DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

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

May 15, 2012

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

RE: House Bill 1201

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1201, "Department of Planning – State Development Plan – Use and Conflicts of Law." This bill limits the effect that the State development plan—commonly known as "PlanMaryland"—has on State permits, State funding, and local ordinances and comprehensive plans. We write to point out conflicts between the bill and two existing statutes and to call your attention to the possibility that the bill may create uncertainty among State agencies as to their duties under your December 19, 2011 Executive Order.

Statutory Conflicts

House Bill 1201 generally limits the effect that the State development plan ("the Plan") may have on State and local decisions relating to planning, permitting, and funding. In relevant part, the bill prohibits the Plan from being "used to deny . . . a State-issued permit; or State funding . . . mandated by statute or regulation; or provided for in the State operating or capital budget." (Internal numbering omitted). The bill also provides that "[t]he plan may not require a local government to change or alter a local ordinance, regulation, or comprehensive plan."

The bill's provision that the Plan "may not be used to deny . . . a State-issued permit" appears to conflict with § 14-508 of the Environment Article ("EN"), which governs the review of applications for permits to construct and operate certain types of oil and gas projects. Under EN § 14-508(a)(3), the Department of the Environment ("MDE") may only grant a permit after the Secretary has affirmatively determined that the applicant has demonstrated that the proposed facility "[c]onforms with the State

development plan, if such plan has been lawfully approved and adopted." Because PlanMaryland is now the lawfully approved and adopted "State development plan," MDE must now deny a coastal facilities permit for a proposed facility that does not "conform[ ] with" it.

Although the bill file does not suggest any legislative intent to repeal this particular requirement, read literally the provision does suggest that outcome. However, it is a rule of statutory construction that, whenever possible, legislative enactments should be interpreted to avoid repeals by implication. *See Farmers & Merchants Nat'l Bank v. Schlossberg*, 306 Md. 48, 61 (1986); *State v. Harris,* 377 Md. 32, 39 (1992) ("[A] repeal by implication does not occur unless the language of the later statute plainly shows that the legislature intended to repeal the earlier statute.") Even so, whether HB 1201 could be interpreted to repeal the criterion stated by EN § 14-508(a)(3) in a particular circumstance is not yet clear; PlanMaryland is a work in progress, and it is difficult to pinpoint the effect of the bill on the Secretary's discretion to deny a coastal facilities permit for a specific facility based on the Plan. Nevertheless, the potential conflict exists and must be taken into consideration in how the Department of the Environment reviews oil and gas permits.

A second potential conflict arises from new State Finance and Procurement Article ("SFP") § 5-606(a)(2)(ii), which provides that the Plan may not be used to deny State funding provided for in the State operating budget or capital budget. It is possible that there are circumstances where the application of SFP § 5-606(a)(2)(ii) may create a conflict with your statutory budget reduction authority under SFP § 7-213. That section grants you the authority, subject to certain restrictions, and with the approval of the Board of Public Works, to reduce, by not more than 25%, any appropriation that you consider unnecessary.

If you approve HB 1201, our Office stands ready to assist in resolving these potential conflicts or recommending ways in which the law may be harmonized in the future.

Executive Order Implementation

The bill also may create uncertainty among agencies as to the scope of their responsibilities under your recent Executive Order. That Order instructs executive branch agencies to "review and consider PlanMaryland when making decisions about actions that affect development in the State" and to use Planning Areas identified under the Plan "to direct their resources to achieve the goals and objectives of PlanMaryland."

COMAR 01.01.2011.22B(3) and C(1)(A). Two provisions of the bill could be viewed as conflicting with those instructions. We discuss these potential conflicts here to help you reach your decision about whether to approve the bill, but it is our view that in practice these conflicts are best handled, when and if they arise, by your executive branch agencies in consultation with their counsel.

The first apparent conflict is the prohibition on the use of the Plan to deny a permit. To the extent that an agency retains discretion under its permitting statute to consider consistency with the State Development Plan, as the Executive Order directs, HB 1201 could be construed to limit that discretion. Forecasting the precise effect of this provision is difficult in light of the fact that the State agencies' reports to the Smart Growth Subcabinet on opportunities to implement PlanMaryland through their regulatory programs are not due until mid-June. Moreover, various State programs already reflect pre-existing statutory or regulatory provisions that embody the smart growth goals and objectives found in the Plan. Because the bill only concerns the scope of the Plan, it would not affect decisions made pursuant to these other smart growth provisions. In short, without knowing how the various agencies' adherence to the Executive Order (and PlanMaryland) would affect their existing criteria for funding and permitting decisions, we cannot identify the specific programs in which the bill would actually present a conflict with the Executive Order, but the bill would present the potential for such conflict. Because, as noted above, the implied repeal of a statute is generally disfavored, a careful analysis of each such potential conflict must be undertaken. Again, the Office of the Attorney General will be ready to assist in the resolution of those conflicts as they arise.

