

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY

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: ADVENTIST HEALTHCARE, INC., :
: and CABIN BRANCH COMMONS, INC. : Case No. DPA 13-02
: :
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A hearing in the above-entitled matter was held on
September 4, 2013, commencing at 9:40 a.m., at the Office of
Zoning and Administrative Hearings, 100 Maryland Avenue,
Seventh Floor Hearing Room, Rockville, Maryland 20850
before:

Lynn A. Robeson
Hearing Examiner

A P P E A R A N C E S

On Behalf of the Petitioner:

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Steve Robins, Esq.
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On Behalf of the Opposition:

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Miller, Miller & Canby
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William J. Chen, Jr., Esq.
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Also Present:

Leonard Bogorad
Christopher Turnbull

E X H I B I T S (Continued)

Exhibit No.		Marked/Received
89	Resume of James Soltesz	167
90	Map of Clarksburg Master Plan Hyattsville Study Area	170
91	Illustration of Town Center District	174
92	Blow-up of Cabin Branch Slide from Exhibit 45	278

C O N T E N T S

Witnesses:	Direct	Cross	Redirect	Recross
Gary Unterberg				
By Mr. Harris:		20		--
By Mr. Kline:		62		--
By Mr. Chen:		265		--
James Soltesz				
By Mr. Kline:		167		251
By Mr. Harris:		195		252

E X H I B I T S

Exhibit No.		Marked/Received
79A	Letter from Winchester Homes	7
79B	Letter from SMTM Cabin Branch East, LLC	7
79C	Letter from West, LLC	7
80	Gaithersburg Master Plan	45
81	Page 67 of Germantown Sector Plan	48
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P R O C E E D I N G S

1
2 MS. ROBESON: This is a continuation of the public
3 hearing in the application of Adventist Healthcare, Inc. and
4 Cabin Branch Commons, Inc. requesting an amendment to the
5 development plan approved by the District Council on
6 September 9th, 2003 in LMAG 806 for property consisting of
7 283.5 acres east of Clarksburg Road, west of I-270 and north
8 of West Old Baltimore Road in Clarksburg, Maryland. Welcome
9 back. I hesitate to ask this but are there any preliminary
10 matters? Yes, Mr. Harris.
11 MR. HARRIS: I have two. One, you had asked for
12 letters of consent from the other property owners --
13 MS. ROBESON: Yes.
14 MR. HARRIS: -- that are part of the Cabin Branch
15 project. I have those and I'll submit those, but I will
16 renew, for the record, my objection to the need for that. I
17 see nothing in the regulations that require all property
18 owners in a development plan area to be, to consent to or
19 otherwise be part of the application. And in fact, there
20 are numerous instances where that has not been the case. If
21 you go to Montgomery Village, that is a development plan for
22 the entire Montgomery Village and I can guarantee you they
23 don't get 5,000, 10,000 people to sign every development
24 plan amendment that comes in there. The same is true for
25 the Churchill and other sectors of Germantown where it's

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1 town sector zoning.
2 The Washingtonian Project, I personally handled
3 the development plan amendment for part of the residential
4 about 15 years ago and there were multiple owners that owned
5 in Washingtonian at that time and they were not parties to
6 it and most recently, I handled a development plan amendment
7 for Clarksburg Village, actually Aurora Hills in Greenway
8 Village, where we put in senior housing into the --
9 MS. ROBESON: Was that G-881?
10 MR. HARRIS: It was 11-1.
11 MS. ROBESON: Oh, 11-1.
12 MR. HARRIS: DPA 11-1. And at that time, there
13 were more than 1,000 homes that were sold and occupied by
14 all the residents and again, they were not parties to those,
15 to that application.
16 MS. ROBESON: Well, I -- okay. I will --
17 MR. HARRIS: In any respect, I'll have the consent
18 letters.
19 MS. ROBESON: -- note your objection for the
20 record and mark these as -- how many are there, Mr. Harris?
21 MR. HARRIS: There are three.
22 MS. ROBESON: I'm going to mark them as Exhibits
23 79A through C. A will be letter from Winchester Homes; B
24 will be letter from SMTM Cabin Branch East, LLC; and C will
25 be letter from -- I have two --

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1 MR. HARRIS: One is East and one is West.
2 MS. ROBESON: Oh. Oh, I see. Okay. So C will be
3 letter from SMTM Cabin Branch West, LLC.
4 (Exhibit Nos. 79A, through 79C
5 were marked for
6 identification.)
7 MS. ROBESON: All right.
8 MR. CHEN: If I may, Madam Chair.
9 MS. ROBESON: Yes, Mr. Chen.
10 MR. CHEN: Just also to note for the record, since
11 Mr. Harrison's made his objection, the fact that other
12 applications or cases may not have been required to be
13 compliant with the Zoning Ordinance does not mean that that
14 is permissible. Indeed, I reserve and note the issues that
15 I addressed to the Examiner at the time this issue came up
16 at the first hearing and quite frankly, under the language
17 of the Zoning Ordinance, I do not believe that a letter of
18 consent is sufficient. Be that as it may, I think this
19 matter has been fully addressed by the Examiner and the
20 parties and we'll abide by what results.
21 MS. ROBESON: Okay. Your position is noted. Mr.
22 Kline, anything to say on this?
23 MR. KLINE: No.
24 MS. ROBESON: Okay. Any other preliminary
25 matters, Mr. Harris?

