

# **Testimony to Maryland General Assembly**

## **Budget and Taxation Committee Health and Human Services Subcommittee**

### **West North Avenue Development Authority – FY'24 Budget Hearing**

**Miller Senate Building, William Amoss Room, 4<sup>th</sup> Floor**

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**Chad Williams, Executive Director**  
West North Avenue Development Authority

#### **Introduction**

Good Afternoon, Chair, Vice-Chair, and other members of the Budget and Taxation Committee's Health and Human Services Subcommittee. I'm Chad Williams, Executive Director of the West North Avenue Development Authority, a newly established Maryland independent economic development agency, a unit of the Governor's Office, established by the Maryland General Assembly in March 2021, and enacted on October 1, 2021. I started as the Executive Director in March 2022.

The Maryland General Assembly created this agency to create one comprehensive plan for housing, economic, transportation, and neighborhood development along West North Avenue between Hilton Parkway and Park Rd, defined as the Target Zone, and 300 yards north and south of the Target Zone, defined as the Buffer Zone. **The plan will focus on economic revitalization in one of the most historically discriminated areas in Maryland and the entire United States, where "Redlining" was created to establish hindrances for economic equity primarily for Black citizens.**

On November 10, 2022, the Authority received a reply from the Office of Maryland Attorney General to its June 28, 2023 letter asking for advice and opinion on the status, purpose, and intended activities of the agency as established by the Maryland General Assembly. The Maryland Attorney General's Office codified the intent of the General Assembly, for the Authority, through a review of the enabling legislation, oral testimony, floor debate, and historical context of how other Maryland independent agencies operate within the State structure.

- 1. Create a forum for stakeholders to come together on "one plan" for West North Avenue.**
- 2. Serve as a "clearinghouse and resource center" for promoting coordination and communication on development opportunities for West North Avenue.**
- 3. Ensure that money is being spent effectively and efficiently (for development) and that development is happening in the appropriate way for West North Avenue.**
- 4. Provide advisory services (to State and City agencies) on planning and development for West North Avenue.**
- 5. "Initiate" and "Fund" development projects for West North Avenue, and**
- 6. Spend funds as part of an appropriated annual budget.**

## **Staffing and General Operations**

In consultation with Authority Members, Neighborhood Associations, and residents within the Target and Buffer Zone, the following positions were deemed essential to meet the intent and activities of the Authority as codified by the Maryland Attorney General's Office.

- **Executive Director** – To provide overall leadership, management, and oversight of the agency; source and structure development deals; identify real estate development priorities, and determine leveraged funding levels for housing, economic, transportation, and neighborhood revitalization projects for W North Ave.; ensure completion of the comprehensive "one plan" for W North Ave.; and report to the Governor and General Assembly on activities, fiscal status, and performance of the Authority.
- **Chief Planning and Development Officer** – To ensure State and City planning and development activities are coordinated for alignment to the comprehensive "one plan" for the W North Ave.; that money (funds) by the State and City are being spent effectively and efficiently for appropriate development; and provide advisory services to the State and City on planning and development along W North Ave.
- **Policy Research Analyst** – To serve as a policy research and data collection clearinghouse and resource center for promoting equitable economic development policies, legislative and regulatory changes, and research materials to the Office of the Governor, General Assembly, Baltimore City, and the general public on what and how the activities of the Authority can be supported through the legislative process; conduct historical research on the policies that have hindered equitable development in West Baltimore, present policy papers and presentations on statistical data; and maintain a database of how various State, City, philanthropic, and private housing, community,

economic, and transportation development resources can be used collaboratively to revitalize W North Ave.

- **Public Affairs Officer** – To promote communication, community engagement, marketing, news media relations, and social media management for advertising opportunities for housing, commercial and retail development along W North Ave.
- **General Counsel/Land Use Attorney/Compliance Officer** – To provide general counsel legal advice to the Authority; review grant agreements, serve as the Compliance Officer for the Authority, and work with Baltimore City DHCD as a deputized attorney in their office to assist with processing land or building transfers to developers who have received grants from the Authority to conduct real estate development projects.
- **Housing and Neighborhood Development Officer** – To receive, review, approve, with consent from the Executive Director and Chief Planning and Development Officer, and monitor housing and neighborhood development grantees; provide technical assistance to grantees and produce reports on the performance productivity of revitalization efforts focused on housing and neighborhood development activities that "initiate and fund" development projects for W North Ave.
- **Economic Development Officer** – To receive, review, approve, with consent from the Executive Director and Chief Planning and Development Officer, and monitor economic development grantees; provide technical assistance to grantees and produce reports on the performance productivity of revitalization efforts focused on economic development activities that "initiate and fund" development projects for W North Ave.

- **Transportation and Green Space Development Officer** - To receive, review, approve, with consent from the Executive Director and Chief Planning and Development Officer, and monitor transportation and green space development grantees; provide technical assistance to grantees, and produce reports on the performance productivity of revitalization efforts focused on transportation and green space activities that "initiate and fund" development projects for W North Ave.
- **Executive Assistant/Office Manager** – To provide administrative assistance to the Executive Director and general office administrative support to all staff members.

These positions have been proposed for funding in the FY'24 budget.

However, after further consultation with State officials and other similar types of State and local agencies, the Authority will need to hire, a **Chief Financial & Administrative Officer** to manage financial, budget, and human resources activities and an **Underwriter** to conduct independent financial risk management review of potential grant awards. The Authority will discuss and approve the reprogramming of funds currently proposed in the FY'24 budget to support these two positions.

**The proposed total amount for Staffing and General Operations is \$1.3 Million.**

## **Grants for Non-Government Entities**

In their advice and opinion letter on the West North Avenue Development Authority, the Maryland Attorney General's Office stated that one of our eligible activities determined by the Maryland General Assembly is to **"fund"** and **"initiate"** development activities for housing, economic, and transportation development.

To accomplish this activity, the Authority would need appropriated funds to engage in this process by using dollars to grant funds or provide financing to:

1. **real estate companies for acquiring vacant and blighted properties for development,**
2. **business entrepreneurs seeking to acquire vacant and blighted commercial properties to establish commercial office buildings and retail storefronts that will create jobs and economic development,**
3. **support improvements in public transportation and infrastructure, and**
4. **fund general neighborhood development projects that support economic development.**

**As a starting baseline for the Authority's first FY budget request, we have determined to request \$10 Million to be used for Non-Government Grants to nonprofit and for-profit entities conducting housing, economic, transportation, and neighborhood development focused on six (6) development areas in the Target and Buffer Zones.**

In 2003, the East Baltimore Development Initiative, which would be the closest comparison to our Authority, started with close to \$20 Million in the State capital and operating support. The value of that \$20 Million in today's dollar value would be \$35 Million. Our \$10 Million request for non-government grant funds is a very conservative request for FY'24 as we consider the time it will take to fully staff the agency, which we estimate will be between July 1 – September 30, and develop operating procedures and granting policies for proper compliance.

**The \$10 million for grants will provide non-government entities with subsidized gap funding to achieve real estate housing, economic (commercial/retail), transportation, and neighborhood development goals within the WNADA footprint.**

The Authority will determine who will receive these grant funds through a competitive application process similar to how Maryland State DHCD and Commerce chooses grant awards, but with a more flexible approval process to ensure we meet MBE goals.

## **Conclusion**

Thank you for the opportunity to testify and answer questions on the Governor's proposed FY'24 budget for the West North Avenue Development Authority.

