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To: Robert McCord, Secretary, Maryland Department of Planning  
From: Rieyn DeLony, Deputy Counsel PD  
Date: June 15, 2018  
Re: Patuxent River Commission authority to review proposed private development projects;  
Secretary's Authority

You have asked for advice on whether the Patuxent River Commission (the "Commission") has the legal authority to review a proposed private development project and to issue a letter to a County Council regarding a proposed project. After examination of the purpose of the Patuxent River Policy Plan (the "Plan"), adopted pursuant to Md. Code Ann., State Fin. & Proc. (SFP) §5-804, and of the Commission's statutory authorities under SFP §5-816, it is my opinion that the Commission has authority to issue such a letter, provided that scope of the letter is limited to matters within the Commission's duties imposed by statute or by the Plan.

You have also asked whether the Secretary of Planning (the "Secretary") has the authority to set policy for the commissions established within the Department of Planning (the "Department"), such as the Patuxent River Commission. After review of the general powers of the Secretary under SFP §5-203, it is my opinion that the Secretary has authority to set policy restricting commentary by the Commission regarding specific private development projects.

### 1. Legal Framework.

The Plan was last amended by the 2015 Policy Plan Update, which was adopted by the Maryland General Assembly during the 2016 legislative session under Joint Resolution 1 (the "Update"). The Update states that the Plan

serve[s] as a policy guide for local jurisdictions and state agencies in carrying out their actions and regulatory programs in the Patuxent River watershed... [and] to "(1) build on the goals and recommendations of the 1984 plan; (2) support the programmatic guidelines of the 1997 plan update; and (3) provide a more flexible and effective policy framework for local governments and units of state government to implement the plan."

Update, pg.1. The Update further explains that the Plan now follows a "more policy-oriented approach," and directs the Commission to achieve the following objectives:

- Advance plan objectives by local jurisdictions and units of state government within the watershed by developing/ updating an Annual Action Plan each January to monitor river restoration efforts. As part of the Annual Action Plan, the PRC may invite local jurisdictions and units of state government to report on their implementation progress. To the extent possible, the PRC's Annual Action Plan should include measurable outcomes.
- Focus its meetings and staff time on the tasks within the Annual Action Plan. Emergency issues, informational presentations, and administrative issues shall be handled as much as possible outside regular meetings.
- Compile accomplishments from the previous year annually.
- Monitor annually:
  - o The Scientific and Technical Advisory Committee report and/or a report from the Chesapeake Research Consortium on the ecological health of the Patuxent River;
  - o The Maryland Department of Natural Resources report on the status of fish and shellfish within the Patuxent River;
  - o The Maryland Department of the Environment report on the status of water quality within the Patuxent River; and
  - o The Maryland Department of Planning report on past and forecasted land use change and wastewater processing within the Patuxent River Watershed, including implementation of PlanMaryland.

Update, pg. 13

As specified in SFP §5-816, "in addition to its other powers and duties," the Commission shall:

- (1) review the operation of units of State and local government that have responsibility for implementation of the Plan;
- (2) provide a clearinghouse for information on the Patuxent River and its watershed;
- (3) review and comment on plans and reports related to the Patuxent River and its watershed; and
- (4) serve as the Tributary Strategy Team for the Patuxent Watershed, coordinating the Patuxent tributary strategy with the Plan.

The Commission exists within the Department of Planning, SFP §5-812, and its 34 voting members appointed by the Governor include seven individuals, one from each of the following seven counties having responsibility for implementation of the Plan: (i) Anne Arundel County; (ii) Calvert County; (iii) Charles County; (iv) Howard County; (v) Montgomery County; (vi) Prince George's County; and (vii) St. Mary's County. SFP §5-814(a)(1). Among the Commission's other powers and duties are the authorities to review and comment on proposed amendments to the Plan, work with the Department of Planning on proposed amendments to the Plan, distribute proposed amendments to the Plan to the Governor, certain members of the



General Assembly, and certain local governments, and conduct of at least one public hearing on proposed amendments to the Plan. SFP §5-805(b).

## 2. Discussion.

The Commission's authority under SFP §5-816 to "review the operations of units of State and local government that have responsibility for implementation of the Plan," read in conjunction with SFP §5-804, which states "[t]he Plan shall be used as a policy guide by local jurisdictions and units of the State government in carrying out *their actions and regulatory programs in the Patuxent River watershed*" (emphasis added), plainly gives the Commission authority to "review" local government actions and programs in the Patuxent River watershed undertaken by the counties that are subject to the Plan. See *Employees' Retirement Sys. of the City of Baltimore v. Dorsey*, 430 Md. 100, 113 (2013) ("the plain language [of a statutory provision] must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute") (citation omitted); *Gardner v. State*, 420 Md. 1, 9 (2011) (statutory provisions must not be "read . . . in a vacuum" or "confine[d] strictly . . . [within context of the] plain language [of] the isolated section alone"). Indeed, the authority to "review the operations" of local governments that implement the Plan certainly encompasses review of local "actions and regulatory programs" within the watershed.

Webster Dictionary defines "review" as "to examine with an eye to correction or criticism," and "an inspection or examination with the intention of evaluating." Webster's II New Riverside University Dictionary. Thus, the Commission's authority to review a local government's operations includes the authority to formulate a critical letter to the local government that proposes corrective action. To the extent that the letter's purpose is to evaluate the operation's impact on the Plan, or the county's implementation of the Plan, the Commission is acting within its authority under SFP §5-816(1).