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1 MR. HARRIS: One relatively small one. I noticed
2 in the exhibit list, actually Mr. Robins noticed in the
3 exhibit list, Exhibit 75, which was an e-mail from you
4 forwarding the MoCo Alliance flyer. And in that description
5 of it, it says that it's a flyer or MoCo Alliance promoting
6 opposition to the proposed development. That is not
7 correct. It is opposition to the development in Ten Mile
8 Creek and includes the Peterson Project,
9 MS. ROBESON: Well, let me just --
10 MR. HARRIS: -- not this project.
11 MS. ROBESON: Okay. I don't know where that --
12 well, clearly, our administrative assistant put that label
13 on it so what I am going to do is have everything after MoCo
14 Alliance in quotes deleted.
15 MR. HARRIS: That's fine.
16 MS. ROBESON: Because quite frankly, I don't know
17 enough about it to say what it is.
18 MR. HARRIS: I have no problem. It stands for, on
19 its own.
20 MS. ROBESON: Yes.
21 MR. HARRIS: I just didn't want anybody
22 misinterpreting it.
23 MS. ROBESON: So I appreciate that.
24 MR. HARRIS: Thank you.
25 MS. ROBESON: That clarification. Okay. Anything

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1 else?
2 MR. HARRIS: No.
3 MS. ROBESON: Anything from, from Mr. Chen or Mr.
4 Kline?
5 MR. CHEN: Not from me as a preliminary, Madam
6 Chair, Examiner.
7 MS. ROBESON: Okay. Well, Mr. Kline has submitted
8 some argument, legal arguments that I am going to give the
9 parties an opportunity to respond to those, particularly Mr.
10 Harris. Have you -- not at the moment. Is there, how long
11 do you think you would need to respond to it?
12 MR. HARRIS: I have something generally prepared
13 already. I can get it finalized probably by the end of
14 today.
15 MS. ROBESON: Oh, okay. That's fine. Then I
16 won't set a date for that. Mr. Kline, I will note, just if
17 through the course of this hearing, 59-D-1.63 I seem to
18 recall. Hold on. Okay. 1.633. We have always, our office
19 has always interpreted that textual stipulations. I believe
20 the hearing, the former hearing examiner, Ms. Carrier, used
21 to call binding elements on a development plan textual
22 binding elements and the basis is that provision, so you may
23 want to address that.
24 As far as what DPS would do, I haven't decided. I
25 may ask -- your position is since it's a building permit

1 issue, DPS doesn't have, I think you call it the time or
 2 inclination to enforce it and much as I respect and admire
 3 your position, I would, you know, prefer to hear that from
 4 DPS, that they can't enforce a development plan amendment.
 5 I'm going to let Mr. Harris respond before I make a decision
 6 whether I have to call in Susan Scala-Demby. I do know that
 7 they, they do measure, because I've had some cases, they do
 8 measure square footage, partially for parking and partially
 9 for other reasons. So but I would like to see the response,
 10 Mr. Harris' response before I make a decision about asking
 11 another agency to appear here.

12 MR. KLINE: If I might, yes. I probably did
 13 casually say not the inclination. That's not really the
 14 thrust of what I was saying. Mechanically, I don't believe
 15 that the review process is set up to be able to identify an
 16 individual bay within a larger building. I agree that they
 17 measure, but I think they measure from perimeter boundaries
 18 and things like that and not internal.

19 MS. ROBESON: Well, I actually had a case once, it
 20 is still in the courts, that was an unusual case and they
 21 did measure, so I would like to hear what they have to say,
 22 what DPS has to say about whether they're capable of
 23 enforcing this or not but I'm going to wait on that for Mr.
 24 Harris' response.

25 MR. KLINE: And if I can add, I was aware, of

1 course, of 59, the subparagraph 3 stipulation.

2 MS. ROBESON: Yes.

3 MR. KLINE: And I just didn't address it because I
 4 thought it was premature to do that. I will give you a
 5 little supplement but it won't go, well, I'll get it done by
 6 tomorrow. Not today.

7 MS. ROBESON: Okay. All right. Anything else?

8 MR. HARRIS: Just one quick point on that to give
 9 you a little teaser on what I will be submitting.

10 Irrespective of the DPS' ability to do it, this project has
 11 to go through a site plan approval and the Planning Board
 12 has every ability to and regularly does measure and define
 13 those things so there is no difficulty of enforcing this.

14 MS. ROBESON: Well, I think what Mr. Kline was
 15 saying is that because the buildings are large, you wouldn't
 16 pick up on it until building, until the U&O to --

17 MR. HARRIS: I find the staff at Park and Planning
 18 picks up on every bush on a site nowadays so I --

19 MS. ROBESON: Well, what you're saying is it would
 20 be incorporated into the site plan and it would be a site
 21 plan violation that they would catch through inspection.

22 MR. HARRIS: Correct. Among many other ways.

23 MS. ROBESON: Yes. I thought, I was thinking of
 24 that too but, you know, you can present that argument into
 25 the record.

1 MR. HARRIS: Okay. Okay. I don't know whether
 2 you intend to discuss now and rule now on the issue of
 3 expert witnesses that was raised in Mr. Kline's e-mail on
 4 Saturday --

5 MS. ROBESON: Yes.

6 MR. HARRIS: -- and my reply.

7 MS. ROBESON: Yes. My position is I, you, Mr.
 8 Harris, you would have to show some kind of prejudice. We
 9 still have September 13th set up as a date. That's 10 days.
 10 Mr. Chen is looking surprised. Our administrative assistant
 11 has it on the calendar. Is that not the case?

12 MR. HARRIS: I understood Friday the 6th --

13 MS. ROBESON: Would be the last date.

14 MR. HARRIS: -- was going to be another day.

15 MS. ROBESON: Okay.

16 MR. HARRIS: And I don't know whether we reserved
 17 the 13th as well. I certainly hope we're not going three --

18 MS. ROBESON: Well, I guess --

19 MR. HARRIS: -- more days but.

20 MS. ROBESON: Well, I feel that -- Mr. Chen, how
 21 long is your case? You still have an expert to go, correct?

22 MR. CHEN: Yes.

23 MS. ROBESON: And Mr. Kline had noted an expert as
 24 well, and then you have rebuttal.

25 MR. HARRIS: Mr. Kline has requested two experts.

1 MS. ROBESON: Two experts, correct.

2 MR. HARRIS: And I would have the opportunity for
 3 rebuttal. So if we're talking about timing, there's
 4 certainly every possibility we can finish today and if we
 5 don't finish today, I don't see --

6 MS. ROBESON: Well, I have time estimates from Mr.
 7 Kline that are four hours.

8 MR. HARRIS: Correct.

9 MS. ROBESON: Just for his case.

10 MR. HARRIS: Correct.

11 MS. ROBESON: And I don't see putting together all
 12 of them with cross-examination, quite frankly, in two days.
 13 The other thing is he didn't change the scope of what the
 14 expert was going to testify to.

15 MR. HARRIS: A big part of an expert's testimony
 16 is who he or she is and what their background is. Plus, you
 17 haven't even talked about it, he asked for one planning
 18 expert when we started this hearing on July 29th. Actually,
 19 his submittal a few days before that. That has now grown to
 20 not only not designating the person in July or even in
 21 August but now --

22 MS. ROBESON: But he did designate two within the
 23 10 days so I guess how --

24 MR. HARRIS: Within 10 days of what?

25 MS. ROBESON: -- are you prejudiced?

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1 MR. HARRIS: Within 10 days of what?
2 MS. ROBESON: Before this hearing.
3 MR. HARRIS: No.
4 MS. ROBESON: When did he designate them?
5 MR. HARRIS: I believe it was on August 28th.
6 MS. ROBESON: Yes, but we still have until August
7 6th.
8 MR. CHEN: September 6th.
9 MS. ROBESON: I mean September 6th, yes, so I --
10 MR. HARRIS: That's still not 10 days. I'm sorry.
11 29, 30, 31 is three and six is nine.
12 MS. ROBESON: It's nine days.
13 MR. HARRIS: That's not 10.
14 MS. ROBESON: Okay.
15 MR. HARRIS: What do we have the rule for?
16 MS. ROBESON: Tell me how -- it's a rule to
17 prevent prejudice. And I guess my problem is I don't like
18 denying somebody the ability to put on their case because
19 they didn't meet a deadline by one day when you have had
20 notice of the one expert. Normally --
21 MR. HARRIS: I'm sorry. Go ahead.
22 MS. ROBESON: Normally what we do is we, in other
23 cases, we have held open the record for additional
24 objections and we brought back the witness for cross-
25 examination if, if one of the parties believes but in the

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1 interest of not creating appealable issues and getting the
2 case finished, I guess I just have trouble seeing how you're
3 prejudiced by the one day.
4 MR. HARRIS: We're prejudiced in multiple ways.
5 Number one, the rule is the rule. It says 10 days. It's in
6 black and white. It doesn't say 10 days from a continued
7 hearing. It says --
8 MS. ROBESON: Well, I'll set another hearing
9 whether you --
10 MR. HARRIS: I understand that but --
11 MS. ROBESON: I'm willing to accommodate and come
12 in for one more hearing just for that witness.
13 MR. HARRIS: We're trying to get this hearing
14 completed, not --
15 MS. ROBESON: I know that.
16 MR. HARRIS: They're trying to extend it
17 indefinitely so --
18 MS. ROBESON: I know that but it's not going to be
19 an indefinite extension and they, to my mind, they are doing
20 what they feel they need to do to represent their clients so
21 if you wish, we can find a day next week right now.
22 MR. HARRIS: Well before we finish this, I
23 certainly want to identify any future hearing dates so that
24 the time doesn't erode any further but I still --
25 MS. ROBESON: Well, okay. I think I understand

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1 where you're coming from and it has been a frustrating
2 process. Let me hear Mr. Kline and Mr. Chen on it. Mr.
3 Kline, it's your witnesses so I'll give you first crack.
4 MR. KLINE: Sure. Well, two things. With regard
5 to Mr. Ferguson, he simply replaced Mr. Berman who was going
6 to -- I believe Mr. Harris had a very good point if Mr.
7 Berman had submitted a report and he had relied and prepared
8 on that, but that wasn't the case so I don't believe the
9 applicant is prejudiced in that case.
10 With regard to Mr. Soltesz, maybe I've got a
11 counter-proposal that will ameliorate some of the concerns.
12 I had not anticipated calling Mr. Soltesz to testify at all.
13 I did, I put his name on the witness list in response to
14 something I thought the Hearing Examiner said, I'd like to
15 understand a little bit more the larger picture of what's
16 going on, and who better to have testify than the engineer
17 who can tell you where the Miles Coppola property is and
18 what's stage 4, some of the questions that came up, but I
19 otherwise wouldn't have had witnesses who could testify. I
20 did not anticipate asking him anything that would require an
21 expert opinion.
22 I did show him as an expert witness or offer him
23 as that because I figured the cross-examination would be
24 pretty rigorous and there may be a reason we would want to
25 get a professional opinion from him or an expert opinion.

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1 I'm comfortable with having him testify as a fact witness
2 and only express expert opinions on issues or topics that
3 we, the parties, all stipulate is worthy of his expert
4 opinion but he is not coming in to testify as an expert. It
5 is much more what I would call background or fact issues.
6 MS. ROBESON: Mr. Chen, do you want to weigh in?
7 MR. CHEN: Just a couple of asides. I thought
8 that the obligation was that Mr. Kline was supposed to file
9 by Friday, that date. I thought that was set and --
10 MS. ROBESON: It was.
11 MR. CHEN: Okay. So I -- it was his ability to
12 file a supplemental or amended prehearing statement to
13 identify experts. He was not limited in what he could do
14 and he just substituted a name but that's not my fight, it's
15 Mr. Kline's. My concern is back when we were looking at
16 dates, back in July, the 13th was not a lock-in date. It
17 was a big question mark date. And my concern is I've got a,
18 I've got a deposition that day and it will be at least in
19 the morning.
20 MS. ROBESON: Okay. Well, we're not limited to
21 the 13th.
22 MR. CHEN: Okay.
23 MS. ROBESON: Mr. Harris?
24 MR. HARRIS: If I understand Mr. Kline correctly,
25 his current proposal would be to call Mr. Ferguson as an

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1 expert witness as soon as we're ready for it, which could be
2 today or could be the Friday.
3 MS. ROBESON: Are you prepared for, to do that
4 today if necessary?
5 MR. KLINE: He was not planning on being here
6 today so I don't think we're going to get that far. Friday,
7 yes.
8 MS. ROBESON: Okay. Friday, yes. All right. Go
9 ahead.
10 MR. HARRIS: This is --
11 MS. ROBESON: Do you agree -- you really think
12 we're going to finish today?
13 MR. HARRIS: Yes. If people come prepared. You
14 know, if they leave their witnesses home, no, we can't
15 finish today.
16 MS. ROBESON: Well, I am going to give Mr. Kline
17 the opportunity to bring him in solely as a fact witness.
18 MR. HARRIS: Mr. Soltesz.
19 MS. ROBESON: Yes.
20 MR. HARRIS: Okay.
21 MS. ROBESON: Now, the expert.
22 MR. HARRIS: Right.
23 MS. ROBESON: Tell me how you're prejudiced by one
24 day.
25 MR. HARRIS: It's not one day. I spent hours

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1 preparing for Mr. Berman's testimony and, you know, I, you
2 know, just got the stuff on Mr. Ferguson. I'm prejudiced
3 only to the fact that we have presented nearly all of our
4 case over the last three days of hearings. The purpose of
5 the rule is so that both sides know who is presenting which
6 witnesses before the hearing begins. It's not a revolving
7 situation. You heard the opposition here object when I --
8 MS. ROBESON: Well, we have had witnesses
9 substituted not infrequently so I --
10 MR. HARRIS: Okay. I don't want to make --
11 MS. ROBESON: Right, because we're taking the
12 time.
13 MR. HARRIS: Yes. I understand. If Mr. Ferguson
14 is prepared to testify by Friday, then, you know, I think
15 we're going to finish early, we're going to have wasted time
16 and --
17 MS. ROBESON: Great.
18 MR. HARRIS: -- I'm disappointed that he isn't
19 here today. I would hope that Mr. Soltesz would then come
20 today so that we can use our time. Mr. Soltesz is local
21 here and he's going to be a fact witness. If we finish
22 before 5:00, Mr. Soltesz should be here to testify or Mr.
23 Ferguson should be, and then the other one should be here on
24 Friday.
25 MS. ROBESON: Mr. Kline, can you give him a call?

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1 MR. KLINE: Mr. Soltesz will be available to
2 testify today.
3 MS. ROBESON: Okay.
4 MR. HARRIS: And then Mr. Ferguson on Friday.
5 MS. ROBESON: Yes, correct?
6 MR. KLINE: I know he has other professional
7 commitments but he'll be here Friday or I won't have a
8 witness.
9 MS. ROBESON: Okay.
10 MR. HARRIS: I'm not happy about it but I can
11 accept that.
12 MS. ROBESON: All right. With that, are you ready
13 to proceed?
14 MR. HARRIS: Yes.
15 MS. ROBESON: Okay. And our next witness?
16 MR. HARRIS: Next and continuing witness is Mr.
17 Gary Unterberg.
18 MS. ROBESON: Okay. Mr. Unterberg. I'm sorry. I
19 have a growing file here and I'm looking for the transcript.
20 Mr. Unterberg, you're still under oath.
21 MR. UNTERBERG: Yes. I understand that.
22 (Witness previously sworn.)
23 DIRECT EXAMINATION
24 BY MR. HARRIS:
25 Q When we were last in the hearing, I think it was

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1 August 14th, did you cover in your testimony the way in
2 which this development plan amendment conforms with the
3 purposes and standards of the MXPDP Zone?
4 A I did with the previous testimony.
5 Q And what is your opinion with respect to that
6 compliance?
7 A That the project, the proposal meets the
8 requirements of the MXPDP Zone as testified to.
9 Q Okay. And at that time, did you begin to cover
10 the requirements with respect to the master plan?
11 A Yes. And I think we made it through the general
12 requirements and the specific requirements.
13 MS. ROBESON: Yes. If I could just clean up one
14 housekeeping matter on my part. When I looked back at the
15 transcript, you adopted technical staff's findings as your
16 own as far as the standards for the zone but I didn't have
17 you identify the neighborhood. Are you adopting technical
18 staff findings for the neighborhood as well?
19 THE WITNESS: Yes, I am.
20 MS. ROBESON: Okay. I just -- are you adopting
21 the whole technical staff report as your --
22 THE WITNESS: Yes. I'm in agreement with the
23 whole report.
24 MS. ROBESON: I just want to make sure it's
25 covered.

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1 THE WITNESS: I'm comfortable with that, yes.
2 MS. ROBESON: Okay. I'm sorry to interrupt, Mr.
3 Harris.
4 MR. HARRIS: No, no. Thank you certainly.
5 MS. ROBESON: Go ahead.
6 MR. HARRIS: Thank you for clarifying that.
7 BY MR. HARRIS:
8 Q All right. So let's resume then, and are there
9 multiple reasons as to why this DPA meets any requirement
10 for compliance with the 1994 master plan?
11 A Yes. There are multiple reasons, and I'd like to
12 go through three of them to be specific today.
13 Q Would you begin by addressing the, any relevance
14 of the Planning Board's review of this?
15 A First, the Planning Board did vote 5-0 in favor of
16 the DPA and particularly, that meets the master plan
17 consistency. In particular on their report or their letter
18 to the Zoning Office on July 25th, I quote, the Planning
19 Board found that the amendment is consistent with the
20 purposes of the MX, of a mixed-use planned development zone
21 and it satisfies the standards of the MXD Zone. The
22 Planning Board also found that the proposed amendment is in
23 substantial compliance with the master plan and the
24 amendment does not represent a significant change from the
25 approved 2003 development plan in terms of density of the

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1 development.
2 Q And did the technical staff come to a similar
3 conclusion?
4 A They did, and they gave their unequivocal support.
5 Q And do you have an understanding with respect to
6 the practice in the Office of Zoning and Hearing under
7 Maryland law with respect to the weight given to the
8 Planning Board's interpretation?
9 MR. CHEN: Objection.
10 MS. ROBESON: Calls for legal conclusion?
11 MR. CHEN: Legal conclusion, and we're before that
12 agency.
13 MS. ROBESON: Yes. I am aware of Maryland law so
14 he doesn't have to answer that.
15 MR. HARRIS: Fine.
16 BY MR. HARRIS:
17 Q Second then, let's turn to the master plan itself
18 and a review of any consistency with this, and first of all,
19 what amount of development does the master plan recommend,
20 commercial development does the master plan recommend for
21 Cabin Branch?
22 A The recommended amount of commercial development
23 is 2,420,000 square feet which is on page 40 of the master
24 plan.
25 Q And does this development plan amendment stay

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1 within that maximum?
2 A It does, and that has not changed from 2003 from
3 the original approval
4 Q And do you have an opinion with respect to the
5 overarching vision of the master plan for the MXPDP area of
6 Cabin Branch?
7 A Yes. The overarching vision of the master plan
8 for the MX --
9 MR. CHEN: Objection. The document speaks for
10 itself.
11 MS. ROBESON: I'm going to let him testify in his
12 opinion. Go ahead.
13 THE WITNESS: In my opinion, the overarching
14 vision of the master plan for the MXPDP area of Cabin Branch
15 is for a comprehensively designed and mixed-use employment
16 center which helps to achieve this vision, particularly in
17 light of Mr. Bogorad's and Mr. Kaplan's testimony regarding
18 a 21st Century mixed-use employment center.
19 BY MR. HARRIS:
20 Q Did the Planning Board and the planning staff
21 conclude that this development plan responds to that
22 overarching vision?
23 A They did and both, both came to the same
24 conclusion.
25 Q I believe last time we talked, you covered some of

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1 the general recommendations in the master plan, is that
2 correct?
3 A Yes. The previous testimony regarding the general
4 recommendations, my opinion that the, that the plan is
5 substantially in compliance with those general
6 recommendations of the master plan, and that was per my
7 August 14th testimony.
8 Q And there again, with respect to the general
9 recommendations in the master plan, did the staff and the
10 Planning Board come to a conclusion?
11 A Yes, they did which also it is previously noted --
12 MS. ROBESON: You don't, I don't want to interrupt
13 your flow but you don't, we know what the Planning Board and
14 staff did.
15 BY MR. HARRIS:
16 Q Is it your opinion that this development plan is
17 substantially consistent with the general recommendations in
18 the master plan?
19 A Yes. It's my opinion that this is generally
20 consistent with the general recommendations of the master
21 plan.
22 Q And do you have an opinion with respect to
23 consists, substantially consistent with the specific
24 recommendations with the master plan?
25 A Yes. Again, it's my opinion that this is

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1 substantially consistent with the specific recommendations
2 of the master plan, and that was also from the August 14th
3 testimony that we went through point by point.
4 Q Now, are you aware that there's been some
5 discussion through cross-examination about the 120,000
6 square foot retail recommendation in the master plan?
7 A Yes, I am, as been mentioned already.
8 Q I want to turn your attention to that then. First
9 of all, with respect to the zone, what does the MXPDP Zone
10 allow in terms of retail?
11 A The MXPDP Zone allows 20 percent of the commercial
12 development to be retail, particularly without any
13 requirement for master plan recommendation so long as the
14 retail is compatible with the other uses in the MXPDP Zone.
15 Q And with respect to the 120,000 square foot
16 recommendation, do you have an opinion with respect to the
17 nature of the retail that the master plan contemplated
18 there?
19 MR. CHEN: Objection. The nature of the retail?
20 BY MR. HARRIS:
21 Q That type of retail were they --
22 MS. ROBESON: He can't ask a leading question so
23 if you -- go ahead, Mr. Unterberg. You can answer.
24 THE WITNESS: Regarding the 120,000 square feet of
25 retail, it's my opinion that the recommendation for the

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1 120,000 was specifically for neighborhood retail and did not
2 limit any uses for specialty retail that could be included
3 in the MXPDP. Specifically, if you look at page 65 of the
4 master plan, that is a map that calls for neighborhood
5 retail. Therefore --
6 MS. ROBESON: Wait. Which page are you on?
7 THE WITNESS: Sixty-five.
8 MS. ROBESON: Okay. Go ahead.
9 THE WITNESS: There's a map and the legend calls
10 for neighborhood retail.
11 MS. ROBESON: Wait. Are you sure it's 60?
12 MR. HARRIS: Sixty-five.
13 THE WITNESS: Sixty-five.
14 MR. HARRIS: Yes.
15 MR. ROBINS: Are you in the technical appendix or
16 are you in the master plan itself?
17 MS. ROBESON: Oh, okay. Okay. I gotcha.
18 THE WITNESS: Okay. The map calls for
19 neighborhood retail. On page 67, toward the top, it says
20 retail, 120,000 square feet. And also, the fold-out plan
21 which also represents the legend in the map on page 65 which
22 calls for neighborhood retail.
23 BY MR. HARRIS:
24 Q I'm sorry. Would you clarify? The fold-out map,
25 what does it denote for Cabin Branch?

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1 A It has a similar legend and it calls for
2 neighborhood retail.
3 Q Have you had occasion to look at the technical
4 appendix and some of the earlier draft documents in the
5 master plan with respect to the issue of neighborhood retail
6 and if so, what have you found there?
7 A I have and in summary, for the technical appendix
8 on page 12, there's a discussion on neighborhood retail and
9 also, it discusses comparison retail. So it does discuss a
10 couple types of retail, and then those recommendations came
11 forward based on the demand for neighborhood retail. That's
12 specifically in the appendix, page 12. Some of the staff
13 drafts, particularly pages 52 and 55 --
14 MS. ROBESON: Staff drafts of what?
15 THE WITNESS: Prior of the technical appendix.
16 MS. ROBESON: Oh, okay.
17 THE WITNESS: They also discuss the different
18 types of retail, particularly neighborhood and comparison is
19 the term that is used.
20 BY MR. HARRIS:
21 Q And do you have an opinion with respect to whether
22 their analysis of the amount of retail had to do with
23 neighborhood retail or comparison retail or both?
24 A My opinion, it dealt with both and they were
25 discussing multiple types of retail.

