



*Martin O'Malley, Governor*

October 25, 2013

The Honorable President and Members of the Charles County Board of County Commissioners  
P.O. Box 2150  
La Plata, Maryland 20646

Dear Madame President and Charles County Commissioners:

The Smart Growth Subcabinet is in receipt of the October 9 letter from attorney Warren Rich regarding the Charles County Comprehensive Plan and asked me to respond, as Chair, on their behalf to the issues he raised.

The Smart Growth Subcabinet, which represents 13 state agencies, is charged with furthering smart growth throughout Maryland. Notwithstanding Mr. Rich's assertions to the contrary, we are well within our authority to comment on the proposed Charles County Comprehensive Plan, and the substantive legal analysis provided by Mr. Rich regarding comprehensive plans is flawed. See the attached response from Maryland Department of Planning Principal Counsel Paul Cucuzzella.<sup>1</sup>

We support the work of local governments to write comprehensive plans. Smart Growth Subcabinet agencies review and provide technical assistance to local governments in developing draft comprehensive plans. For example, Maryland Department of Planning (MDP) staff has provided technical assistance on Charles County comprehensive plans for decades, including the development of the current draft plan starting in April 2009.

Contrary to Mr. Rich's assertion, the draft comprehensive plan does more than change the name of land use districts from Agricultural Conservation to Rural Residential on almost 191,000 acres. The plan, in fact, changes the intended use of those lands and sets the stage, legally and in the minds of property owners, to encourage large-lot, sprawl development. The expectations for future land uses for these rural lands will not be agriculture or resource conservation, but, rather, for development, compromising and fragmenting the landscape adjacent to existing protected lands. Indeed, the draft plan references an expectation for "comprehensive rezoning."

*While farming can and is expected to continue in the near future, the long-range land use over time can be replaced by rural residential housing on large lots as the dominant use...Future comprehensive rezoning of this area will be required to better match the land use designation.*

While much of Charles County's growth is projected to occur within existing population centers like Waldorf and La Plata, the proposed plan opens up 65 percent of the county that was previously designated for agriculture or

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<sup>1</sup> The Smart Growth Subcabinet provides a copy of this memorandum pursuant to a limited waiver of attorney-client privilege. This waiver does not extend beyond this memorandum.

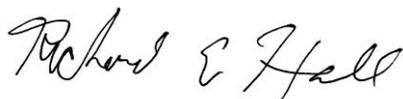
conservation to large-lot growth. That growth would have a significant impact on Charles County schools, many of which are overcrowded and lagging behind in modern amenities, according to a state school construction program official in a July 10, 2013 letter to the Charles County Public Schools superintendent.

Regarding the future of state funding to Charles County, consider that a number of state programs are tailored to land uses. For example, Maryland Agricultural Land Preservation funds provide protection for farmland, but Charles County's proposed plan eliminates the Agricultural Conservation District. Similarly, the Rural Legacy program purchases conservation easements for large, contiguous tracts of agricultural, forest and natural areas. If large, contiguous natural areas do not exist, there would be no basis for funding easements.

We believe that there are reasonable solutions that could not only help balance Charles County's interest in growth, but also protect agricultural and natural resource programs. As commissioners, you might consider density exchange and transfer of development rights (TDR) programs, which have proven effective in steering development into areas best suited for growth. These programs compensate landowners in designated zones in exchange for developers receiving more density in growth areas. Such programs might help support Charles County's goal of bringing transit to the Waldorf corridor by showing a county policy supporting population growth, which might help win state and federal funding for transit.

The Subcabinet stands ready to work with Charles County Commissioners and staff in developing a balanced, achievable comprehensive plan.

Sincerely,

A handwritten signature in black ink that reads "Richard E. Hall". The signature is written in a cursive, flowing style.