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November 10, 2022

Anthony L. Jenkins, PhD  
President, Coppin State University  
2500 West North Avenue  
Baltimore, MD 21216

Dear President Jenkins:

As President of Coppin State University and ex officio Chair of the West North Avenue Development Authority (the "Authority"), you asked several questions about the Authority's status and relationship to the State. As you know, the General Assembly created the Authority in 2021 to develop a comprehensive revitalization plan for a segment of West North Avenue in Baltimore City. Your questions raise four issues of law: (1) whether the Authority is an independent agency in the Executive Branch of State government; (2) whether the Office of the Attorney General represents the Authority; (3) whether the State's General Procurement Law applies to the Authority; and (4) whether the Authority can apply for and receive competitive grant funds from State or City agencies.<sup>1</sup>

To the first issue, we cannot definitively say whether the Authority is a State agency for all purposes because an entity may be a State agency in some contexts and a local or non-governmental entity in others. But, speaking generally, the Authority is more akin to a State agency than to a local or non-governmental entity. Second, we think our Office does represent the Authority given that it is generally a State agency, although resource

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<sup>1</sup> You also asked: "If the Authority is an independent agency, are there standard operating procedural guidelines for these entities?" Although this question is difficult to answer in the abstract, the individual State agencies that deal with particular areas may be able to provide relevant instructions and guidelines: for example, the Department of Budget and Management for fiscal and budget issues or the Office of State Procurement in the Department of General Services for procurement issues.



constraints may prevent us from assigning an Assistant Attorney General to the Authority in the near term. The Authority also may either retain pro bono counsel with our Office's consent, as explicitly allowed by the Authority's statute, or hire paid counsel with our Office's consent if it has funds available for that purpose, though its authority to do this is less clear. Third, the Authority also appears to be subject to the Procurement Law because it has the general features of a State agency and there is no persuasive basis to exclude it from Procurement Law coverage. Fourth, the Authority can apply for and accept grants from the State and City governments.

In the final analysis, however, the questions you have presented are challenging and our answers are not free from all doubt. For greater certainty on any of these issues, the Authority should seek clarification from the General Assembly.

## **I Background**

The General Assembly created the Authority in 2021. 2021 Md. Laws, ch. 80, 81. The Authority's purpose is to "support the development and approval of a comprehensive neighborhood revitalization plan" in the "target area" and the "buffer zone." Md. Code Ann., Econ. Dev. ("EC") § 12-706. The "target area" stretches from the 600 block to the 3200 block of West North Avenue in Baltimore City, and the "buffer zone" extends out 250 yards from the target area. EC § 12-701. The target area and buffer zone include parts of the campuses of Coppin State University and the Maryland Institute College of Art ("MICA"). The Authority's governing board can alter the boundaries of the target area and buffer zone. EC § 12-706(b).

The Authority's mission comes with a time limit. The Authority must submit its "comprehensive neighborhood revitalization strategy" to the Governor and General Assembly by October 1, 2023. EC § 12-706(c). The statute creating the Authority will sunset on September 30, 2026. 2021 Md. Laws, ch. 80, § 2.

The Authority's fifteen-member governing board is mostly made up of State and Baltimore City officials. EC § 12-703. These include two State Cabinet secretaries serving ex officio; four Baltimore City department heads, also serving ex officio; members of the General Assembly and City Council; one appointee each of the Governor and the Mayor; and the President of Coppin State, serving as Chair. *Id.*<sup>2</sup> The board also has three non-

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<sup>2</sup> Because of the separation of powers concerns that might arise from General Assembly members making decisions on the funding of economic development projects, the General

governmental representatives: the President of MICA and two members elected by community groups. *Id.*

The General Assembly, at least initially, saw the Authority more as a forum for stakeholders to come together on one plan for West North Avenue than a traditional development authority that would make grants and invest in neighborhood projects itself. The Fiscal and Policy Note summarizing the bill stated that it “does not explicitly allow the authority to finance neighborhood improvements and economic development initiatives that are typical for development authorities.” Revised Fiscal & Policy Note, H.B. 1293, 2021 Leg., Reg. Sess., at 2 (“Fiscal Note”). Delegate Lierman, the bill’s subcommittee chair and floor leader, explained in a committee meeting that she did not expect the Authority would handle State money. *Voting Session on H.B. 1293 Before the House Env’t & Transp. Comm.*, 2021 Leg., Reg. Sess., at 1:32:00 (Mar. 19, 2021). In her assessment, “the point of the Authority” was “to bring everybody to the table and be on the same page so that they can make sure that money is being spent effectively and efficiently and that development is happening in the appropriate way.” *Id.*; see also, e.g., *Hearing on S.B. 783 Before the Senate Finance Comm.*, 2021 Leg., Reg. Sess., at 54:00 (Mar. 16, 2021) (statement of Natasha Mehu, Mayor’s Office of Government Relations) (describing the Authority as a “clearinghouse and resource center” promoting coordination and communication on development opportunities). Our Office, in approving the bill for constitutionality and legal sufficiency, also noted that “most of [the Authority’s] responsibilities” are “advisory in nature” and instances of the Authority funding projects itself would be “at most occasional.” Bill Review Letter on H.B. 1293 and S.B. 783, 2021 Leg., Reg. Sess., at 2-3 (Apr. 12, 2021) (“Bill Review Letter”).

At the same time, the Legislature left open the possibility that the Authority would undertake some traditional development authority projects. The Authority’s statute authorizes it to “manage appropriated funds from the City of Baltimore and the State.” EC § 12-704(a). The Fiscal Note interpreted this language as allowing the Authority to initiate development projects “to the extent that it receives funds from Baltimore City and the State for those purposes.” Fiscal Note, *supra*, at 2. During that same session, the General Assembly approved a \$250,000 grant to the Authority. 2021 Md. Laws, ch. 357 (Fiscal Year 2022 Budget Bill), at 369. We understand the City made a matching grant to the Authority around the same time. For Fiscal Year 2023, the Authority has received a total of \$1.5 million in grants (two-thirds of that from the State, and one-third from the City). Thus, the Authority seems to have some latitude to fund development projects, even if they are not the Authority’s main purpose.

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Assembly representatives are nonvoting. See generally Bill Review Letter on H.B. 1293 and S.B. 783, 2021 Leg., Reg. Sess., at 2-3 (Apr. 12, 2021).

The General Assembly also left the question of the Authority's staffing somewhat ambiguous. The Fiscal Note anticipated that Coppin State would be able to "provide staff for the [A]uthority with existing resources," with possible additional support from the City, and that no additional State money would be spent to staff the Authority. Fiscal Note, *supra*, at 2. The statute also provides that the Authority may "receive donated services from accountants, lawyers, or other consultants," EC § 12-704(b), and can "supervise, manage, and terminate staff and consultants," EC § 12-704(c). We understand that, in practice, Coppin State has not been able to provide substantial staff support to the Authority. The Authority's State grants also come with the condition that the Authority may not use them for staffing or administration. The Authority plans to use its City grants for these purposes.

## II Analysis

We first consider whether the Office of the Attorney General represents the Authority (or must approve its choice of other counsel). In considering that question, we also address whether the Authority is a State agency more generally. We then examine whether the State procurement law applies to the Authority. Finally, we discuss whether the Authority may apply for State and City grants.

### ***A. Whether the Office of the Attorney General Represents the Authority***

Whether our Office represents the Authority depends on whether the Authority is a "unit of the State government" under § 6-106 of the State Government Article. Under that provision, with certain exceptions not relevant here, "the Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for each officer and unit of the State government." Md. Code Ann., State Gov't ("SG") § 6-106(b). If an agency is a "unit of the State government," then, our Office ordinarily represents it. However, with our Office's consent and pursuant to statutory authority, such a unit may instead retain outside counsel. SG § 6-106(c). As we will explain, we think the Authority is a "unit of State government" within the meaning of § 6-106.

The question of whether an entity is a "unit of the State government" is rarely easy to answer. That is because there is "no single test for determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose." *A.S. Abell Publ'g Co. v. Mezzanote*, 297 Md. 26, 35 (1983). "[A]n entity may qualify as a State agency for some purposes, while being classified as a local agency for other purposes." *Washington Suburban Sanitary Comm'n v. Phillips*, 413 Md. 606, 632 (2010). Similarly, an entity may be a State agency for some purposes, and a quasi-private or non-

governmental entity for other purposes. *See, e.g., 70 Opinions of the Attorney General* 30, 32-33 (1985); Letter from Steven M. Sullivan, Assistant Attorney General, to Thomas L. Hastings, Chairman, Maryland Underground Facilities Damage Prevention Authority (Sept. 22, 2016) (“Hastings Letter”).

