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April 28, 2014

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

RE: House Bill 202 and Senate Bill 186, "Clean Energy Loan Programs – Private Lenders – Collection of Loan Payments"

Dear Governor O'Malley:

House Bill 202 and its crossfile, Senate Bill 186, are identical and could be signed in either order. The bills amend a pre-existing statutory loan program titled Clean Energy Loan Programs, which is codified in Local Government Article ("LG"), Title 1, Subtitle 11. That Subtitle authorizes local governments to enact an ordinance or resolution to establish such a program that is designed to finance energy efficiency and renewable energy projects. Current law allows the loan payments to be collected as a surcharge on the property tax bill for the improved property. LG § 1-1105. House Bill 202 and Senate Bill 186 go a step further and provide that if the payments are not timely paid, the surcharge will be collectable as a tax lien through the tax sale process authorized under Tax-Property Article, Title 14, Subtitle 8, despite that the lender may be a private party. As a result, the unpaid surcharge will become a first lien on the property that could become superior to other liens on the property. The bills require any existing lien holder on the property to consent to this collection process, but do not provide for any recordation of a loan under this program that indicates this first lien superiority. Thus, we have considered whether a constitutional due process issue is raised for subsequent lenders.

Under due process, a person is entitled to reasonable notice and opportunity to respond before being deprived of a property right by governmental action. *VNA Hospice v. Department of Health and Mental Hygiene*, 406 Md. 584, 603-04 (2008). No due process problem is presented for the lien holders existing when a loan is issued under the Clean Energy Loan Program because they must consent before the clean energy loan debt

could jump ahead of the debt of those creditors upon default of the loan. Therefore, under the loan issuance process other lenders are given sufficient notice. The tax collection process created by these bills for that first lien, however, could put the security for a subsequent loan in serious jeopardy, denying that lender of its right of redemption in the property. Yet, because there is no recordation requirement, a subsequent lender is not given notice that its loan security will not maintain its primacy under certain circumstances. That lack of recordation could be construed as a constitutional violation.

To resolve any due process issue with House Bill 202 and Senate Bill 186, therefore, we make the following recommendation should these bills be signed. Under current law, if a local government establishes a Clean Loan Program, it is to do so in an ordinance or resolution that provides the terms and conditions for participating in the program. LG § 1-1104(a). To ensure that its program is implemented in compliance with the mandates of the federal and Maryland Constitutions, including all due process requirements, the local government should include in its ordinance or resolution a recordation requirement that associates the loan with the property and includes notice of the special collection status of this loan. In this way, the program can be established as the legislature designed and without depriving subsequent lenders of any due process rights.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/SBB/kk

cc: The Honorable Brian Feldman
The Honorable Charles E. Barkley
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro