

BRIAN E. FROSH
ATTORNEY GENERAL



SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

KATHRYN M. ROWE
DEPUTY COUNSEL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

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

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

January 4, 2019

The Honorable Jim Rosapepe
Maryland Senate
314 James Senate Office Building
Annapolis, Maryland 21401

Dear Senator Rosapepe:

You have inquired about the authority of the Patuxent River Commission (“PRC” or “Commission”) to comment on private development issues. You have also asked if there is a legal justification for the Maryland Department of Planning (“Department”) to withhold the PRC’s email listserve from the members of the Commission and whether it is possible and appropriate for the PRC to have its own separate counsel assigned by the Attorney General. Regarding your inquiry regarding the Commission’s authority, the attached December 28, 2018 Letter of Advice from Assistant Attorney General Patrick B. Hughes, Chief Counsel, Opinions and Advice to the Hon. Anne Healey reflects the conclusions of our Office with respect to the authority of the PRC in this matter.

With respect to your inquiry regarding access to the Commission’s email listserve, according to Department counsel, access by Commission members to other members’ email addresses has never been denied by Department (PRC) staff. The email practice of PRC staff has been to send emails to all PRC members through “bcc” rather than listing each PRC member’s email address as part of the email. According to Department counsel, this practice began a few years ago (with notice to the PRC members) in response to some concerns that PRC members were replying to all members and engaging in substantive discussions through email, which raised concerns among PRC staff that such substantive discussions among the PRC members could result in a violation of the State Open Meetings Act. *See* 81 Md. Op. Att’y Gen. 140, 143-44 (1996) (opining that a contemporaneous email exchange among a quorum of a public body may constitute a “meeting” for the purposes of the Open Meetings Act); Md. Code Ann., General Provisions Article, § 3-101(g).

To the extent PRC staff sends “bcc” emails rather than listing each recipient’s email address in the email, such a decision to establish email policies for the Department and the units of State government within the Department, which includes the PRC, appears to be within the administrative authority and prerogative of the Secretary of Planning, particularly given the purpose of ensuring the unit’s compliance with State law. *See* Md. Code Ann., State Government Article, § 8-205(b)(2) (Secretary of a principal department is “responsible for establishing policy

The Honorable Jim Rosapepe
January 4, 2019
Page 2

to be followed by the units of State government within the secretary's department"). I am not aware of a recognized right of email recipients to receive emails in a particular format of receipt. As indicated above, it appears that the Department would not deny a request of a PRC member to obtain the email addresses of other PRC members.

You also asked if it was possible or appropriate for the Commission to have its own dedicated counsel assigned by the Attorney General. Although it may be possible, most units within a principal department of State government do not have a separate counsel and are adequately and appropriately advised and represented by agency counsel and assistant Attorneys General assigned to the agency by the Attorney General. The Commission is "in the Department." Md. State Finance and Procurement Article ("SFP"), § 5-812. The Attorney General is the "legal advisor to the Department[.]" SFP § 5-204(a), and assigns "assistant Attorneys General" that are "necessary to give effective legal advice and counsel" to the Department. SFP § 5-204(b).

This statutory duty of the Office of the Attorney General to provide legal advice and representation to State government agencies and their units has been recognized to prevail over conflict of interest provisions in the Maryland Attorney's Rules of Professional Conduct that apply to private counsel:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government attorneys may include authority concerning legal matters that ordinarily reposes in the client in private client-attorney relationships. For example, an attorney for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, attorneys under the supervision of these officers may be authorized to represent several government agencies in intra-governmental legal controversies in circumstances where a private attorney could not represent multiple private clients. These Rules do not abrogate any such authority.

Maryland Rule 19-300.1(18) (Scope of Maryland Attorney's Rules of Professional Conduct) (Emphasis added).

Various courts have similarly recognized the unique role of state Attorneys General in representing the interests of the state government. For example, as the Connecticut Supreme Court explained:

[A]lthough an attorney-client relationship exists between a State agency and the Attorney General, it cannot be said that the role of the Attorney General apropos of a State agency is precisely akin to the traditional role of private counsel apropos of

a client [citations omitted]. Indeed, where he or she is not an actual party, the Attorney General may represent opposing State agencies in a dispute. [Citations omitted]. The Attorney General's responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State. This responsibility will occasionally, if not frequently, include instances where State agencies are the opposing parties. It seems to us that if the Attorney General is to have the unqualified role of chief legal officer of the State, he or she must be able to direct the legal affairs of the State and its agencies. Only in this way will the Attorney General properly serve the State and the public interest.