Richard Hall, Secretary, Department of Planning  
Chair, Smart Growth Subcabinet

cc: Warren Rich, Rich and Henderson, P.C.  
cc: The Smart Growth Subcabinet Secretaries

DOUGLAS F. GANSLER  
ATTORNEY GENERAL

KATHERINE WINFREE  
CHIEF DEPUTY ATTORNEY GENERAL

JOHN B. HOWARD, JR.  
DEPUTY ATTORNEY GENERAL



PAUL J. CUCUZZELLA  
ASSISTANT ATTORNEY GENERAL  
COUNSEL TO THE DEPARTMENT

RIEYN DELONY  
ASSISTANT ATTORNEY GENERAL  
DEPUTY COUNSEL TO THE DEPARTMENT

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF PLANNING  
301 West Preston Street, Baltimore, Maryland 21201  
Telephone 410-767-4500 Facsimile: 410-767-4480

*Satellite Office:* 100 Community Place, Suite 2.300, Crownsville, Maryland 21032-2023  
Telephone 410-514-7800 Facsimile 410-514-7099

**MEMORANDUM**

**PRIVILEGED AND CONFIDENTIAL  
ATTORNEY-CLIENT COMMUNICATIONS**

**TO:** Members of the Smart Growth Subcabinet

**FROM:** Paul J. Cucuzzella, Counsel to MDP and the Subcabinet

**DATE:** October 15, 2013

**RE:** Draft Charles County Comprehensive Plan

You have asked for me to review the letter from attorney Warren K. Rich, dated October 9, 2013, written on behalf of the County Commissioners of Charles County (the "Commissioners") in response to the letter dated September 20, 2013, regarding the draft Charles County comprehensive plan, sent to the Commissioners by the Maryland Smart Growth Subcabinet (the "Subcabinet"). Specifically, you ask that I address a number of legal issues raised by Mr. Rich that touch upon the Subcabinet's authority, the nature of the "Visions" and implementation of the Visions in the local comprehensive plan, and State funding authority.

**1. The Subcabinet's Authority.**

Mr. Rich asserts as a "threshold matter" that, in reference to the Subcabinet's September 20, 2013 letter, the Subcabinet lacks the authority to "advocate specific positions." This is simply not the case. The General Assembly established the Subcabinet within the Executive Department of State Government so that the State's smart growth policy could be "better articulated, coordinated, and implemented." Md. Code Ann., State Gov't (SG) § 9-1402. In addition to the general powers bestowed upon the Executive under the State Constitution to "take care that the Laws are faithfully executed," Md. Const., Art. II, § 9, the Subcabinet is charged with, among other things, using "all available resources to promote the understanding of smart growth," and to confer with local governments on "issues relating to activities that affect smart growth." *Id.* § 9-1406(h)(1).

Moreover, as Secretary of the Department of Planning and Chair of the Subcabinet, Richard Hall has the authority to “file a formal statement expressing the views of the Department *and any other unit of State government* concerning environmental or economic impact” of “any administrative . . . proceeding in the State concerning land use, development, or construction.” Md. Code Ann., State Fin. & Proc. (SFP) § 5-305(a)(2) (emphasis added). The Commission’s consideration of the draft comprehensive plan is a type of proceeding “concerning land use” to which this authority applies.

Thus, the Subcabinet’s September 20, 2013 letter – which expressed and detailed the Subcabinet’s “comments and concerns” regarding Charles County’s draft comprehensive plan – fell squarely within these powers, duties, and authorities.

## **2. Applicability of the Visions to, and Local Implementation of, a Comprehensive Plan.**

Relying on the Court of Appeals’ 2008 decision in *Trail v. Terrapin Run, LLC*, 403 Md. 523 (2008), Mr. Rich suggests that the twelve “visions” that a planning commission “shall implement” through a comprehensive plan, as set forth in Section 1-201 of the Land Use Article, “are at best precatory in nature,”<sup>1</sup> and are not “absolute requirement[s].” Also in reliance on *Terrapin Run*, Mr. Rich asserts that a comprehensive plan acts merely as a “guide” for a county’s future growth and development “implementation actions.” In *Terrapin Run*, the Court of Appeals determined that the Economic Growth, Resource Protection, and Planning Act of 1992 (the “1992 Growth Act”), “did not impose on local governments a requirement that in applying their special exemption provisions, they must comply absolutely and completely with the suggestions of their master plans or the visions contained in those plans.” *Id.* at 569. The Court further suggested that the twelve “visions” are “visionary aspirations” that do not create “absolute requirements on local governments” through implementation of their land use programs. *Id.* at 574-75.