The second potential conflict between HB 1201 and your Executive Order is the provision that "[t]he plan may not be used to deny . . . State funding . . . provided for in the State operating budget or capital budget . . . ." SFP § 5-606(a)(2)(ii) (as proposed) ("the funding provision").[1] Read broadly, this provision could be seen as limiting the extent to which an agency, when making discretionary funding decisions within a program, may use inconsistency with PlanMaryland as a basis for denying a specific grant. If interpreted that way, the bill could dramatically limit the extent to which PlanMaryland could be used to influence funding decisions under a number of State programs, including the Maryland Agricultural Land Preservation Foundation, Program

[1] The funding provision refers to the adopted operating and capital budget bills *passed by* the General Assembly and does not apply to the *formulation* of the operating or capital budget. The Plan thus may be used to direct state resources to achieve the goals of PlanMaryland in the preparation by the Executive Branch of these budgets. *See* SFP §§ 7-104 and 7-105.

Open Space, and the water and sewer Revolving Fund implemented by the MDE.[2] The funding provision, however, may be read more narrowly to limit the reach of its prohibition to the denial of state funding through the withholding of an *appropriation* based on the State development plan, either for a program appropriation or specific-project appropriation.

We believe this second, narrower reading is the better one for three reasons. First, had the Legislature intended to affect agencies' discretionary funding authority, it would have stated simply that "[t]he plan may not be used to deny . . . State funding," without adding the modifier, "provided for in the State operating budget or capital budget." Second, the legislative history reveals that the bill's sponsors, the Fiscal Note writer, MDP, and the Maryland Association of Counties—which proposed the bill—all believed that the State funding language would not impair the State's ability to make discretionary project-funding decisions based on PlanMaryland.[3] Third, the narrower reading we recommend avoids a possible constitutional question under Art. III, § 52, which generally provides that the General Assembly may not prevent the Governor from including or excluding funding for a particular purpose in the ingoing budget.[4] 62 *Opinions of the Attorney General* 106 (1977) ("Restriction of the discretion of the Governor to fund, or not to fund, the Baltimore Subway project at a level which he deems to be appropriate is inconsistent with Article III, Section 52(3) of the Maryland Constitution which directs the Governor to formulate a 'complete plan of proposed expenditures' which, except for those mandatory appropriations specified in the Constitution, may be included, or not included, as the Governor deems appropriate."). Although "the General Assembly could amend the organic statutory authority" to make a particular project or program illegal, *id.* at 108 n.1, it lacks the authority to say that the Governor may not use his budgetary

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[2] As discussed above in text, many of these programs already take into consideration smart growth criteria under existing law. House Bill 1201 would not affect their ability to continue to do so.

[3] We refer to legislative history because we believe the statutory language is ambiguous, but even where a bill's language is not ambiguous, the Court of Appeals has sanctioned the resort to legislative history to avoid the situation where a drafting mistake frustrates the legislative goal. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 513 (1987). Here an apparent drafting error would have the unintended effect of repealing an essential component of PlanMaryland, *i.e.*, the State's ability to direct funding in a manner consistent with the goals of PlanMaryland.

[4] The General Assembly may pass legislation that mandates a specific level of funding. Art. III, § 52(11) and (12). HB 1201 does not, however, create a funding mandate under those constitutional provisions.

discretion to fund a particular, legal project. As we have previously stated, if the General Assembly could "fix the items and amounts of the budget bill, the Executive Budget system embodied in Art. III, Section 52 . . . 'would be destroyed.'" *Id.* at 107 (citing *Maryland Action for Foster Children, Inc., v. State*, 279 Md. 133, 152 (1977)).

To give effect to the apparent intent and to avoid a possible conflict with Art III, § 52, we believe that the proposed amendments to SFP § 5-606(a)(2)(ii) should be interpreted as if it read: "[t]he plan may not be used to deny . . . State funding . . . *specifically* provided for in the State operating budget or capital budget *bills*." (Added words italicized). Under this interpretation, PlanMaryland could not be used to withhold project-specific authorizations that appear in the budget, but could be used to influence the manner in which agencies allocate discretionary spending on particular projects. Read in this way, HB 1201 would do little to impair the directive contained in your recent Executive Order.

In sum, it is our view that the bill is both constitutional and sufficient in form. The permitting and funding provisions, do, however, raise questions with the directives in your Executive Order on the implementation of PlanMaryland. Although the matter is not free from doubt, we believe those questions are best answered in a way that confirms your ability to direct executive branch agencies to render their permitting and funding decisions in a manner consistent with PlanMaryland. Further, the bill appears to be inconsistent with one of the mandatory criteria for the grant of a permit for an oil or gas project in a coastal area, although there may be ways in which the Department of the Environment can apply the bill's provisions to avoid an implied repeal.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/MB

cc: The Honorable Norman H. Conway
The Honorable Thomas M. Middleton
The Honorable John P. McDonough
Joseph Bryce
Karl Aro