Conn. Comm'n. On Spec. Revenue v. Conn. Freedom of Info. Comm'n, 387 A.2d 533, 537-38 (Conn. 1978). See also *Tennessee Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 773-74 (Tenn. Ct. App. 2001) ("The majority rule is that the Attorney General, through his or her assistants, may represent adverse state agencies in intra-governmental disputes.").

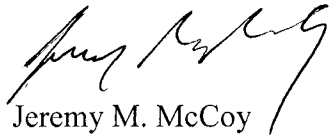
Although Maryland courts have not appeared to address the issue of conflicts of interest in dual representation by the Office of the Attorney General, the Court of Special Appeals has recognized the authority of governmental attorneys (public defenders) in certain circumstances to represent more than one party in a manner that private attorneys could not. *Graves v. State*, 94 Md. App. 649 (1993). The Court of Appeals has similarly elected not to apply stringent conflict of interest rules to the Attorney General in holding that the Attorney General may litigate contrary to his private views, (*State v. Burning Tree Club, Inc.*, 301 Md. 9, 36 (1984)), and contrary to his own formal opinions. *Sheriff of Baltimore City v. Abshire*, 44 Md. 256, 262 n.6 (1979).

In this instance, there does not appear to be any inherent conflict of interest in the Office of the Attorney General representing both the Department and the Commission. The Attorney General is statutorily obligated to provide legal advice and representation to the Department and its units, as agency counsel similarly represents principal agencies and their units throughout State government. Even if an intra-governmental dispute arises between the Commission and the Department, there is no inherent legal or ethical conflict of interest in the Office of the Attorney General's representation of each unit. Although the assignment of separate counsel to the Commission is possible, that would be a policy question for the Attorney General or the General Assembly to decide.

The Honorable Jim Rosapepe
January 4, 2019
Page 4

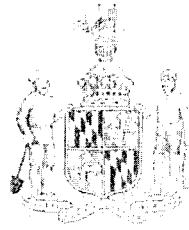
I hope this is responsive to your request. If you have any questions or need any additional information, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeremy M. McCoy". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Jeremy M. McCoy
Assistant Attorney General

BRIAN E. FROSH
Attorney General



ELIZABETH HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

FACSIMILE NO.
410-576-7036

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

WRITER'S DIRECT DIAL NO.
410-576-6327

December 28, 2018

The Honorable Anne Healey
Maryland House of Delegates
361 House Office Building
Annapolis, Maryland 21401

Dear Delegate Healey:

You have asked whether the Patuxent River Commission (the "PRC" or the "Commission") has the authority to review and comment on plans for specific local private development projects that are under consideration by a unit of local government within the Patuxent River watershed. Additionally, you have inquired about whether the Secretary of Planning (the "Secretary") has the authority to control actions taken by the PRC, and, specifically, whether the Secretary may prohibit the PRC from commenting on proposed local private development projects.

With respect to your first question, although it is a close one, the language of the statute governing the PRC's statutory authority is likely broad enough to provide the PRC with the authority to review and comment on proposed local private development projects that relate to the Patuxent River or its watershed. Although a court might find that the statute is ambiguous and that the legislative history does not provide any definitive guidance, my view is that a court would conclude that, at the very least, the PRC has discretion to interpret its own statute as providing authority to comment on the plans for such projects. That conclusion might be tempered, however, if the PRC has not previously exercised that authority or has not previously interpreted its statute to allow it to exercise that authority, either of which could lead a court to afford less deference to the PRC's interpretation.

With respect to your second question, to the extent the PRC possesses authority to review and comment on proposed local private development projects, the statutory structure of the PRC suggests that the PRC possesses such authority independent of the

The Honorable Anne Healey
December 28, 2018
Page 2

Secretary and the Department of Planning (the “Department”). Although the Legislature placed the PRC in the Department, and the Secretary thus likely has at least some authority over the PRC, the PRC also appears to have a certain amount of independence from the Secretary, including—in my view—the ability to review and comment on plans and reports related to the Patuxent River watershed.¹

I Background

The PRC is established under Title 5, Subtitle 8 of the State Finance and Procurement Article. The Commission is located “in the Department[,]” Md. Code Ann., State Fin. & Proc. (“SFP”) § 5-812, and consists of 34 voting members appointed by the Governor, including members recommended by the governing bodies of seven counties, representatives from various State and local planning bodies, private industry and citizens groups, and ex officio members that include cabinet-level State officials and representatives from federal agencies. SFP § 5-814. The Secretary of Planning, or the Secretary’s designee, is an ex officio member of the PRC. SFP § 5-814(a)(7)(iv). Other than ex officio members, members of the PRC serve staggered terms of four years. SFP § 5-814(b)(4).

