MARYLAND ASSOCIATION OF COUNTIES, INC.

BILL NO.: House Bill 445

TITLE: Sustainable Growth and Agricultural Preservation Act of 2012

POSITION: **SUPPORT WITH AMENDMENTS**

DATE: February 15, 2012

COMMITTEE: Environmental Matters

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The Maryland Association of Counties (MACo) **SUPPORTS** House Bill 445 **WITH AMENDMENTS**. This bill would implement a wide ranging series of policy changes, clearly with a major intended effect on overriding local land use authority. MACo believes that the bill as introduced is deeply flawed in many ways, and should not be considered without dramatic revisions to a number of its components. Any MACo potential to accede to a more practical bill is absolutely conditioned on such substantial rewritings via bill amendments.

As introduced, the bill would require the Maryland Department of the Environment (MDE) to approve all residential subdivision plats and deny any "major" subdivisions on septic systems (this is less than 5 housing units in some counties) unless a county incorporates a "4-tier system" into its comprehensive plan. The tiers define where a county can use sewer or septic systems for their subdivisions. A county's tiers are subject to approval by the Maryland Department of Planning (MDP). A more detailed summary of the bill's provisions is attached at the end of this testimony.

HB 445 is ostensibly based on the recommendations of last year's Task Force on Sustainable Growth and Wastewater Disposal, but the bill includes key provisions that are not based on the Task Force recommendations, such as broad-based MDE approval of residential subdivisions. Conversely, several key Task Force recommendations, such as the requirement that new septic systems use best available technology (BAT) for nitrogen removal are conspicuously absent from the bill. BAT systems can remove up to 93% of nitrogen from a septic system's discharge.

MACo is not inherently opposed to reasonable limitations on septic systems to mitigate their environmental impacts, but has always actively resisted attempts to vest land use decision making at the State level. MACo firmly believes that local elected officials are the most accountable to and familiar with the unique needs and concerns of their citizens. In contrast, appointed state officials are further removed and do not often appreciate or understand local nuances and differences.

CRITICAL ISSUES

MACo has identified five key provisions that it believes represent a usurpation of local land use authority by the State. It is critical to MACo that these provisions be removed or amended as suggested. Otherwise, HB 445 would represent an even more significant intrusion in local land use than last year's legislation (HB 1107/SB 846), which MACo opposed.

(1) Approval of Residential Subdivision Plats and Lot/Street Lines by MDE

The bill grants MDE the authority to approve residential subdivision plats, including lot lines and street lines. This authority goes well beyond MDE's traditional oversight role for subdivision water and sewerage systems and grants MDE broad authority with little criteria or direction. The approval authority was not a Task Force recommendation and should be removed from the bill.

(2) Approval of the Tiers by MDP

Currently MDP has approval authority over a county's proposed tier system. This goes far beyond their existing authority to comment on Priority Funding Areas (PFAs) and like MDE with subdivisions, will give the Department a substantial role in drawing county land use maps. The approval authority should also be removed from the bill.

(3) *Definition and Criteria for the Tiers*

Under the bill, Tier III requires that the land not be targeted for agricultural or natural resource protection. Tier IV includes lands marked by the State for agricultural and natural resource protection. These criteria are vague and seemingly indicate that the Tier maps will ultimately be determined by the State's AgPrint and GreenPrint maps (a purpose these maps were never designed for).

If this is the case, then any flexibility that might be granted to a county to set its own tiers would be largely illusory. Instead, the criteria language should focus on whether or not the areas are marked or targeted for preservation in the local comprehensive plans, which will capture areas such as priority preservation areas, Rural Legacy areas, and lands subject to an easement by the Maryland Agricultural Land Preservation Foundation (MALPF).

(4) Definition of Subdivision

HB 445 uses each county's definition of what constitutes a "major" and "minor" subdivision as of January 1, 2012. This definition might work if all county subdivision definitions were simply based on lot numbers. However, some counties, such as Harford, do not have a definition for a major or minor subdivision. In other counties, such as Montgomery, the definition is not based on lot numbers but on the particular circumstances of the instance. Other counties have modifiers that change the definition; in Talbot County for instance, one lot constitutes a major subdivision if it also has a road. Finally, there is the issue of when and how

you start counting lots and could be a problem for counties like Kent or Howard. The subdivision definition must be reworked.

Additionally, the definition of "subdivision" in the bill includes a "resubdivision" which means that a resubdivision would also be subject to MDE approval. This provision should be removed from the bill.

(5) Expansion of PFAs and MDP Comment Areas

The bill also expands the existing purpose of PFAs and MDP comment areas. PFAs were created as a way to direct State funding for growth-related projects. They were never intended to be a substitute for local designated growth areas. It is relevant to note that PFAs were drafted to the State Finance and Procurement Article of the State Code, as opposed to the local land use provisions found in Article 66B. However, the bill would require counties that adopt the tier system to include PFAs in their comprehensive plans. MACo has opposed this in the past as PFAs were not meant to supplant local decisions regarding growth – only to incentivize Smart Growth by directing and channeling State funding. The requirement to amend PFAs into a county comprehensive plan should remain optional. Otherwise PFAs become a de facto form of State zoning.