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1 Q And the 120,000 square feet, do you have an
2 opinion with respect to whether that was a conclusion with
3 respect to neighborhood retail or comparison retail?
4 MR. CHEN: I object to this because I think the
5 document, including the appendix, speaks for itself but I
6 assume the Examiner is going to allow.
7 MS. ROBESON: I am going to allow it for the
8 weight it deserves and because he is an expert, so go ahead.
9 THE WITNESS: My opinion, the recommendation for
10 120,000 square feet at the Cabin Branch neighborhood was for
11 or is for neighborhood retail. It also does not limit the
12 uses including specialty retail that could be included or
13 achieved through MXPDP Zone.
14 BY MR. HARRIS:
15 Q Let's turn to the split zoning --
16 MS. ROBESON: Wait.
17 MR. HARRIS: Sure.
18 MS. ROBESON: Could I just clarify something --
19 MR. HARRIS: Sure.
20 MS. ROBESON: -- in my mind? What you're saying
21 is they recommended a minimum of 120,000, the technical
22 appendix said okay, you have to have 120,000 square feet of
23 retail, of neighborhood retail, but then there's no limit on
24 the amount of retail that you can have except per the MXPDP
25 Zone? is that your position?

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1 THE WITNESS: The 120,000 is up to, specifically
2 for neighborhood retail which is the master plan.
3 MS. ROBESON: Okay. And where does it use the
4 word comparative retail?
5 THE WITNESS: In the technical appendix?
6 MS. ROBESON: Yes.
7 THE WITNESS: Page 12.
8 MS. ROBESON: Oh, okay. I just haven't had a
9 chance to go through it. Okay.
10 THE WITNESS: Okay.
11 MS. ROBESON: Go ahead.
12 THE WITNESS: And then the master plan itself is
13 silent as far as other types of retail, so it does recommend
14 MXPDP which allows 20 percent retail of the total.
15 MS. ROBESON: Okay.
16 BY MR. HARRIS:
17 Q And just to clarify, did you say that the
18 preliminary draft and the staff draft of the master plan
19 discussed this topic as well?
20 A I did.
21 Q And --
22 MR. KLINE: Objection. Whatever's in those
23 preliminary drafts is basically superseded by the final
24 draft of the plan.
25 MS. ROBESON: But they are legislative history.

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1 I'm going --
2 MR. KLINE: Well, then they ought to be put in the
3 record then.
4 MS. ROBESON: Well, do you --
5 MR. KLINE: Or you take administrative notice of
6 it.
7 MS. ROBESON: I think I do have them downstairs so
8 I can take official notice. If you can identify the drafts.
9 MR. CHEN: As an aside to that, Madam Examiner, at
10 the last hearing, you also noted the 2011 amendment to the
11 plan, to the Clarksburg plan.
12 MS. ROBESON: Yes.
13 MR. CHEN: Will you be taking official notice of
14 that?
15 MS. ROBESON: Yes. In the form of, I forget what
16 the resolution number is at the moment.
17 MR. CHEN: 17-188.
18 MS. ROBESON: That's right. I am going to take
19 that from the Council files.
20 MR. CHEN: There also, well, just on, because you
21 raised it was, there also was a Clarksburg Master Plan
22 Hyattsville study area public hearing draft and there also
23 was a staff report on that.
24 MS. ROBESON: On what?
25 MR. CHEN: There was also a staff report on that.

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1 MS. ROBESON: On what?
2 MR. CHEN: On the, I apologize, the 2011 master
3 plan amendment.
4 MS. ROBESON: Oh, well, those, when the time
5 comes, I will take them into the record rather than taking
6 official notice.
7 MR. CHEN: Fine. Fine.
8 MS. ROBESON: Okay. Do you have the preliminary
9 drafts?
10 MR. HARRIS: The staff draft about which he spoke
11 is dated October 1991 and the preliminary draft he spoke of
12 is dated February 1992, and I believe he gave the page
13 references to those.
14 MS. ROBESON: Okay. All right.
15 BY MR. HARRIS:
16 Q Okay. Well, let's turn then to the split zoning
17 of the property. I believe you testified the other day that
18 the property was split-zoned.
19 A I did, and there were options for proceeding with
20 the existing zoning or to rezone MXPDP.
21 Q Can you explain to us the limitations of the RMX
22 Zone and how that relates to the 120,000 square feet of
23 retail that we've been discussing?
24 MR. CHEN: Excuse me. Again, it's an objection.
25 I understand the Examiner's ruling. I'm just asking that an