There are nevertheless some considerations that the courts and our Office will often take into account when examining whether an entity is a State agency. These considerations include: who created the entity; who controls its operations, including by appointment or removal of the entity’s leadership; the entity’s form (i.e., whether it is structured like a government agency or a private corporation); the entity’s purpose or function (i.e., whether it primarily serves a statewide interest, a local interest, or a narrower interest); the entity’s geographic scope (i.e., whether its functions are confined to a particular area or cover the whole State); whether, even if local in scope, the entity is part of a Statewide system of similar entities subject to oversight by a State agency (akin to, for example, the local boards of education); and whether the entity has expressly been granted any governmental powers or immunities. *See, e.g., Reliable Contracting Co. v. Maryland Underground Facilities Damage Prevention Auth.*, 446 Md. 707, 722-28 (2016); *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129, 136-37 (2000); *94 Opinions of the Attorney General* 134, 141-45 (2009); *61 Opinions of the Attorney General* 567, 572 (1976); Letter from Patrick B. Hughes, Chief Counsel, Opinions & Advice, to Archana G. Leon-Guerrero, Chair, Adult Public Guardianship Review Board of Howard County, at 10 & n.10 (Sept. 30, 2019) (“Leon-Guerrero Letter”); Hastings Letter, *supra*, at 3-5.

Of course, this list is not exhaustive, because “[a]ll aspects of the interrelationship between the State” and the entity are relevant to determining the entity’s status. *Reliable Contracting*, 446 Md. at 722. But examining the above factors holistically helps us to evaluate whether an entity is a State agency generally speaking, and in a broad sense. *See* Leon-Guerrero Letter, *supra*, at 9; *see also* Letter from Robert N. McDonald, Chief Counsel, Opinions & Advice, to Robert W. Slosson, Executive Director, Maryland Stadium Authority, at 2 (Nov. 19, 2001) (concluding after examining many of the above factors that the Maryland Economic Development Corporation “would be considered a ‘State agency’ in many, if not most, contexts”). Even after reaching such a conclusion, factors specific to a particular context may yield a different answer in that context.

We have followed this approach when considering whether an entity is a “unit of the State government” for purposes of representation by our Office. First, we will examine, as discussed above, whether the entity, speaking generally and in a broad sense, most resembles a State, local, or non-governmental entity. Leon-Guerrero Letter, *supra*, at 9. Second, we will consider whether any factors specifically bearing on the question of legal

representation or any special features of the entity require a different conclusion in this particular context. *See id.*

1. *Whether the Authority Is Generally a State Agency*

a. State Agency versus Non-Governmental Entity

Generally speaking, we think the Authority is closer in nature to a State agency than a quasi-private or non-governmental entity. Again, there is no single or definitive test for answering this question. But the most relevant factors include whether the entity serves a public purpose and the extent of governmental control over the entity. *See, e.g., Reliable Contracting*, 446 Md. at 724-26; *Daughton v. Maryland Auto. Ins. Fund*, 198 Md. App. 524, 544-45 (2011); *A.S. Abell*, 297 Md. at 37-39; 61 *Opinions of the Attorney General* at 572.

The Authority serves a public purpose. Its function is to promote the revitalization of a neighborhood, both for the benefit of the neighborhood's residents and for the general purpose of economic development. EC § 12-706. The General Assembly also intended to benefit Coppin State and indicated that intent both by making the President of Coppin State the Authority's chair, EC § 12-703(b), and by establishing a target area centered on Coppin State's campus, EC § 12-701. One of the bill's sponsors, Senator Hayes, testified that revitalizing the Authority's target area would "attract students and families to one of Maryland's most treasured historically Black colleges and universities." *Hearing on S.B. 783 Before the Senate Finance Comm.*, 2021 Leg., Reg. Sess., at 46:00 (Mar. 16, 2021) (statement of Sen. Hayes). Because Coppin State is part of the State's "consolidated system of public higher education," these benefits to Coppin State serve the interest of the State as a whole. *See* Md. Code Ann., Educ. § 12-101(a).

The Authority is also subject to governmental control. The General Assembly created the Authority, specified the date on which it will cease to exist, and retains plenary control over it through the power to amend its governing statutes. Twelve out of fifteen members of the Authority's governing board are officers and/or appointees of either State or City government. EC § 12-703. Seven of the thirteen voting board members are ex officio public officeholders, and the lack of defined term lengths or tenure protection for the appointed members also indicates that they are meant to represent governmental policy rather than act independently. *Cf. 71 Opinions of the Attorney General* 10, 19 (1986). And so far, all of the Authority's funding has come from State and City government grants. This degree of government control is a strong indication that the Authority was intended to be a government agency.

The General Assembly also did not provide for the Authority to be separately incorporated and operate with the formalities of a private corporation. This contrasts with other economic development entities the Legislature has authorized. *Compare* EC §§ 12-701 to 12-706, *with, e.g.,* EC §§ 11-301 to 11-325 (local military installation redevelopment authorities); EC §§ 10-401 to 10-417 (Maryland Technology Development Corporation); *see also, e.g.,* 70 *Opinions of the Attorney General* at 33 (concluding that Office of the Attorney General does not represent the Maryland Insurance Guaranty Association in part because MIGA’s structure and functions suggested the General Assembly “intended it to operate in most respects as a private entity”). Indeed, the statute provides very few explicit details about how the Authority will operate, suggesting that in most respects the Legislature expected the default rules for State agencies to apply. These aspects of the Authority’s form and structure further support the notion that the Authority is part of State government.

To be sure, there are considerations pointing the other way as well. First, the General Assembly includes operating budget grants to the Authority under the heading of “Miscellaneous Grants to Private Nonprofit Groups.” 2022 Md. Laws, ch. 484, at 370; 2021 Md. Laws, ch. 357, at 369. But the analysis that the courts use to determine whether an entity is a State agency gives more weight to the substantive features of the entity’s “interrelationship [with] the State” than to labels of this kind. *Cf. Reliable Contracting*, 446 Md. at 722-23 (“A statement in enabling legislation that disclaims an entity’s connection to State government is not conclusive as to whether it is an agency or instrumentality of the State for certain purposes.”). Second, we recognize that the Authority has no traditional governmental powers such as regulatory authority or eminent domain. But the Authority will engage in traditional governmental activities similar to those of a local development authority, such as financing projects for general public benefit. The Authority’s lack of formal coercive power thus does not change our analysis. *See* Bill Review Letter, *supra*, at 2-3 (concluding that Authority’s activities were close enough to core Executive Branch functions that legislators could not direct them without violating separation of powers). These countervailing factors do not outweigh the factors favoring State status.

b. State Agency versus Local Agency

We also think the Authority is closer in nature to a State agency than an agency of Baltimore City. The General Assembly, rather than the Baltimore City Council, created the Authority, and thus only the General Assembly can alter its structure and functions. When the General Assembly intends to authorize the creation of a local development authority as a local agency, it most often delegates authority to create the entity to local governments rather than establish the entity itself. *See, e.g.,* EC § 12-105 (delegating

power to create industrial development authorities); EC § 12-403 (delegating power to create business improvement districts). Here, the General Assembly created the Authority itself rather than authorize Baltimore City to create it. EC § 12-702.

The Authority's structure also suggests that the General Assembly understood the Authority would be performing a State function. The Authority is required to submit its final report to the Governor and General Assembly, not the Mayor and City Council. EC § 12-706(c); *see* Letter from Bonnie A. Kirkland, Assistant Attorney General, to Sen. Ida G. Ruben, at 2 (Oct. 10, 2003) (noting that question "to whom a report is required to be submitted" is relevant to agency's status under ethics law). The presence of various State officials and appointees on the governing board also indicates that the General Assembly thought the Authority would affect State as well as City interests. EC § 12-703. All of the Authority's board members are entitled to receive reimbursement of their expenses in the State budget, in the usual manner for unpaid members of State boards and commissions. EC § 12-705(2). In addition, the General Assembly anticipated the Authority would receive staff support from Coppin State, a State university. Fiscal Note, *supra*, at 2. Finally, there is precedent for the General Assembly treating neighborhood revitalization, including in Baltimore City, as a State function, even though it appears local on its face. *See, e.g.*, Md. Code Ann., Hous. & Cmty. Dev. §§ 6-501 to 6-510 (establishing Baltimore Regional Neighborhood Initiative Program in the State's Department of Housing and Community Development).