Mr. Rich’s reliance on *Terrapin Run* is legally flawed. During the Session that immediately followed the Court’s decision, the General Assembly, in enacting the Smart and Sustainable Growth Act of 2009, expressly and specifically overturned the decision, finding that the decision “could undermine the importance of [a local jurisdiction] making land use decisions that are consistent with the [jurisdiction’s] comprehensive plan.” 2009 Md. Laws, ch. 181, at 2. The General Assembly included in the Act the following:

SECTION 3. AND BE IT FURTHER ENACTED, That it is the intent of the General Assembly that this Act overturn the Court of Appeals ruling in *David Trail et al. v. Terrapin Run LLC et al.*, 403 Md. 523 (2007).

As discussed below, the narrow view and applicability that Mr. Rich attributes to the visions and local implementation of comprehensive plans, in flawed reliance upon *Terrapin Run*, is inconsistent with statutory history.

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<sup>1</sup> Webster’s Dictionary defines “precatory” as “expressing a wish.”

(a) *Applicability of the Visions.*

The 1992 Growth Act first enacted a list of seven “visions.” 1992 Md. Laws, ch. 437, § 1 at 2967-8. Originally codified in Article 66B, the 1992 Growth Act required local planning commissions to draft comprehensive plans that contain certain prescribed elements, including the seven visions. *See* Md. Ann. Code, Art. 66B, 3.05(b) (2) (1992) (“[o]n or before July 1, 1997, all local jurisdictions *shall* adopt and include in their plans . . . the visions set forth in . . . this [a]rticle”) (emphasis added)). The Act further provided that local planning commissions “*shall implement* the . . . visions through the plan.” *Id.* § 3.06(b) (emphasis added). Planning commissions were directed to review and revise their comprehensive plans every six years to “include all elements required . . . and the visions,” and were required to provide to the Governor a schedule of compliance with comprehensive plan requirements, “including a schedule for the adoption and implementation of . . . the visions.” *Id.* §§ 3.05(b)(3); 3.05(e). The floor reports for the 1992 Growth Act, H.B. 1195, further established the requisite nature of the visions – the bill “*require[d]* that local comprehensive plans, in addition to existing requirements, include . . . [as] elements in plans prepared or revised . . . 7 Visions for future growth.” *See* Senate Economic and Environmental Affairs Committee, Floor Report, H.B. 1195 (1992) (emphasis added).

Since 1992, the General Assembly has twice added to and re-framed the “visions,” but the mandatory and directive language has stayed intact. In 2000, an eighth vision was added to Art. 66B, § 3.06(b), but the requirement that planning commissions “shall implement the . . . visions” was unaltered. 2000 Md. Laws, ch. 676, § 1. Then, in 2009 the General Assembly substantially amended the visions to their current formulation. 2009 Md. Laws, ch. 176, § 1, at 5.<sup>2</sup> In doing so, the General Assembly noted that “[t]he visions are a now-familiar touchstone of Maryland land use law and policy.” *Id.*, at 2. Again, left unaltered was the language that planning commissions “shall implement the . . . visions.” *Id.*, § 1 at 4. The Fiscal and Policy Note to the 2009 Act, S.B. 273, stated that, as established by the 1992 Growth Act, the visions “must be pursued in county and municipal comprehensive plans.”<sup>3</sup>

The “visions” – both as originally crafted and as subsequently revised and augmented – are broadly stated and thus open to interpretation, at least insofar as specific implementation in concerned. For instance, the original seven visions included that development is to be “concentrated in suitable areas,” “sensitive areas are [to be] protected,” and “stewardship of the Chesapeake Bay and the land is a universal ethic.” Art. 66B, § 3.06(b)(1), (2), (4) (1992). As a consequence, observers at the time commented that, while local jurisdictions were required to include the visions in their comprehensive plans, it would be difficult for a local jurisdiction to

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<sup>2</sup> The 2009 reformulation of the visions was subsequent to the Court’s decision in *Terrapin Run*. As stated, *Terrapin Run*, which characterized the visions as only “aspirations,” was overturned during the 2009 Session.