Currently, if MDP disagrees with a county's designation of a PFA, it may treat the PFA as a comment area and the State may withhold discretionary funding to that area. This creates a powerful incentive for the county to resolve its differences with MDP. However, the comment area does not impose a limit on a county's ability to draw its own comprehensive planning map. By linking the definition of Tier II to a PFA subject to comment, the bill would expand the use of the comment area beyond its traditional use and would force a county adopting a tier system to use the comment area when setting its own growth boundaries. This expands the authority of MDP to influence local maps and should be removed.

IMPLEMENTATION AND TECHNICAL ISSUES

In addition to the five critical issues mentioned above, HB 445 also raises a number of implementation and technical concerns. In the interest of brevity, MACo is only highlighting 3 such concerns in its testimony, but county planners have identified others that may need to be considered and addressed as the Committee works with the bill.

(1) Amending Tiers Into the Comprehensive Plan

The bill provides that the tier system can be added to a county's comprehensive plan as an appendix. However, the reality is that a county would likely face lawsuits from both developers and citizen groups if such a major land use change was simply done as an appendix. Counties will be forced to go through their formal comprehensive plan amendment process, which will add additional time and expense. It is very unlikely that any county would be able to create the tiers before the bill's subdivision and septics restrictions take effect at the end of this year. Some counties will face unique challenges. Montgomery County will have to go through the very

cumbersome process of amending its general plan. Frederick County believes it will have to amend its comprehensive plan every time it approves a floating zone application. Counties may also have to amend their subdivision regulations and zoning ordinances in addition to their comprehensive plans.

(2) Issues with the 1 in 25 "Exception" for Tier IV

The bill allows the building of major subdivisions on septics in Tier IV if the subdivision and zoning requirements of the county results in an "actual overall yield" of not more than one dwelling unit per 25 acres that has been verified by MDP. County planners have raised concerns about how MDP would calculate and verify the actual yield and feel a better measure would be the county's stated zoning for its Tier IV regions. It is also unclear why a yield of 1 in 25 was chosen as that number has not traditionally been used by MDP when discussing strong preservation zoning.

(3) Legal Ramifications

HB 445 creates many questions relating to the potential legal ramifications of the bill. Currently, counties have their own appeals process for cases relating to subdivision decisions. By vesting an approval right with MDE, a separate appeals track may be created, allowing a person opposed to a project multiple venues to challenge and delay.

The bill requires that recorded plats for minor subdivisions state that you cannot further subdivide but the bill then creates a statutory exception allowing resubdivision. There may be a possible conflict between recorded plat and statute. The effect the bill would have on Critical Area designations and growth allocation, MALPF easements and agricultural conveyances, and Maryland Environmental Trust agreements is also unclear.

OTHER IMPACTS

Besides the 8 issues listed above, there are many other ramifications of the bill that should be carefully considered.

If bill results in significant devaluation of land and loss of development ability, a county could see a meaningful effect on county property tax collections. Transfer and recordation taxes, building excise taxes, development impact fees, and subdivision plat fees could also be affected.

A long-term failure of the State in regards to Smart Growth policy has been the lack of funding support for infrastructure within PFAs and land preservation funding outside of PFAs. Without assistance from the State for infrastructure, including the establishment of water and sewer facilities in rural growth areas, the bill could "freeze out" rural counties from growing.

The bill would remove the need and effectiveness of agricultural preservation and Transfer of Development Rights (TDR) programs. The full effect of this, particularly in those

counties that have successfully linked these programs to their development strategies is unknown but likely significant.

Artificially restricting housing demand in certain areas and stimulating housing demand in other limited areas will likely lead to a decrease in affordable housing in certain growth areas. As the State expects all areas to provide an adequate supply of affordable and workforce housing, this could create challenges to county planning agencies and may require offsetting developer mandates or other strategies.

The bill's impact on a property owner's land values was debated by the Task Force and studies have produced conflicting results. However, the bill could have a significant effect on the land value of certain properties if development potential is lost. Based on the criteria used by banks and lending institutions, farmers may have a harder time securing loans and some farmers may be asked to contribute cash to secure a loan if the equity value of their land is diminished.

CONCLUSION

In conclusion, MACo acknowledges the bill's overall goals of reducing septic system pollution but believes that portions of the bill usurp local land use decision making, raise numerous implementation and technical concerns, and may have other significant policy impacts that have not been fully considered. Despite these flaws, MACo is willing to work to address its concerns and has offered constructive criticism and suggestions for improving the bill where possible. If the suggested changes are made, MACo could support the bill. But without such changes, MACo would likely oppose the final product. Accordingly, MACo requests that the Committee give HB 445 a report of **SUPPORT WITH AMENDMENTS**.