Together, the Department and the PRC prepare and consider amendments to the Patuxent River Policy Plan (the “Policy Plan” or “Plan”). SFP § 5-805. The Policy Plan

¹ I recognize that my ultimate conclusions on these two questions differ from advice that was previously provided to the Department of Planning by its Deputy Counsel. *See* Memorandum from Rieyn DeLony, Assistant Attorney General, to Robert McCord, Secretary of Planning (June 15, 2018). In the course of the daily operations of State government, Assistant Attorneys General frequently provide advice to their clients on many close questions of law, as the need for that advice arises. When, as here, the Office is asked for review of that advice by another unit within State government, that request sometimes necessitates a more comprehensive review by the Opinions & Advice Division within the Office of the Attorney General to make sure that the Office gives consistent advice to all of its many clients. Clients may also ask directly for review of advice by the Opinions & Advice Division. Here, after that review, my view is that the better interpretation of the statutory scheme, though not entirely clear, is that the PRC has statutory authority to comment on specific development proposals related to the watershed and may exercise that authority independent of the Secretary. However, the Department or any interested person or group who might disagree with that analysis can always seek clarification from the General Assembly.

The Honorable Anne Healey

December 28, 2018

Page 3

“shall be used as a policy guide by local jurisdictions and units of the State government in carrying out their action and regulatory programs in the Patuxent River Watershed.” SFP § 5-804. The Department has primary responsibility for preparing proposed amendments to the Plan and then must submit its proposed amendments to the PRC for review, comment, and changes, before the amendments are submitted to the affected local jurisdictions. SFP § 5-805(b) and (c). If the local jurisdictions approve the amendments, they are presented to the General Assembly for final approval. SFP § 5-805(d).

In addition to its powers and duties relating to the Policy Plan, the PRC is required to: (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.” SFP § 5-816.

II Analysis

A. The Authority of the PRC to Comment on Specific Development Plans Under § 5-816(3) of the State Finance & Procurement Article

Your first question is whether the PRC has the authority to review and comment on plans for proposed local private development projects under consideration by a unit of local government. “An administrative agency, as a creature of statute, has only the power its enabling statute delegates to it” either expressly or by implication. *Lussier v. Maryland Racing Comm’n*, 343 Md. 681, 701 (1996). Thus, your question is one of statutory interpretation. The rules of statutory construction in Maryland are well-established. “The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature.” *State v. Johnson*, 415 Md. 413, 421 (2010) (internal quotation marks omitted). As the Court of Appeals has explained:

To ascertain the intent of the General Assembly, we begin with the normal, plain meaning of the statute. If the language of the statute is unambiguous and clearly consistent with the statute’s apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction. We neither add nor

The Honorable Anne Healey

December 28, 2018

Page 4

delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with “forced or subtle interpretations” that limit or extend its application.

We, however, do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute’s plain language to the isolated section alone. Rather, the plain language 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. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute’s object and scope.

Where the words of a statute are ambiguous and subject to more than one reasonable interpretation, or where the words are clear and unambiguous when viewed in isolation, but become ambiguous when read as part of a larger statutory scheme, a court must resolve the ambiguity by searching for legislative intent in other indicia, including the history of the legislation or other relevant sources intrinsic and extrinsic to the legislative process. In resolving ambiguities, a court considers the structure of the statute, how it relates to other laws, its general purpose and relative rationality and legal effect of various competing constructions.

Id. at 421-22 (quoting *Lockshin v. Semsker*, 412 Md. 257, 274-77 (2010)).

According to the language of the PRC’s enabling statute, the PRC has the authority, under SFP § 5-816(3), to “review and comment on plans and reports related to the Patuxent River and its watershed.” Although the terms “plans” and “reports” are not defined in the statute or anywhere else in the State Finance & Procurement Article, that language appears to vest the PRC with broad authority to review and comment on any plans or reports relating in any way to the Patuxent River and its watershed. *See Dictionary.com* (last visited 12/27/18) (defining “plan” to include a “scheme or method of acting, doing, proceeding, making, etc., developed in advance;” “a design or scheme of arrangement;” or “a specific project or definite purpose”); *see also Chow v. State*, 393 Md. 431, 445 (2006) (“[I]t is proper to consult a dictionary or dictionaries for a term’s ordinary and popular meaning”).