The Authority's limited geographic scope—covering only one part of one Baltimore City street and its immediate environs—does weigh against State agency status. Of course, entities with local scope can sometimes be considered State agencies in a general sense, including the local boards of education and local liquor boards. *See* Leon-Guerrero Letter at 8-9. But the Authority is different: it is a one-off entity, not part of a statewide system of similar entities. *See Chesapeake Charter*, 358 Md. at 136-37. Still, given our mandate to consider all aspects of the entity's nature, we do not think the Authority's geographic scope would be enough to tip the balance. *Cf. 94 Opinions of the Attorney General* at 144-45 (observing, in the ethics context, that an agency's geographic scope "does not truly define it"). In sum, having considered the relevant factors, we think that the Authority is best characterized as a State agency, at least in a broad and general sense.

## *2. Whether Special Factors Require a Different Conclusion in the Legal Representation Context*

Because we think the Authority is generally a State agency, we next consider whether there is a reason to reach a different conclusion in the specific context of representation by our Office under SG § 6-106. Importantly, this Office has declined to

apply a “purely mechanistic approach” to determining whether an entity is a “unit of State government” that must be represented by the Attorney General. 70 *Opinions of the Attorney General* at 32 (concluding that the Maryland Insurance Guaranty Association, a quasi-public entity, was not a “unit of State government” for purposes of our representation). Instead, this Office has employed a more “flexible standard” that recognizes that, even when an entity might be a unit of State government for other purposes, that does not necessarily mean that the General Assembly intended for that entity to be entitled to the Attorney General’s representation. *Id.* at 31; *see also* Leon-Guerrero Letter, *supra*, at 14. Ultimately, however, we think that many of the same elements that suggest that the Authority is generally a State entity—including, among other things, the fact that it receives significant State funding, has significant State representation on its governing board, and was designed to further an important State interest of revitalizing an area around a State university—also suggest that it is a “unit of State government” for purposes of SG § 6-106.

We note two considerations that could weigh in favor of the opposite conclusion, but they are ultimately not enough to change our view. First, our Office has historically taken the position that it generally does not represent entities that operate only in one jurisdiction of the State, even those that are considered State agencies for other purposes. *See* Letter from Dennis M. Sweeney, Chief General Counsel, Office of the Attorney General, to Sen. Harry J. McGuirk, at 1 (Feb. 16, 1982) (in bill file for S.B. 600, 1982 Leg., Reg. Sess.) (“Historically, the Attorney General’s office has generally not provided legal representation to entities that, although created by State statute, operate on a local . . . basis.”); *accord* Leon-Guerrero Letter, *supra*, at 14; Letter from Jeffrey P. Hochstetler, Assistant Attorney General, and Patrick B. Hughes, Chief Counsel, Opinions & Advice, to James R. “Smokey” Stanton, Chair, State Soil Conservation Committee, at 11-12 (Aug. 2, 2019). This principle has been based partly on resource constraints and partly on the understanding that the Attorney General’s core duties have not traditionally extended to representing entities with “distinctly local orientation.” 67 *Opinions of the Attorney General* 3, 4 (1982).

However, many exceptions to this principle have either been recognized from the beginning or developed over time. For example, we represent State constitutional officers who are elected and operated locally, such as the Sheriffs and State’s Attorneys. *See id.* at 5. We also represent some other entities that exist in each county but are part of a uniform statewide scheme—such as the twenty-three local adult public guardianship review boards, which together cover the entire State. Leon-Guerrero Letter, *supra*, at 3-4, 4 n.3. We represent Morgan State University and St. Mary’s College even though they each operate only in a single locality and are not part of the statewide University System of Maryland. Most relevant here, we represent some entities that operate within one county but serve the



purpose of developing or revitalizing an area of special interest to the State, including the Bainbridge Development Corporation, EC §§ 11-401 to 11-421, in Cecil County, and the Canal Place Preservation and Development Authority, Fin. Inst. §§ 13-1001 to 13-1031, in Allegany County. Because we see no substantial basis for distinguishing the Authority from these other entities with local geographic footprint, we think our representation under SG § 6-106 likely covers the Authority as well.<sup>3</sup>

We do not mean to suggest that every entity that can be described as a State agency in the broad and general sense is necessarily entitled to representation by our Office. However, we reach that conclusion with regard to the Authority because it has important features in common with other entities that we have determined we represent. Both Bainbridge and Canal Place seek the preservation and economic development of areas significant to the State; in Bainbridge's case, the area is former federal property that had been transferred to State ownership, *see Bainbridge Development Corporation*, Maryland Manual (last visited Nov. 10, 2022), <https://msa.maryland.gov/msa/mdmanual/25ind/html/08bain.html>, and in Canal Place's case, the area has historic significance to the State as a whole, *see Canal Place Preservation & Development Authority, Origin and Functions*, Maryland Manual (last visited Nov. 10, 2022), <https://msa.maryland.gov/msa/mdmanual/25ind/html/12canalf.html>. The Authority similarly seeks to develop and revitalize an area of significance to the State, namely the neighborhood around a State university, Coppin State. Representing an entity that benefits a State institution of higher education is also consistent with our representation of Morgan State and St. Mary's. Other entities, even if created by State statute and having State-agency-like features, may be too remote from any Statewide interest to qualify as units of State government for purposes of our representation or may have other features that suggest that they were not intended to be represented by the Attorney General. This question, like all questions about whether an entity qualifies as a State agency for any particular purpose, must be answered on a case-by-case basis based on the totality of the circumstances. To be clear, we also maintain our practice of not representing certain entities that are generally State agencies but have a long-established tradition of separate representation, such as the local liquor boards. *See Leon-Guerrero Letter, supra*, at 9.

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<sup>3</sup> Both Bainbridge and Canal Place have statutory language expressly designating them as an “instrumentalit[ies] of the State,” EC § 11-402(b); Fin. Inst. § 13-1004(b), and Canal Place is also explicitly called a “unit in the Executive Branch,” Fin. Inst. § 13-1004(c). Thus, there is arguably stronger evidence that Bainbridge and Canal Place are State agencies generally, as compared to the Authority. However, for the reasons discussed above, we are confident that the Authority is generally a State agency despite the absence of express statutory language to that effect.

A second argument against representation by our Office is the statutory provision authorizing the Authority to “receive donated services from . . . lawyers.” EC § 12-704(b). This might imply that the General Assembly expected the Authority to be represented by its own (pro bono) counsel, rather than the Office of the Attorney General.

However, there is an alternate and equally plausible reading of this provision: it could be intended to allow the Authority to retain its own counsel *with* our Office’s consent and subject to our supervision. A State agency “may employ or be represented by a legal adviser or counsel other than the Attorney General . . . with prior approval of the Attorney General.” SG § 6-106(c)(1)(i). That approval must be provided under statutory “authority specified by the Attorney General.” SG § 6-106(c)(1)(ii). EC § 12-704(b), then, may be read as providing our Office with the necessary statutory basis to approve separate counsel for the Authority. This reading is consistent with our historic view that a statute authorizing a State agency to hire “lawyers” (but not a “general counsel”) merely authorizes the agency to hire lawyers *with our consent*, see, e.g., Letter from Robert A. Zarnoch, Counsel to the General Assembly, to Bruce A. Myers, Legislative Auditor (Oct. 24, 2005), a view the General Assembly codified in 2009, see 2009 Md. Laws, ch. 588.<sup>4</sup>

The General Assembly may have included EC § 12-704(b) in the Authority’s statute due to its awareness of resource constraints in our Office that, as a practical matter, make it unlikely that we will be able to assign an Assistant Attorney General to represent the Authority in the immediate term. See Fiscal Note, *supra*, at 2 (“No State expenditures are expected to be incurred to staff the [A]uthority.”). To the extent that the Authority has need for more than occasional legal services, the Authority may be able to retain pro bono counsel subject to our consent under EC § 12-704(b) and SG § 6-106(c)(1). Additionally, to the extent the Authority has grant funds available for the purpose, it may be able to hire counsel (with our Office’s consent) to advise it as necessary. That is, we do not think the provision allowing the Authority to “receive donated services from . . . lawyers,” EC § 12-704(b), was intended to be the *exclusive* method by which the Authority could retain outside counsel. We think the Authority’s power to “manage appropriated funds,” EC § 12-704(a), allows it to spend those funds to obtain services that are necessary for the authority to carry out its purposes (assuming the terms of the grant allow it), cf. 106 *Opinions of the Attorney General* 38, 52 & n.15 (2021) (recognizing that agencies have implied authority to take actions that are reasonably necessary to carry out their express purposes). It seems unlikely that by allowing the Authority to “receive donated services”

