




Policy Memo

To: Patuxent River Commission
From: Robert S. McCord, Secretary of Planning 
Date: May 2, 2018
Re: The Patuxent River Commission's authority to review operations of local government

Due to recent agenda discussions by the Patuxent River Commission regarding the review of pending legislation before the Howard County Council related to the "Settlement at Savage Mill" development, the Maryland Department of Planning (Department) has determined there is a need to clarify (a) the authority of the Patuxent River Commission (Commission) to review operations of local government, and (b) the assigned legal counsel for the Patuxent River Commission. This policy guidance is intended to redirect the Commission's attention to those matters that the Commission has the authority to address in promoting collaboration among the state agencies, local governments and stakeholders on the Commission.

Authority of the Patuxent River Commission to review operations of local government

The Commission has the legal authority to review the operation of local government undertaken by the counties that are subject to the Patuxent River Policy Plan (Plan), to ensure consistency with the implementation of the Plan. **That authority does not, however, extend to advocating for or against specific private development projects.**

An "operation" of local government is its "discharge of a function." 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 (or municipality's) administration of programs and services, and implementation of county (or municipality) 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's authority to review may also not impinge on the authority of any other principal department of State government.**

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 an entity's jurisdiction, or beyond its powers or purposes, and 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, these activities must be done in the member's individual capacity, or as a member of an entity other than the Commission¹, to avoid violation of the Maryland Public Ethics Law.**

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. The practice of reviewing specific proposed projects may lead to the appearance of the Commission's lack of impartiality or independent judgment if the Commission later encounters the same project in its official duty of review of the operations of a local government obligated to implement the Plan in relation to the same project.

The practice of reviewing specific proposed projects can also lead to the perception that the Commission can give a project its "stamp of approval" or be seen as interference in an operation of local government at the request of an advocate or opponent of a specific project.

Examples of Commission's review authority:

- Concerns, issues, or recommendations regarding state or local government procedures or development requirements.
- Recommendations to state or local government regarding best practices.

Examples not within Commission's review authority:

- Concerns, issues, or recommendations regarding private actions, such as a developer's proposed approach.
- Taking a position for or against a specific project.
- Providing comments on matters related to the application or interpretation of federal, state or local government procedures, law or regulations, before an "operation" has occurred.

In addition to being outside the Commission's legal purview, commenting on the application or interpretation of government procedures, law or regulations, before an "operation" has occurred is bad policy because Commission involvement on pending or impending matters may have the effect of discouraging our local governments from

¹ Subject to the approval of, or an exception by the State Ethics Commission to serve on boards of other entities that engage in activities that may relate to the Commission's activities..

actively engaging with the Commission on Plan implementation. Without local government participation on the Commission, our efforts to develop a collaborative approach to restore the Patuxent River will fail.

Lastly, the Commission risks being drawn into local land use conflicts when it provides comment on the application or interpretation of government procedures, law or regulations before the local government has completed its operation with respect to the matter, especially regarding specific development projects. If the Commission pursues the practice of commenting on conceptual development proposals, other proponents or opponents of prospective development proposals may seek out the Commission for support of their views on such projects, with the Commission being put in the position of weighing in on a matter of which it lacks full comprehension of all the facts. This practice may also lead to many more private development proposals coming before the Commission for "approval" or evaluation. The Commission lacks the legal authority, the capacity, and mechanisms for receiving or reviewing technical or policy information from the numerous parties that may be involved or interested in a proposed development project; nor does the Commission have any established review criteria to render consistent and informed and recommendations.

Appropriate Legal Counsel for the Patuxent River Commission

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." State Finance and Procurement (SFP) Article §5-812. The Department of Planning, in turn, is established in Title 5 of the Article as a principal department of the State government. SFP §5-201(a). Accordingly, the Commission is a unit of State government within the Department of Planning.

The Office of Attorney General is the legal counsel assigned to 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.