SUMMARY OF HB 445/SB 236 SUSTAINABLE GROWTH AND AGRICULTURAL PRESERVATION ACT OF 2012

(Prepared by MACo 2012-01-26)

ORIGIN OF THE BILL

During the 2011 Session, Governor Martin O'Malley announced a proposal that would have prohibited developments of 5 or more housing units on septic systems. Legislation was introduced later in that Session to codify the Governor's proposal [HB 1107/SB 846]. Based on numerous concerns raised about the proposal, the bills did not pass and instead a task force was formed to study the issue. The Task Force on Sustainable Growth and Wastewater Disposal met over the summer and fall of 2011 and released a set of recommendations to Governor O'Malley in December. HB 445 is based partly on the recommendations of that Task Force.

SUMMARY OF THE BILL

MDE Subdivision Approval Authority

The bill grants the Maryland Department of the Environment (MDE) authority to approve residential subdivision plats for both "major" and "minor" subdivisions. The bill uses each local government's definition for major and minor subdivisions as of January 1 of this year. Starting at the end of 2012, MDE may only approve minor subdivisions on septic or any subdivision on public sewer unless a local government has adopted the "four tier" system in its comprehensive plan.

There are two grandfathering provisions in the bill for projects "in the pipeline." Both are contingent upon filing the subdivision application and recording the subdivision plat by certain dates

Four Tier System

If a local government has adopted the four tier system as part of its comprehensive plan, the local government may have some additional flexibility to have major subdivisions on septic.

TIER I

Tier I areas are Priority Funding Areas (PFAs) not subject to comment by the Maryland Department of Planning (MDP). All new subdivisions in a Tier I area must be on public sewer.

TIER II

Tier II areas are locally designated growth areas needed to satisfy demand for development or PFAs subject to MDP comment. Tier II allows minor subdivisions on septic systems.

TIER III

Tier III areas are zoned for large lot rural development, not planned for sewer, and not targeted for agricultural or natural resource protection. Tier III allows minor subdivisions on septic

systems, or major subdivisions on septic systems if: (1) the subdivision has been approved by the local planning board; and (2) MDE has determined, in a one-time consultation with MDP, that the local government's Tier III and IV areas meet the applicable criteria.

TIER IV

Tier IV areas are (1) planned or zoned for land preservation or resource conservation; (2) are areas dominated by agricultural or natural lands; or (3) are Rural Legacy areas, Priority Preservation Areas, or lands marked by the State for agricultural or ecological preservation. Tier IV allows minor subdivisions on septics. Major subdivisions on septics are also allowed if the zoning in the cumulative Tier IV area provides a minimum yield of one home per 25 acres.

CONSULTATION WITH MDP

MDE must make a one-time consultation with MDP for advice when a local government submits its first subdivision plat to ensure that the local government's Tier III and IV areas meets the required criteria and, if applicable, is consistent with the local government's municipal growth element, priority preservation element, and water resources element. Another one-time consultation is required when the local government amends its Tier III or Tier IV area.

Subdivision Restrictions on Minor Subdivisions

The bill includes prohibitions against further subdividing minor subdivisions or remainders unless the land is in a PFA and designated for public sewer within 10 years. Land may still be subdivided in stages if the number of total lots, plats, and building sites are fixed in the initial subdivision.

Use of Community Systems and Shared Facilities

The bill allows the use of community systems or shared facilities in certain instances but requires the system be under the control of a governmental entity or public corporate entity, such as Maryland Environmental Services

TASK FORCE RECOMMENDATIONS NOT IN THE BILL

Besides the tier proposal to limit septics, the Task Force also recommended increasing the Chesapeake Bay Restoration Fee (BRF or "flush tax") and requiring all new septics or replacement septics that were enhancing capacity to be equipped with best available technology (BAT) for nitrogen removal. Neither of these recommendations is in HB 445. The BRF increase is in a separate Administration bill, HB 446/SB 240. The BAT provisions will likely be implemented through regulation.

REFERENCES TO "LAND USE ARTICLE"

One confusing aspect of HB 445 is that it references both the existing land use article, 66B, and a separate "Land Use Article." The Land Use Article is a revised and recompiled version of Article 66B and Article 28 and will be introduced as separate legislation this Session. This is part of an update process called code revision where the old and poorly organized versions of the 1957 Code Articles (the black code books) are replaced with a better organized and more readable version (the maroon code books). This Session, local land use provisions will be re-codified in the new Land Use Article and the Articles 66B and 28 will disappear. Code revision is not supposed to make substantive changes to the law, only better organize and present it and code revision bills, like the Land Use Article, typically pass as a matter of course. The provisions of HB 445 are drafted to both versions of the Articles, in anticipation of the change.