The Honorable Anne Healey

December 28, 2018

Page 5

In the absence of statutory definitions, the plain meaning of that term suggests that the PRC has authority to review and comment on the plans for a proposed private development project being considered by a unit of local government, so long as the project has some relationship to the Patuxent River or its watershed. After all, a proposed local private development project that may have some relation to or effect on the Patuxent River watershed and that is submitted for approval to a local planning board or governing body would seem to constitute a “plan” with respect to land use in the Patuxent River watershed. Thus, based solely on the language of SFP § 5-816(3), there is a strong argument that the PRC has the power to review and comment on plans for proposed private developments that it believes will impact the Patuxent River.

However, statutory provisions must not be “read in a vacuum” and “must be viewed within the context of the statutory scheme to which it belongs.” *Johnson*, 415 Md. at 421. The PRC is part of the Department of Planning, and the term “plan” as it relates to the Department’s work often has a more technical meaning that refers to governmental documents establishing general guidance for land-use management, rather than documents relating to specific development proposals. For example, the Department plays an important role in the comprehensive planning process for local governments. *See, e.g.*, Md. Code Ann., Land Use (“LU”) § 1-207(f) (establishing that the Department shall receive and “may comment” on reports prepared by local government related to the local planning and development processes); SFP § 5-501 (establishing the Department as the depository of all local planning documents). Under that scheme, a local jurisdiction must adopt “a plan” for the jurisdiction’s overall development, LU §§ 1-405; 3-101, and then adopt implementing mechanisms—zoning, planned development, subdivision, and other provisions—that are consistent with the adopted “plan.” LU §§ 1-417, 3-303. In that context, therefore, plans tend to refer to governmental planning documents. Although the term “plan” as used in the PRC’s statute is not limited in the same way, the fact the General Assembly placed the PRC in the Department of Planning could suggest that the Legislature intended the term “plan” in the PRC’s statute to refer to a narrower category of governmental plans that establish general guidance for development—like those that the Department of Planning typically reviews—rather than plans for specific development projects. Therefore, a reviewing court might find that the meaning of “plans and reports” in this context is ambiguous.

To the extent that the meaning of “plan” in this context could be viewed as ambiguous, a court would likely examine the legislative history of the statute to determine

The Honorable Anne Healey
December 28, 2018
Page 6

whether the PRC has the authority to comment on specific development projects. The legislative history here, however, appears to be inconclusive.

The PRC was first created by Chapter 746 (Senate Bill 1047) of the Acts of 1980 (the “Act”). The impetus for the Act was a 1978 report of the Patuxent River Watershed Advisory Committee (“Advisory Committee”), which recommended establishing an entity like the PRC via Executive Order. The Advisory Committee Report had recommended that the PRC should be created to advise the Department in preparing the Patuxent River Plan, and—as relevant here—also recommended that, among other duties, the PRC be authorized to “review and comment on Section 208 and 305b Plans/Reports.” Bill File for S.B. 1047, 1980 Leg., Reg. Sess., Advisory Committee Report at 5. Section 208 plans/reports referred to plans required under Section 208 of the federal Clean Water Act, *see* 33 U.S.C. § 1288, and Section 305b plans/reports referred to a required biennial report on water quality made under 33 U.S.C. § 1315(b) to the U.S. Environmental Protection Agency. Thus, as proposed by the Advisory Committee, the PRC would have had the power to review and comment only on two particular types of governmental plans and reports.