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<sup>4</sup> We have represented both Bainbridge and Canal Place even though both have similar statutory authority to hire attorneys, EC § 11-407(b); Fin. Inst. § 13-1008(6), although those authorities were granted before the General Assembly amended SG § 6-106 in 2009 to confirm the limited effect of such grants.

the General Assembly meant to bar the Authority from paying for services that are necessary and within the Authority's resources. However, if the Authority does not rely on EC § 12-704(b) as authority to retain counsel, another source of authority to retain separate counsel with our approval would be needed pursuant to SG § 6-106(c)(1)(ii). One possible source of such authority would be SG § 6-105(b), which allows the hiring of outside counsel, with the approval of our Office and the Governor, when "necessary to carry out any duty of the Office in an extraordinary or unforeseen case or in special county work." We cannot advise in the abstract, however, as to whether that provision would apply and would have to consider whether to grant approval based on a specific request. As a third option, the Authority may be able to seek General Assembly funding for a new Assistant Attorney General position with the capacity to represent the Authority from within our Office.

***B. Whether the General Procurement Law Applies to the Authority***

The General Procurement Law generally applies to "procurement" by a "unit." *See* Md. Code Ann., State Fin. & Proc. ("SFP") § 11-202. "Procurement" is the process of acquiring, among other things, "supplies, services, construction," and various services related to construction, as well as leasing property (as the lessee). SFP § 11-101(n). A "unit" subject to the Procurement Law is "an officer or other entity that is in the Executive Branch of the State government," with one relevant exception discussed further below. SFP § 11-101(y). Although the Procurement Law, like SG § 6-106(b), uses the term "unit," the Authority may be a "unit" for purposes of the Procurement Law even if it is not a "unit" for purposes of legal representation. *See Phillips*, 413 Md. at 632.

In our view, the Authority is a "unit" subject to the Procurement Law. As discussed above, the Authority is, broadly and generally speaking, a State agency rather than a local or non-governmental entity. *Supra* Part II.A.1. The State created the Authority; it is subject to State control both through legislation and through the appointment of much of the governing board; the General Assembly seems to have understood that it would serve a State interest; and it is not structured like a private or non-profit corporation.<sup>5</sup> As always,

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<sup>5</sup> A procurement law "unit" must be not only a State agency but also "in the Executive Branch." SFP § 11-101(y). We have suggested that in some contexts the definition of "Executive Branch" could exclude entities that are part of the State government but not under the Governor's direct policy control. *See, e.g.,* Letter from Adam D. Snyder, Chief Counsel, Opinions & Advice, to Sen. Paul G. Pinsky and Del. Anne R. Kaiser, at 17-19 (Sept. 16, 2016) (suggesting as much for State Board of Education in the context of the Governor's executive order authority); 99 *Opinions of the Attorney General* 3, 19-20 (2014) (concluding local jails controlled by the Sheriff were not under the "operational control of the State's executive branch" for purposes of the Prison Rape Elimination Act in part because "the sheriff does not answer to the Governor"). But there is no

however, that is not the end of the analysis, as an entity can be a State agency for some purposes but not for purposes of the procurement law. For example, in *Chesapeake Charter*, the Court of Appeals held that local boards of education are *not* subject to the Procurement Law despite generally being State agencies. 358 Md. at 136, 145-46. The Court concluded that “from a budgetary and structural perspective, [the boards] are local in character” and also relied on the local boards’ history of operating under their own distinct procurement laws, a situation the General Assembly had never acted to change. *Id.* at 139, 141, 144.

Here, there is no equally persuasive reason to conclude that the Authority is a local entity for procurement law purposes. Like the local boards of education, the Authority receives both State and local funding, but the Authority’s budget is not subject to local government control and approval. And unlike the local boards, *see id.* at 136 n.1, the majority of the Authority’s funding has come from the State. Also unlike the local boards, which are mostly elected by local voters, *see id.* at 135-36, the Authority’s board contains a balance of State and local representatives. In addition, there is no history of the Authority operating under its own procurement laws. Finally, as a point of comparison, we note that the Canal Place Preservation and Development Authority—which, as discussed above, is a local-scope entity that resembles the Authority—is expressly exempted from most of the Procurement Law. Fin. Inst. § 13-1027(2). That such an exemption was needed implies that Canal Place would otherwise be a Procurement Law “unit,” further supporting the view that the Authority is as well.

Including the Authority under the Procurement Law serves the purposes of the Procurement Law as well. The Authority has received significant State funds and might spend those funds on neighborhood revitalization projects, which could necessitate the acquiring of services subject to the Procurement Law, like construction or consulting services. *See* SFP § 11-101(n). Unlike the local boards of education, which have their own procurement laws, such procurements by the Authority would be unregulated if the State Procurement Law does not apply. This state of affairs would threaten the Procurement Law’s objectives of “providing for increased confidence in State procurement” and “providing safeguards for maintaining a State procurement system of quality and integrity.” SFP § 11-201(a).

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authority suggesting that such a principle would apply in the procurement context. Indeed, the Procurement Law expressly excludes various independent agencies from its scope, suggesting that those agencies would otherwise be “units” for Procurement Law purposes. SFP § 11-203(a)(1). We think the purpose of the “Executive Branch” language in the Procurement Law’s definition of “unit” is to exclude Legislative Branch and Judicial Branch agencies from Procurement Law coverage, not to exclude independent executive agencies.

The definition of “unit” in the Procurement Law does have one potentially relevant exception: the exception for “political subdivisions.” The Procurement Law does not apply to a “special tax district, sanitary district, drainage district, soil conservation district, water supply district, or other political subdivision of the State.” SFP § 11-101(y)(2). We assume that the catch-all category of “other political subdivision[s]” includes only entities that are similar in relevant ways to the types of entities listed by name. That is because “when general words in a statute follow the designation of particular things or classes of subjects or persons, the general words will usually be construed to include only those things or persons of the same class or general nature as those specifically mentioned.” *See* 105 *Opinions of the Attorney General* 66, 90 (2020) (citation omitted).

The entities that are identified as “political subdivisions” generally cover a defined geographic area, raise money within that area (such as through taxes, fees, or special benefit assessments) and then spend the money within, or to benefit, the same area (on infrastructure improvements or other services). *See generally* 99 *Opinions of the Attorney General* 225, 228-30 (2014) (special tax districts); Md. Code Ann., Envir. §§ 9-658, 9-664 (sanitary districts); Md. Code Ann., Agric. § 8-306 (soil conservation districts); Md. Code Ann., Local Gov’t § 27-703 (drainage districts). In this context, then, a “political subdivision” appears to be an entity that raises and spends its funds locally and is accountable to the local government or to local property owners. Because these entities generally do not rely on State money, it is logical that the State Procurement Law would not apply. So understood, this category does not include the Authority. Although it has one of the distinguishing features of a political subdivision—a defined territory—it has been funded by State (and City) appropriations and not by special assessments levied within its territory. The Authority also is not subject to wholly local control. We therefore doubt that the Authority qualifies for the “political subdivision” exception from the Procurement Law.

### ***C. Whether the Authority May Apply for State and Local Grant Funds***

Your final question was whether the Authority may apply for and receive competitive grant funds from agencies of the State and Baltimore City. We think the answer is yes, as to both. Although you did not ask about private grants, the Authority’s ability to accept these grants is less certain and would benefit from legislative clarification. Finally, we note that any grant funds received must be handled according to State fiscal procedures, including deposit in the Treasury.