<sup>3</sup> A 2013 Opinion of the Attorney General, written in response to an inquiry from County Commissioners of Charles County concerning the County’s authority under the Land Use Article to regulate homeowner association bylaws, noted that “[u]nder [the Land Use Article], non-charter counties *must* ‘enact, adopt, amend, and execute’ a comprehensive plan that *must contain* the twelve ‘visions’ specified in LU Section 1-201(1)-(12).” 98 Op. Atty Gen. Md. 60, at 40 (Aug. 8, 2013) (citing LU § 3-204(a) (“[e]ach local jurisdiction shall adopt a plan that includes . . . the visions set forth in § 1-201”)) (emphasis added). The Opinion further noted that a local jurisdiction’s comprehensive plan “serve[s] as the document through which the planning commission ‘shall implement’ those visions . . . [and that] ‘implementation’ of the visions [is] ‘achieved through the adoption of applicable . . . subdivision ordinances and regulations.’” *Id.*

determine the boundary between merely listing the visions and adequately incorporating them. *See, e.g.*, Philip J. Tierney, “Bold Promises But Baby Steps: Maryland’s Growth Policy To The Year 2020,” 23 U. Balt. L. Rev. 461, 473-74 (1994).

However, it would be contrary to well-established principles of statutory construction to conclude that, in enacting the “visions” and making local implementation mandatory, the General Assembly intended to permit a local planning commission to simply restate the visions in a comprehensive plan without incorporating therein plans, provisions and policies giving the visions meaningful effect. *See, e.g.*, *Doe v. Montgomery County Board of Election*, 406 Md. 697, 712 (2012) (a statute should be read and interpreted so as “no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory”) (citation omitted); *Lawson v. State*, 389 Md. 570, 583 (2005) (same). Indeed, Art. 66B § 3.06 (1992) – as originally enacted by the 1992 Growth Act – provided that local jurisdictions, in developing a comprehensive plan, must, in order to accomplish the “harmonious development of the jurisdiction [and] . . . best promote . . . the general welfare,” include within the plan:

adequate provisions for traffic, the promotion of public safety, adequate provision for light and air, conservation of natural resources, the prevention of environmental pollution, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements.

Moreover, the Act’s Preamble noted, among other things, that the Act was intended “to assure that economic growth is better directed and to assure the more efficient use and protection of Maryland’s land and other natural resources.” 1992 Md. Laws, ch. 437, at 2963.

The seven visions codified in 1992 speak to these purposes and objectives. For example, visions (1) and (3), which established that development should be concentrated in suitable areas and within existing population centers, Art. 66B, § 3.06(b)(1), (3) (1992), were aligned with the Act’s stated goal to promote “the healthful and convenient distribution of the population.” Visions (2), (4), and (5), which addressed conservation of natural resources, *id.*, § 3.06(b)(2), (4), (5), furthered the stated objective to “[conserve] natural resources” and “[prevent] environmental pollution.” Since the original seven visions are intertwined with the overall goals established by the General Assembly for a local jurisdiction’s comprehensive plan, one must conclude that the visions as originally crafted, and as subsequently amended and augmented, were intended to serve as the framework for a local jurisdiction’s comprehensive plan. *See Gardner v. State*, 420 Md. 1, 9 (2011) (parts of a statute must be “reconcile[d] and harmonize[d] . . . to the extent possible consistent with the statutes objective and purpose); *State v. Fabritz*, 276 Md. 416, 421 (1975) (a statute should be interpreted “with reference to the purpose to be accomplished”). Thus, contrary to Mr. Rich’s assertion that the visions are merely “precatory in nature,” if a local jurisdiction implements a policy framework through its comprehensive plan that violates the visions or fails to align with them, then the plan likely violates the State statutory requirements.