The Commission's authority to "review" the operations of local governments for consistency with implementation of the Plan does not, however, extend to advocating for or against specific private development projects. An "operation" of local government is its "discharge of a function" Google Dictionary Online. Local government operations are the discharge of overarching public purpose functions, such as public safety, health, and general welfare. Local government functions are achieved through a county's administration of programs and services, and implementation of county procedures, processes, and laws. Review of a conceptual development project proposed by a private party is not the same thing as a review of an "operation" of local government that the Commission is statutorily authorized to do, because the local government has not carried out a function and no "operation" has occurred. The Commission may review, for example, whether a sewage overflow notification was properly implemented, or whether a public hearing followed regulatory procedures, but it may not "review" a specific development project in advance of the county's performance of an operation. The Commission authority to review may also not impinge on the authority of any other principal department of State government. See SFP §5-813 ("[t]he existence of the Commission

does not take away or limit the authority [of] any principal department of the State government"). The Commission has no independent authority to intervene in any administrative, judicial, or other proceeding in the State concerning land use, development, or construction, nor can it file formal statements expressing its views concerning environmental or economic impact. For example, the Department of the Environment, in consultation with the Department of Natural Resources, is the unit of State government tasked with the duties of implementing regulations concerning the impact of storm water on waters of the State. *See* Md. Code Ann., Envir. § 4-203(a).

The Commission's activities must remain within the bounds of the authority granted to it by law to avoid running afoul of the doctrine of ultra vires, or the invalid exercise of authority outside a body's jurisdiction, or beyond its powers or purposes (Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.). Adherence to this principle is also necessary to avoid violation of State public ethics law. In the event members of the Commission wish to carry on activities outside of the Commission's official duties, such as advocating for or against a specific development project, these activities must be done in the member's individual capacity. Members acting in their individual capacity may not use of the member's prestige of office or public position on the Commission for such activities. State law prohibits an official's use of the prestige of office or public position for that member's private gain or that of another, or to influence, except as part of the member's official duties, the award of a State or local contract to a specific person. *See* Md. Code Ann., General Provisions § 5-506. Members of the Commission must also avoid conflicts of interest. They may not participate in a matter before the Commission if the member or certain qualifying relatives of the member have an interest in the matter before the Commission. *See* Md. Code Ann., General Provisions § 5-501. Members of the Commission should contact the State Ethics Commission on public ethics questions.

It is of utmost importance that the Commission conducts its business in a manner that avoids improper influence or even the appearance of improper influence. *See* Md. Code Ann., General Provisions § 5-102. The practice of reviewing specific proposed projects may lead to the appearance of the Commission's lack of impartiality or independent judgement if the Commission later encounters the same project in its official duty of reviewing an operation of local government involving the same project. The practice can also lead to the perception that the Commission can give a project its "stamp of approval," or put a "thumb on the scales of justice," or be seen as interfering in an operation of local government at the request of an advocate or opponent of a specific project.

### **3. Related Questions.**

Though discussed above, you have asked for specific clarity as to whether the Commission is established within the Department of Planning. In 1980, the Patuxent River Commission was created within the Department of State Planning. *See* 1980 Laws of Md., ch. 746. The Commission's enabling legislation specifically states that "[t]here is a Patuxent River Commission in the Department." SFP §5-812. The Department of Planning, in turn, is established in Title 5 of the Article as a principal department of the State government. SPF §5-



201(a). Accordingly, the Commission is a unit of State government within the Department of Planning.

You have also asked whether the Office of Attorney General is the legal counsel of the Commission. SFP §5-204 states that the Attorney General is the legal advisor to the Department and shall assign Assistant Attorneys General to the Department to give effective advice and counsel. Since the Commission is established within the Department of Planning, Assistant Attorneys General assigned by the Attorney General to the Department are to serve as legal advisors to the Commission.

You have further asked whether the Secretary has the authority to set policy for the Patuxent River Commission. The Commission is established in the Department and therefore is a unit in the Department. SFP §5-812. The Secretary of Planning is responsible for the comprehensive planning of programs and services of the Department, and the Secretary is responsible for reviewing and approving the plans *of the units in the Department*. SFP §5-203(g)(1)-(2). He may exercise any power necessary and proper to discharge the Secretary's duties SFP §5-203(m), including the power to approve or disapprove or revise the regulations of the Commission (SFP §5-203 (b)(2)); the power to call a meeting of the Commission to consider any subject that the Secretary considers necessary and proper (SFP §5-203 (c)); and the power to require the Commission to report to the Secretary on the Secretary's written directive. SFP §5-203(d). Because commenting for or against specific private development projects is not within the Commission's jurisdiction, and because the Secretary has determined that the Commission's practice of taking positions on such projects is adverse to the Department's policies, programs, services or plans for the reasons outlined in the Secretary's May 2, 2018 memo to the Commission, under the Secretary's power to exercise any power necessary and proper to discharge his duties, the Secretary has the authority to set policy restricting this practice.

**ADVICE OF COUNSEL  
NOT AN OPINION OF THE ATTORNEY GENERAL**