In general, an agency cannot take any action—including accepting grants—without express or implied statutory authority. *See, e.g.,* 106 *Opinions of the Attorney General* 38, 52 (2021). Some economic development agencies have express statutory authority to

accept grants. *See, e.g.*, EC §§ 12-109 (industrial development authorities), 12-406 (business improvement districts), 13-612 (Tri-County Council for Southern Maryland). While the Authority's governing statute is less clear, the Authority appears to have this capacity as well. The statute empowers the Authority to "manage appropriated funds from the City of Baltimore and the State." EC § 12-704(a). Although the statute refers only to "appropriated funds," we think the General Assembly must have intended it to encompass grants as well, at least when the grant moneys flow from funds that were originally appropriated by the State or the City. After all, if the Authority is a State agency, then any money coming from the City would necessarily be a grant, and if it is a City agency, any money coming from the State would be a grant. Of course, the Authority would also need to be eligible under the terms of the specific grant program at issue. But we do not see any legal obstacle to the Authority applying for and accepting grant funds from the City and the State as long as the particular grant program allows for it.<sup>6</sup>

We also understand that so far the Authority has been holding its funds in a bank account outside the State Treasury. Ordinarily, a State agency must deposit its funds, including grant funds, in the State Treasury, and may spend them only under the authority of an appropriation in the annual budget. *See* Md. Const., Art. III, § 52; *id.* Art. VI, § 3; SFP § 6-213; 68 *Opinions of the Attorney General* 86, 94 (1983) (discussing federal block grants); 83 *Opinions of the Attorney General* 180, 189 (1998) (discussing matching funds from local governments). Given that, as we have explained, the Authority generally appears to be a State agency, we think it is likely to be subject to this requirement of handling funds through the Treasury. Although the General Assembly does have some authority to exempt agencies from the State's regular fiscal processes, *see* 76 *Opinions of the Attorney General* 59, 61 (1991), we do not see any strong indication that it intended to grant the Authority such an exemption, *see* 71 *Opinions of the Attorney General* at 18-23 (discussing the relevant factors, including degree of State control over the entity, the entity's fiscal characteristics, the scope of services the entity provides, and any unusual financial support the State provides to the entity). Accordingly, it is likely that the Authority is subject to the requirement of depositing funds in the Treasury.

### III Conclusion

The Authority, speaking generally, is more likely to be a State agency than a local agency or a quasi-private entity. The Office of the Attorney General also represents the

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<sup>6</sup> Your letter addressed only State and City grants, and did not ask whether the Authority can accept grants from foundations or other private sources. The Authority's governing statute does not clearly address this issue either, and we would advise the Authority to seek legislative clarification if it intends to pursue private grant funding.

Anthony L. Jenkins, PhD  
November 10, 2022  
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Authority, though the Authority may also need to retain outside counsel for its day-to-day legal needs, depending on the fiscal constraints on our Office. The Authority also is likely covered by the General Procurement Law. Finally, the Authority may apply for and receive competitive grants from State and City agencies, though it may need to handle those grant funds in accordance with regular State fiscal processes.

Although this letter is not an official opinion of the Attorney General, we hope it is helpful to you.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Hughes", with a stylized flourish at the end.

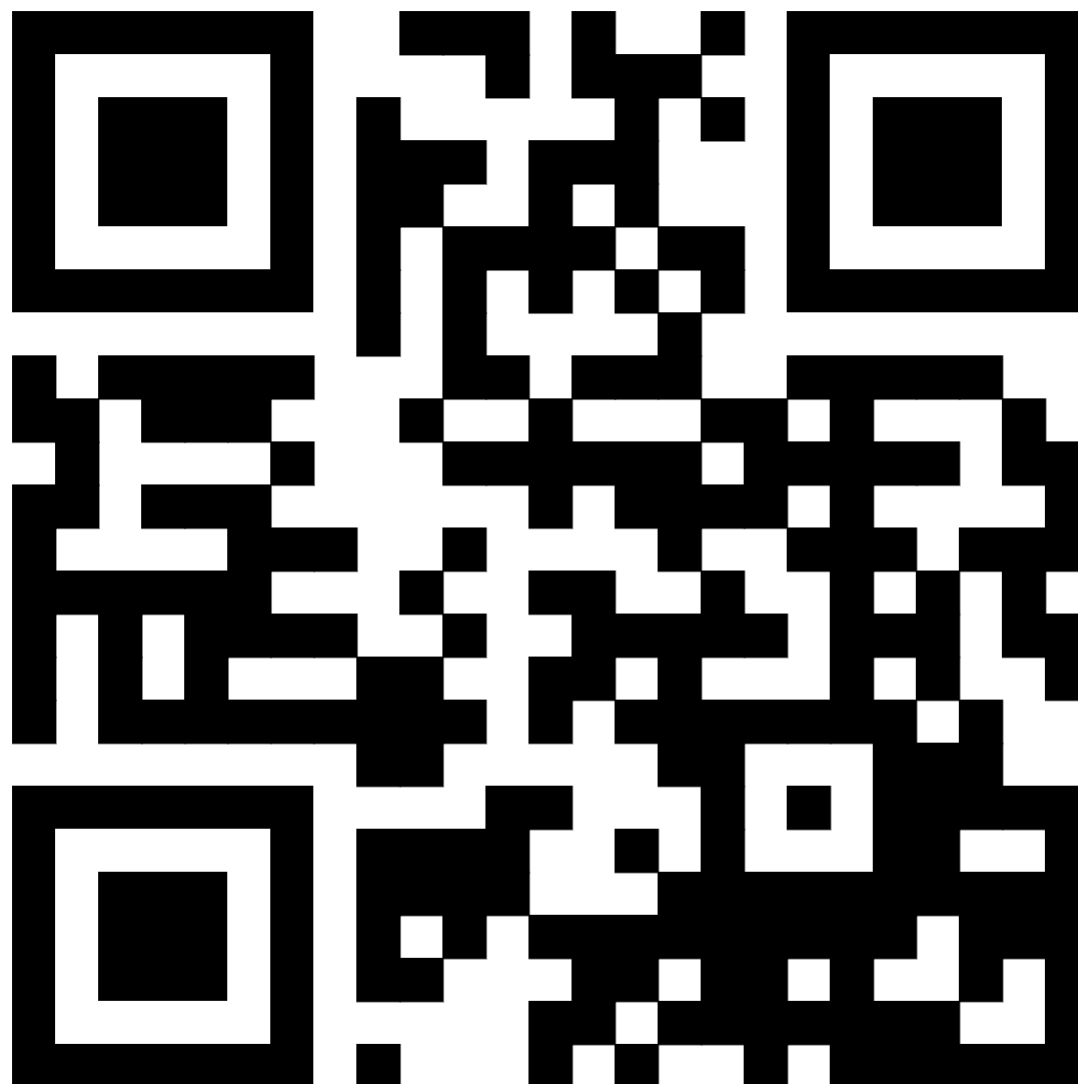
Patrick B. Hughes  
Chief Counsel, Opinions & Advice

A handwritten signature in black ink, appearing to read "Chapman", with a stylized flourish at the end.