As introduced, Senate Bill 1047 provided more broadly that the PRC would have the power to “review and comment on plans and reports,” without expressly limiting that power to the two types of federal “Plans/Reports” that had been referenced by the Advisory Committee. *See* S.B. 1047, 1980 Leg., Reg. Sess. (first reader). The bill, as introduced, also proposed to establish the PRC within the Natural Resources Article as a part of the Department of Natural Resources (“DNR”). *Id.* The bill was amended to place the PRC within the Department, rather than DNR. But the final legislation retained the authority of the PRC to “review and comment on plans and reports.” 1980 Md. Laws, ch. 746.²

² In 1985, this language providing the PRC with authority to “review and comment on plans and reports” was revised as part of the Legislature’s ongoing Code Revision efforts, and recodified without substantive change. *See* 1985 Md. Laws, ch. 11. During that same session, the General Assembly clarified the PRC’s duties in this respect by requiring the PRC to “review and comment on plans and reports *related to the Patuxent River Watershed.*” 1985 Md. Laws, ch. 547 (emphasis added). The legislative history of this change indicates only that the change “[r]estates certain duties of the Patuxent River Commission” without additional explanation. Bill Analysis for S.B. 480, 1985 Leg., Reg. Sess. That language is the same as the current language contained in SFP § 5-816(3).

The legislative history of the Act does not contain any explanation for why the General Assembly chose not to follow the language of the Advisory Committee Report with respect to the PRC's authority to "review and comment on Section 208 and 305b Plans/Reports" and instead granted the PRC broader authority to "review and comment on plans and reports." Although the review authority granted under the Act is broader in scope than that which was recommended by the Advisory Committee, it is not clear how much broader the Legislature intended that authority to extend. The Legislature might have intended that the PRC would have authority to comment on any and all "plans and reports" that relate to the Patuxent River, including plans for proposed development projects in the watershed. But, alternatively, the Legislature might have removed the specific reference to "Section 208 and 305b Plans/Reports" merely because it wanted the PRC to have authority to comment on other *governmental* plans and reports, not just the two specific types of governmental reports mentioned in the Advisory Committee's recommendations.

Ultimately, given the broad language of the statute, the ordinary meaning of "plan," and the lack of any definitive legislative history, I think the PRC could likely interpret its statute to allow it to comment on plans for specific development projects, and that such an interpretation would likely be entitled to a degree of deference. *See McCullough v. Wittner*, 314 Md. 602, 612 (1989) ("The interpretation of a statute by those officials charged with administering the statute is, of course, entitled to weight."). In fact, it appears that the PRC, in the early years of its existence, may have commented on some specific development proposals in conjunction with the Department. *See* 1984 Patuxent River Policy at 40, <https://planning.maryland.gov/Documents/OurWork/PRC/OriginalPolicyPlan.pdf>.³ I must caution, however, that if the PRC has not previously interpreted its authority under SFP § 5-816(3) to include the ability to review and comment on proposed private development plans, a new interpretation by the agency that it has the power to do so may not be entitled to the same degree of deference than if it had previously interpreted its authority in this manner. *See Baltimore Gas & Elec. v. Public Serv. Comm'n*, 305 Md. 145, 161 (1988) ("[T]he *contemporaneous* interpretation of a statute by the agency charged with its administration is entitled to great deference, especially when the interpretation has been applied consistently and for a long period of time" (emphasis added)); *Consumer Protection Div. v. Consumer Pub. Co.*, 304 Md. 731, 759 (1985) ("The consistent

³ It is not clear from the discussion in the Plan whether, in those instances, the PRC commented separately from the Department or assisted the Department in providing comments.

The Honorable Anne Healey

December 28, 2018

Page 8

construction of a statute by the agency responsible for administering it is entitled to considerable weight.”⁴

In sum, the ordinary meaning of “plans” as used in SFP § 5-816(3) suggests that the PRC may review and comment on a private development project related to the Patuxent River and its watershed when those plans are under consideration by a unit of local government. To the extent the scope of SFP § 5-816(3) may be viewed as ambiguous, the legislative history of the statute is inconclusive. Although there is some indication in the legislative history that the origin of the statutory language in the Advisory Committee’s Report was based on a narrower intent, the resulting enactment by the General Assembly was not as limited, and it broadly authorized the PRC to review and comment on “plans and reports” in general. Thus, in the absence of definitive authority to the contrary, the PRC likely has discretion to interpret its authority under SFP § 5-816(3) to include the authority to review and comment on proposed local private development projects.

B. The Authority of the Secretary of Planning Over the PRC

You also inquired as to whether the Secretary has the legal authority to control actions taken by the PRC, including whether the Secretary may prohibit the PRC from commenting on proposed local private development projects. In my view, if the PRC has authority under SFP § 5-816(3) to review and comment on specific proposed local private development projects, then the PRC’s structure and its duties suggest that it possesses the independent discretion to exercise such authority, notwithstanding contrary guidance from the Secretary.

