

Memorandum

TO: Senator Reed and Representative Doyle and Members of the Joint Committee on Energy and Technology

FROM: Jonathan Anderson, VP and Senior Title Counsel, CATIC

RE: Raised Bill No. 6995, An Act Concerning A Residential Property Assessed Clean Energy Program

DATE: March 17, 2015

This is testimony in opposition of Raised Bill No. 6995, An Act Concerning A Residential Property Assessed Clean Energy Program. The proposal expands the scope of an existing statute, Section 7-121n, to go well beyond its original goal of encouraging the installation of renewable energy or energy saving systems. The proposal even goes well beyond encouraging the installation of clean energy systems that its title suggests, to include asbestos, mold and lead remediation as well as flood and hurricane resistant construction. CATIC is certainly in favor of making residential homes safer and more energy efficient. CATIC is opposed, however, to the ways in which this proposal seeks to accomplish its expansive mandate.

Unlike the existing statutory program, where municipalities use public funding derived from bond issues to finance the purchase and installation of energy improvements on qualifying residential or non-residential property, the proposal makes the Connecticut Green Bank the administrator for purposes of establishing a residential sustainable energy program and "serving as an aggregate entity for the purpose of securing state or private third - party financing (emphasis added) for energy improvements...."

As a means of attracting private capital to finance the wide-ranging projects envisioned in the bill, this proposal authorizes the use of super-priority assessment liens against the residential property that benefits from the private capital. In addition, when a participating municipality assigns an assessment lien to any third party capital provider, that private party (or any assignee of that private party) would have the same powers and rights at law as the participating municipality and its tax collector have with regard to the priority and the enforcement of that

lien. In other words, the private party holding the lien could enforce the lien either through foreclosure or through a levy and sale procedure authorized by Sections 12-140 and 12-157 (the tax sale procedure).

This is unprecedented. Mechanisms and procedures developed to ensure revenue collection by municipalities so that municipalities can fund public services and public improvements would, if this proposal is enacted, be used instead to ensure a return on private investment. The statute takes extraordinary remedies previously reserved for municipal tax collectors and allows private parties to take full advantage of them.

An essential element of the free enterprise system is the concept of assuming some investment risk for the potential of a greater investment return. This proposal, by contrast, appears to remove most of the risk of private investment by allowing the private party to exploit the advantages of super-priority liens and summary tax sale procedures. Unfortunately, the favoritism shown to private capital providers (or their assignees) in this proposal comes at the expense of practically everyone else who deals with the affected real estate, including the property owner.

A necessary part of performing due diligence whenever someone is buying, leasing or mortgaging real property is examining the land records of the town where the real estate is located. People understand the importance of the land record system in Connecticut, where, with very limited exceptions, the order of recording an instrument determines the rights of the party claiming an interest by virtue of that instrument. This modified "first in time, first in right" priority rule provides certainty and reliability. Those liens with true super-priority, that is, those having priority over any previously recorded lien or encumbrance, have heretofore been limited to tax liens and liens for the recovery of public expenditures.

The proposal itself recognizes some of the risks to the property owner in that portion of the bill requiring disclosures when the owner seeks to participate in the sustainable energy program. These risks include, but are not limited to:

1. failure to pay the assessment;
2. the assessment remaining on the property until satisfied;
3. the potential to impair the sale of the property;
4. the potential for the participation in the program or the existence of the assessment lien to constitute a default or violation of an existing mortgage loan; or
5. the likely requirement that the assessment be paid in full when an existing mortgage is refinanced or the subject property is sold.

But the risks to the property owner are not the only risks associated with this bill. A lender who places a mortgage on the property in 2015 can have that mortgage trumped by a 2016 energy assessment lien. A lender asked to refinance a mortgage will be faced with a difficult situation if an underwriter at the bank has to consider the future prospect of being subject to a super-priority energy assessment lien.

The private capital provider's (or an assignee's) use of the levy and sale procedure previously reserved to municipal tax collectors also sets a dangerous precedent with a strong potential for abuse. As it stands now, the summary procedure for selling a home for taxes is scrutinized intensely by title insurers. When title insurance is requested after completion of the sale, legitimate due process concerns can lead to a challenge by either the property owner or any "subsequent" lienholder who fails to receive adequate notice. Some insurers will not insure a purchaser from the tax sale until a number of years have passed from the sale date and the tax collector provides an affidavit with proof of compliance with statutory notice procedures. Connecticut itself has a judicial foreclosure process and, to some extent, has been spared many of the problems associated with the non-judicial or judicial foreclosures existing in other states. Additional financial regulations and court challenges have resulted from defective foreclosures. Yet now, with this proposal, there exists the potential to take several steps backward and allow private parties to take someone's home away with a procedure that is entirely outside of the judicial system.

The existing Section 7-121n of the Connecticut General Statutes authorizes the municipality to place a contractual assessment on the qualifying real estate. These assessments constitute a lien, but the lien does not have priority over any prior mortgage. Existing law also allows the property owner to seek private financing through traditional capital providers such as banks through the use of home improvement loans, home equity loans and lines of credit secured by a mortgage.

Even if there is a perceived need to change Section 7-121n, there is no justification for a proposal to take most of the risk away from private investors who stand to make money from the program and shift it entirely onto the shoulders of those who have prior interests in the land or who must reasonably rely on the land records for information regarding the real estate.

For all of the reasons stated in this testimony, CATIC strongly opposes the proposed legislation, Raised Bill 6995, in its present form.

Respectfully Submitted,



Jonathan Anderson
Vice President and Senior Title Counsel
CATIC