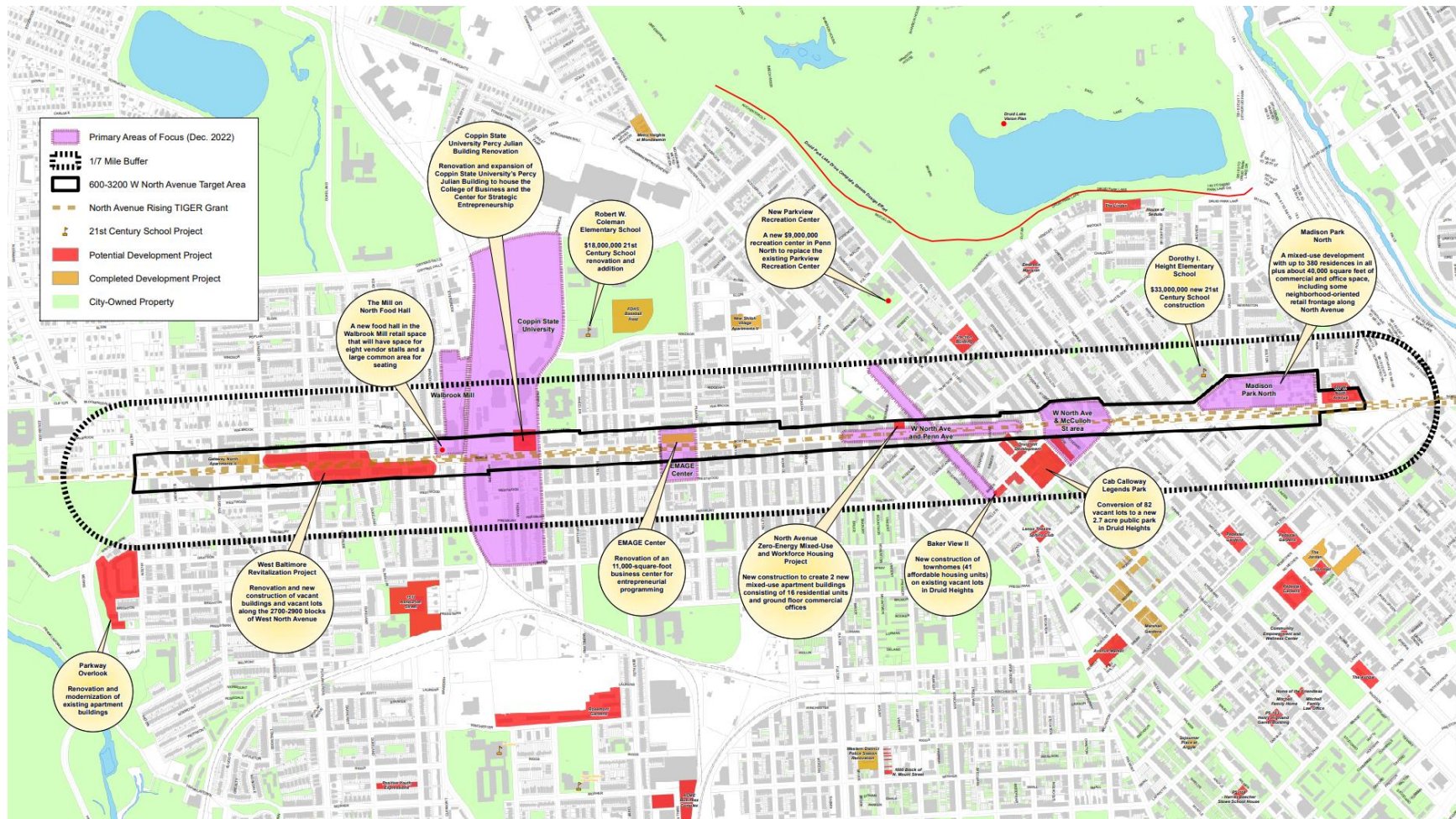
Thomas S. Chapman  
Assistant Attorney General







# WEST NORTH AVENUE DEVELOPMENT AUTHORITY TARGET AND BUFFER ZONE

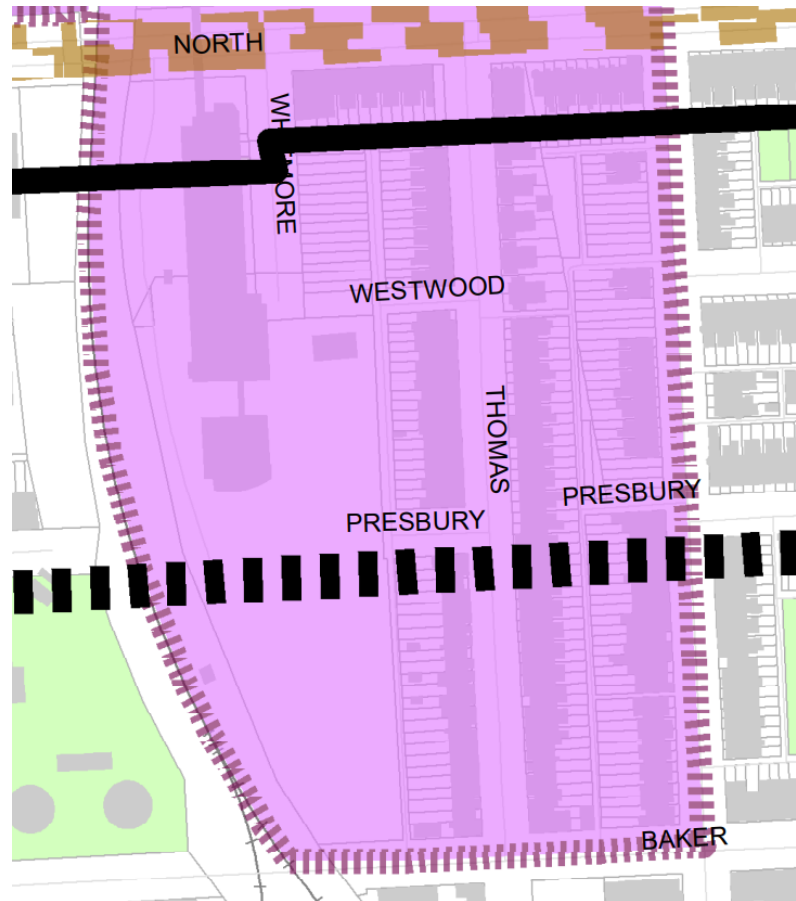


## **COPPIN HEIGHTS CDC - WEST BALTIMORE REVITALIZATION PROJECT**



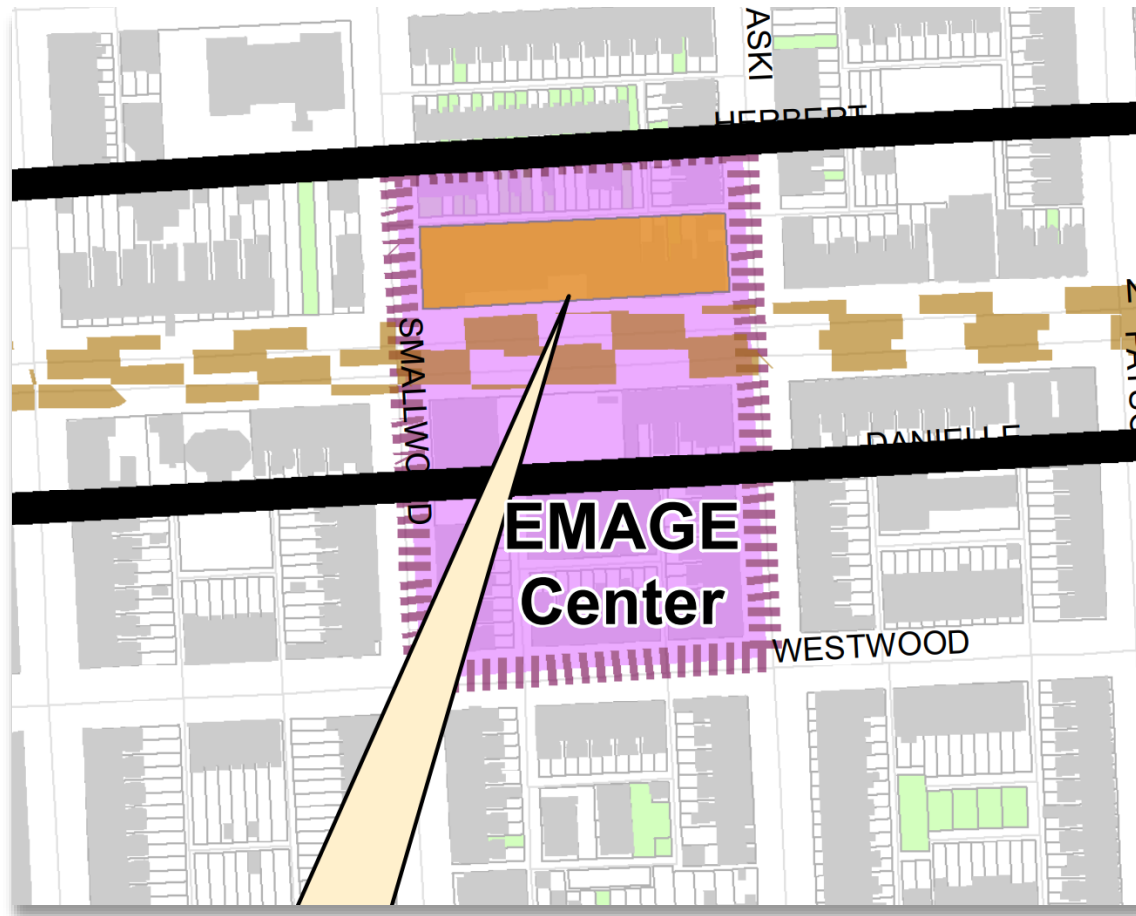
**\$1.25 Million in Funding for Acquisition, Development, and Downpayment Assistance of Single-Family Homes for Homeowners and Coppin State University Employees.**