⁴ The PRC might also have the authority to review and comment on specific development projects under its power to “review the operations of units of . . . local government that have responsibility for implementation of the Plan.” SFP § 5-816(1). If a local government is poised to approve a development project that, in the PRC’s view, will negatively affect the Patuxent River, the PRC might arguably be “review[ing] the operations” of that local government unit by submitting comments opposing the project. Although the power to “review the operations” of a governmental unit could be read as merely backward looking—i.e., as giving the PRC authority to object only to governmental decisions that have already been made—it would seem strange to give the PRC authority to object to an action taken by a local government after the fact and yet prevent the PRC from informing the local government in advance about the Commission’s objections. However, given my conclusion about the PRC’s powers under SFP § 5-816(3), there is no need to definitively resolve that question here.

The Honorable Anne Healey

December 28, 2018

Page 9

In general, the Secretary of Planning has significant authority over the units within the Department. For example, the Secretary has the power to review and to approve or disapprove or revise “regulations of all boards, commissions, divisions, and other agencies within the jurisdiction of the Department.” SFP § 5-203(b). The Secretary also “is responsible for the operation of the Department and shall establish guidelines and procedures to promote the orderly and efficient operation” thereof, SFP § 5-201(d), and is “responsible for the comprehensive planning of programs and services of the Department,” SFP § 5-203(g)(1). Thus, the Secretary must “review and approve or disapprove the plans of the units in the Department.” SFP § 5-203(g)(2). In addition, “[a]ll boards, commissions, divisions, and other agencies of the Department shall report to the Secretary or the Secretary’s designee as provided in regulations or written directives of the Secretary[,]” SFP § 5-203(d), and the Secretary may exercise “any power necessary and proper to discharge the Secretary’s duties.” SFP § 5-203(m). Finally, the Secretary is “responsible for establishing policy to be followed by the units of State government within the Secretary’s Department.” Md. Code Ann., State Gov’t § 8-205(b)(2).

Although the PRC is located “in the Department[,]” SFP § 5-812, and thus may be subject to the Secretary’s authority over units in the Department to at least some degree, the structure of the statutory scheme governing the PRC suggests that the Commission has a certain amount of independence from the Department. As an initial matter, the PRC consists primarily of individuals recommended to the Governor by the governing bodies of the seven counties in the Patuxent River watershed, as well as representatives of municipal, business, environmental, and agricultural interest groups and other State and federal governmental entities. SFP § 5-814. Those members have a statutorily established term of office of four years, and their terms are staggered, such that the composition of the PRC does not turn over entirely with the election of each new Governor. SFP § 5-814(b). The PRC also includes a handful of ex officio members, including the Secretary of Planning. SFP § 5-814. The requirement for staggered terms for regular members, as well as the fact that those regular members are appointed by the Governor (without any statutory requirement that they be approved by the Secretary), suggests that the Commission is not subject to the exclusive direction of the Secretary.

In addition, the Secretary of Planning (or the Secretary’s designee) serves as only one of 34 voting members. SFP § 5-814. Given that the Secretary is merely one of 34 voting members, it is unlikely that the General Assembly intended for the exercise of the PRC’s statutory authority to be subject to the exclusive approval of the Secretary, which

would give one member of the Commission complete veto power over all of the PRC's decisions. That result would be in tension with the statutory scheme, because one of the duties of the PRC is to "review and comment on" amendments to the Patuxent River Plan that have been proposed by the Department. SFP § 5-805(b)(1). If the Secretary could control all of the PRC's policy decisions, then the Secretary could effectively shield the Department's proposed amendments to the Policy Plan from any meaningful review by the PRC and thereby undermine a core purpose of the statutory scheme. There is simply no indication in the PRC statute or its legislative history that the General Assembly intended to allow the Secretary to single-handedly limit exercise of the PRC's authority or to otherwise provide the Secretary with any greater authority than possessed by any of the other members over the decisions of the PRC.⁵

Thus, in my view, the structure of the PRC suggests that the PRC has independent authority to decide whether to comment on particular plans or reports, despite the Secretary's general authority over the Department. As the Court of Appeals has explained, "[e]ven though two statutes may require conflicting results with regard to their common subject, they are not thereby necessarily rendered irreconcilable. Where provisions of one of the statutes deal with the common subject generally and those of the other do so more specifically, the statutes may be harmonized by viewing the more specific statute as an exception to the more general one." *Government Employees Ins. Co. v. Insurance Com'r*, 332 Md. 124, 132-33 (1993). Although the Secretary has broad authority to guide the operations and activities of the Department, in this instance, the specific statutory authority granted to the PRC to review and comment on plans and reports relating to the Patuxent River and its watershed may amount to an exception to the general authority of the Secretary over units in the Department.

