confined to short and limited periods required by the practicabilities of producing ... legislation." *PBGC v. R.A. Gray & Co.,* 467 U.S. 717, 731 (1984); and *U.S. v. Darusmont,* 449 U.S. 292, 296-97 (1981). This is exactly what the General Assembly did here.

A takings and impairment of contract attack on HB 172 / SB 106 would also fail because the legislation advances a substantive government interest in protecting homeowners from abusive practices.

For all of these reasons, it is our opinion that HB 172 / SB 106 is constitutional.

Sincerely,

/s/
Douglas F. Gansler
Attorney General

DFG/RAZ/as
cc: Joseph Bryce
Secretary of State
Karl Aro

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[5] Similar legislation was introduced in 2006 (SB 489), but did not pass.