## **COPPIN STATE UNIVERSITY LIVE NEAR YOUR WORK/SCHOOL PROGRAM**



**\$1.25 Million in Funding for Acquisition, Development, and Downpayment Assistance of Single-Family Homes for Homeowners and Coppin State University Employees.**

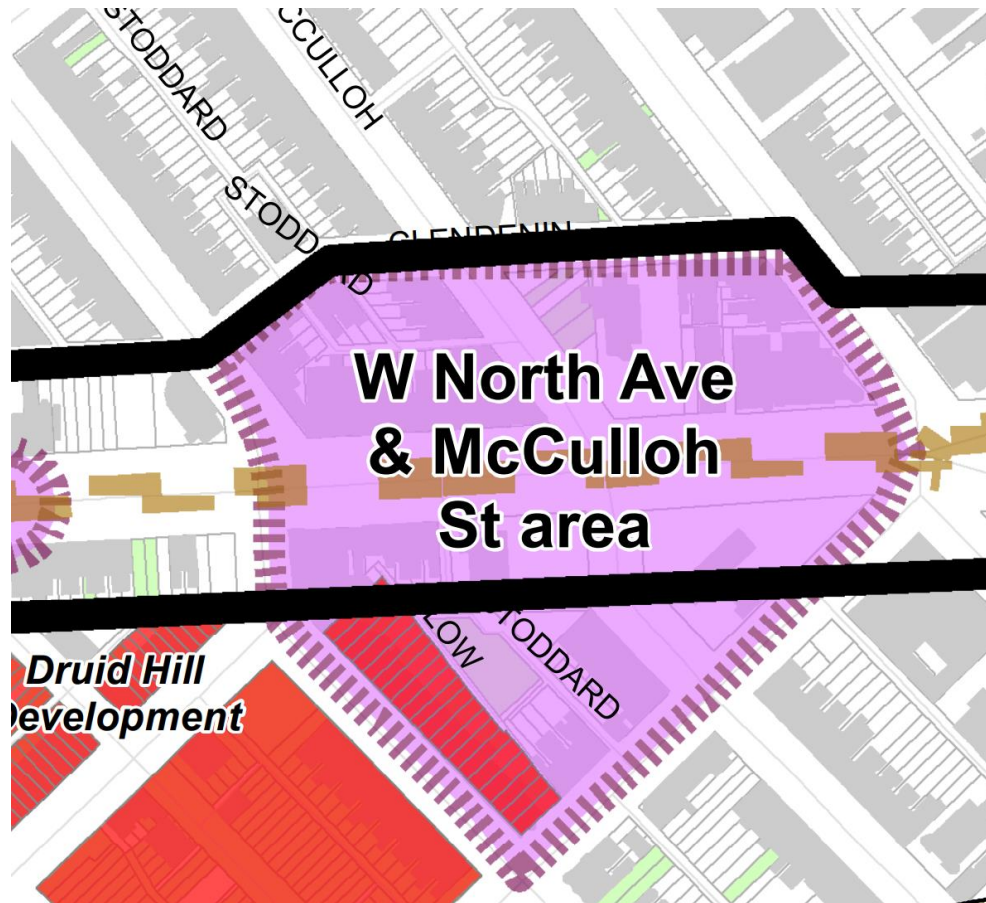
## RETAIL BUSINESS ENTREPRENEUR INCUBATOR ENTERPRISE ZONE



**\$1.5 Million in Funding for Acquisition and Development of Residential and Commercial Space for Small Business Retail and IT Entrepreneurs.**

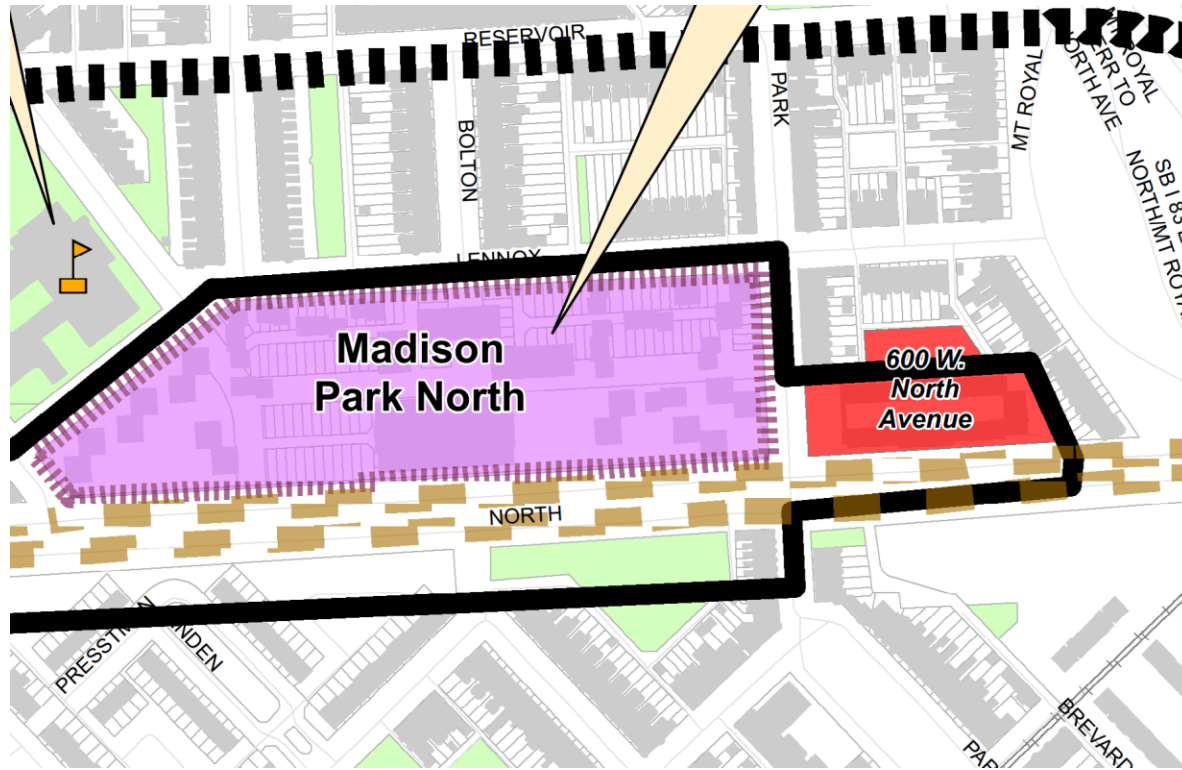


## W NORTH AVE & MCCULLOH ST. RESTAURANT DEVELOPMENT ZONE

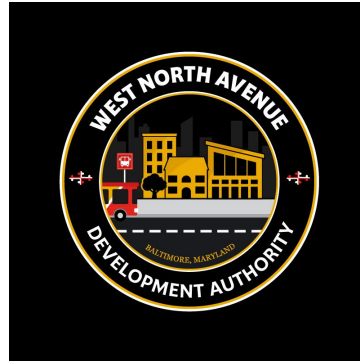


**\$1.5 Million in Funding for Acquisition and Development of Residential and Commercial Space for Small Business Retail and Restaurants.**

## 600 W NORTH AVENUE



**\$1.5 Million in Funding for Acquisition and Development into Mixed-use Residential, Commercial, Retail, and Entertainment to support Madison Park North Redevelopment.**



## **Economic Development Business Venture Capital Grants**

**\$1.25 Million**

## **Neighborhood Association Beautification Projects**

**\$500,000**

## **Transportation and Green Space Development**

**\$1.25 Million**