(b) *Compliance with a Comprehensive Plan.*

Mr. Rich’s assertion that a comprehensive plan acts merely as a “guide” for future “implementation actions,” as the Court in *Terrapin Run* noted,<sup>4</sup> is contrary to the express provisions of §3-303 of the Land Use Article.<sup>5</sup> Section 3-303 provides that:

(a) At least once every 10 years, which corresponds to the comprehensive plan revision process under § 3–301 of this subtitle, a local jurisdiction shall ensure the implementation of the visions, the development regulations element, and the sensitive areas element of the plan.

(b) A local jurisdiction shall ensure that the implementation of the requirements of subsection (a) of this section are achieved through the adoption of the following applicable implementation mechanisms that are consistent with the comprehensive plan:

- (1) zoning laws;
- (2) planned development ordinances and regulations;
- (3) subdivision ordinances and regulations; and
- (4) other land use ordinances and regulations.

These statutory implementation requirements impose upon local jurisdictions the affirmative obligation to craft their land use ordinances and regulations – the “implementation mechanisms” – such that they are consistent with the jurisdiction’s adopted comprehensive plan. As such, if a land use ordinance or regulation is *inconsistent* with the comprehensive plan, the ordinance or regulation likely violates State law.<sup>6</sup>

### **3. Impact on State Funding.**

In his letter, Mr. Rich addresses potential impacts on State funding decisions regarding the County’s compliance with comprehensive plan requirements, and states that it would be “simply inappropriate” for the State to withhold certain funding based on a non-compliance determination. To the extent that Mr. Rich suggests that the State lacks the authority to withhold public funds should it determine that the County’s comprehensive plan or implementing ordinances and regulations violate State law, he is incorrect. The 1992 Growth Act established the seven “visions” as the State’s “Economic Growth, Resource Protection, and Planning Policy.” 1992 Md. Laws, ch. 437, § 1, at 2977. It also established that with respect to State public works, transportation, or major capital improvement projects, the “State may not provide State funding for the project if the project is not consistent with [either] . . . the State Economic Growth, Resource Protection, and Planning Policy . . . [or] the local [comprehensive] plan.” *Id.*, at 2977-8. These provisions are codified at SFP §§ 5-7A-01 and 5-7A-02(a), respectively, and have been amended to incorporate the current twelve visions.

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<sup>4</sup> *Terrapin Run*, 403 Md. at 535.

<sup>5</sup> The corresponding provision for implementation of the plan and the visions is §1-417 of the Land Use Article.

<sup>6</sup> In 2012, the General Assembly corrected a code revision error in §3-303 of the Land Use Article that occurred in tabulating former §4.09 of Article 66B. 2012 Md. Laws, ch. 674.

While the appellate courts have not had the opportunity to apply or interpret a State agency's authority under SPF § 5-7A-02(a) to withhold funds, the only logical reading of the statute is that the State, acting through its varied agencies, has such authority. Indeed, the Bill Summary for the 1992 Growth Act stated that, under SPF § 5-7A-02(a), "[a] State [agency] could withhold or delay discretionary funding for projects that do not conform to the 7 Visions of the State Policy." Bill Summary for H.B. 1195, 1992 Growth Act, February 17, 1992, at 3. At the time, Counsel to the General Assembly, in response to an inquiry from the Chair of the Environmental Matters Committee, concluded that, in accordance with SPF § 5-7A-02(a), "[i]f the [agency] statute . . . confers discretion regarding funding, . . . that agency might delay funding approval if it can reasonably conclude that a balancing of the [State Economic Growth, Resource Protection, and Planning Policy] warrants such a delay until local action alleviates the problem." *See* Letter from The Attorney General of Maryland, Office of Counsel to the General Assembly, dated February 7, 1992, at 5.

Please note that this memorandum is advice of counsel and is not a formal opinion of the Attorney General.