Indeed, this Office has previously recognized that, in some cases, an administrative agency that is placed within a department for certain purposes may be independent from that department for other purposes. *See 59 Opinions of the Attorney General* 430, 430-31, 433 (1974) (concluding that the Health Services Cost Review Commission ("HSCRC"), though located in the then-Department of Health & Mental Hygiene ("DHMH"), was

⁵ Although the PRC's enabling statute provides that the existence of the PRC "does not take away or limit the authority that any principal department of the State government had on July 1, 1980," SFP § 5-813, that provision suggests that the PRC was not meant to supplant any authority of a State principal agency when it was established, not that the Department may exercise or control the independent duties of the PRC.

The Honorable Anne Healey

December 28, 2018

Page 11

independent of DHMH and was merely placed in DHMH for administrative purposes). That opinion relied in part on the fact that, as here, the members of the commission were appointed by the Governor, without the involvement of DHMH, and that the commission was given certain “substantive responsibilities and powers . . . without reference to” DHMH. *Id.* at 430. To be sure, in that context, the General Assembly made absolutely clear that the HSCRC was to be independent of DHMH by expressly stating that the unit was “an independent commission functioning within” DHMH. *Id.* at 431 (quoting Md. Ann. Code, art. 43 § 568-I). Thus, the PRC—which is “in” the Department—may not be as independent from the Department of Planning as the HSCRC was from DHMH. But the statutory structure of the PRC, for the reasons explained above, strongly suggests that the PRC may decide to review and comment on plans and reports independent of the Secretary.

To be clear, the PRC does not appear to be entirely independent from the Department or entirely free from the Secretary’s control. The Secretary’s powers seem to extend to at least certain types of activities of the PRC, given that the PRC is “in the Department.” SFP § 5-812. For example, the PRC does not have independent authority to adopt regulations, and must rely on the Secretary’s authority to review and approve or disapprove or revise “regulations of all boards, commissions, divisions, and other agencies within the jurisdiction of the Department.” SFP § 5-203(b). Similarly, “[a]ll boards, commissions, divisions, and other agencies of the Department shall report to the Secretary or the Secretary’s designee as provided in regulations or written directives of the Secretary[.]” SFP § 5-203(d), so the Secretary may require the PRC to provide updates about its activities. The Secretary also has the express power to “call a meeting of a board or commission [within the Department] to consider any subject that the Secretary considers necessary and proper.” SFP § 5-203(c). Therefore, it appears that the PRC may not adopt regulations without the approval of the Secretary, that the PRC is generally subject to the operational guidelines and procedures of the Secretary, and that the PRC is required to report to the Secretary with respect to its operations. However, in my view, a court likely would conclude that the PRC’s power to review and comment on plans and reports may be exercised independent from the control of the Department and is an exception to the Secretary’s otherwise broad authority of oversight and guidance for the units within the Department.

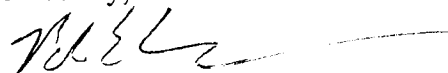
The Honorable Anne Healey
December 28, 2018
Page 12

III Conclusion

Although not entirely without doubt, the language of the statute allowing the PRC to “review and comment on plans and reports related to the Patuxent River and its watershed,” SFP § 5-816(3), appears broad enough to permit the PRC to comment on proposed local private development projects that may affect the Patuxent River or its watershed and are under consideration by a unit of local government. At the very least, the PRC likely has the discretion to interpret its own statutory powers to include that authority. In addition, to the extent the PRC possesses that authority, it seems likely that the PRC may exercise that authority independent from the control of the Secretary. Of course, given the ambiguities in the statute, the Department, the Commission, or any other interested group may wish to seek clarification from the General Assembly about the scope the PRC’s authority and/or the degree to which the Secretary may exercise his or her authority over the activities of the PRC.

Although this is not an official Opinion of the Attorney General, I hope this is responsive to your request. If you have any questions or need any additional information, please feel free to contact me.

Sincerely,



Patrick B. Hughes
Chief Counsel,
Opinions & Advice

Cc: Sandra Benson Brantley, Counsel to the General Assembly
Paul J. Cucuzzella, Principal Counsel to the Department of Planning