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1 objection, a continuing objection be recognized.
2 MS. ROBESON: Yes. I mean, there's a difference
3 between speculation and expert opinion, but I'm going to let
4 it in for the weight it deserves.
5 THE WITNESS: In particular, the RMX Zone, which
6 is the existing zone, that only allows retail use if it is
7 expressly recommended in the master plan. Thus, if it were
8 developed under the RMX, 120,000 square feet of retail would
9 be a cap but it's not if it is or has been rezoned MXPDP.
10 BY MR. HARRIS:
11 Q Did the property owners subsequently, to the
12 master plan, apply for MXPDP zoning?
13 A They did, and it was rezoned in 2003 to MXPDP.
14 Subsequently, in 2004 and then updating 2008 of the
15 preliminary plan, both the A and B amendment were approved
16 which allows for 2,420,000 square feet of undefined
17 commercial uses in the MXPDP area.
18 MS. ROBESON: Well, it says employment, doesn't
19 it?
20 THE WITNESS: The preliminary plan speaks to
21 commercial.
22 MS. ROBESON: Oh, okay.
23 THE WITNESS: And this includes also, at the time,
24 well, also, there has been a site plan that was approved for
25 a hotel which is part of the employment although not spelled

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1 out in the master plan. And also, the intent at the time
2 was to do a hospital, nursing and care facilities that were
3 also not specific to the master plan.
4 BY MR. HARRIS:
5 Q So do you have an opinion with respect to master
6 plan limits as far as the uses within the MXPDP area?
7 MR. CHEN: Objection. Calls for a legal
8 conclusion.
9 MS. ROBESON: I'm going to let him answer.
10 THE WITNESS: I do have an opinion. It's my
11 opinion that they master plan did not preclude specialty
12 retail in MXPDP and that if the MXPDP Zone were sought, that
13 it could be approved or retail could be approved up to the
14 20 percent of the total employment as allowed per the zone.
15 BY MR. HARRIS:
16 Q And have you had occasion, in connection with that
17 opinion, to compare any other development plans for project
18 approvals with respect to either the MXPDP Zone or other
19 zones and if so, what have you learned from that analysis?
20 MR. KLINE: Objection.
21 MR. CHEN: Objection.
22 MS. ROBESON: Basis?
23 MR. KLINE: I'm not sure what would be the
24 relevance in going and looking at other master plans because
25 that's really what's kind of driving all of this and I think

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1 that's what you're trying to do. You can't, you can't glean
2 out of another master plan things that would help in this
3 case.
4 MR. CHEN: Beyond that, the way the question was
5 posed, it was not limited to a circumstance where the base
6 zone or the previous zone was RMX Zone rezoned to MXPDP
7 pursuant to a development plan. And pursuant to that
8 process, the development plan, I'll even take the
9 development plan, forget a development plan amendment, that
10 the development plan approved allowed that 20 percent of,
11 allowed that in theory, the zone would permit, contrary to
12 the master plan.
13 I mean, if there is an exact case that has pre-
14 dated this application where you had the same standards, the
15 same zones involved, the same type of, it doesn't even have
16 to be the Clarksburg Master Plan but if you have the,
17 comparable is probably a better word, if you have a
18 comparable situation that reflects, and I think where the
19 Examiner might go, an interpretation of, of the law in this
20 regard, you know, I could see that being admissible but I
21 haven't heard that yet.
22 MS. ROBESON: Well, I think you're going to the
23 weight and the relevance of the evidence and not necessarily
24 the admissibility. Mr. Harris, in what -- can you proffer
25 the relevance of the other master plans?

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1 MR. HARRIS: It is the combination of words in a
2 master plan and how they're interpreted irrespective of
3 which master plan and equally important, how the MXPDP Zone
4 and other zones have been interpreted. It's highly relevant
5 here because that is the crux of their argument.
6 MS. ROBESON: So your focus is on interpretations
7 of the MXPDP Zone.
8 MR. HARRIS: And interpretations of master plans
9 that, like this one, do not specify the amount of retail in
10 an MXPDP area.
11 MS. ROBESON: Okay. Okay. I'm going to let it in
12 for the weight it deserves. It is, to my mind, it is not a
13 matter of inadmissible evidence, and you are free to cross-
14 examine on it. Go ahead, Mr. Unterberg.
15 BY MR. HARRIS:
16 Q So would you first talk about the Washingtonian
17 Project?
18 A Washingtonian Center, which is G-439, particularly
19 the MXPDP Zone was written for this project from --
20 MS. ROBESON: How do you know that?
21 THE WITNESS: Well, it didn't exist before they,
22 the 1985 Gaithersburg Master Plan and then was applied, this
23 was the first project that it was applied to.
24 MS. ROBESON: Okay.
25 THE WITNESS: Again, it was, this is regarding the

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1 1985 master plan, Gaithersburg Master Plan. In particular,
2 the point I'd like to make is that the area that is the
3 Washingtonian Center, it called for a, to be corporate
4 district on the map which was for signature office,
5 development buildings, specifically for office and
6 residential uses. With that, the Planning Board, the Zoning
7 Hearing Examiner and Council approved 400,000 square feet of
8 comparison and specialty retail which they found consistent
9 with the master plan because the MXPDP Zone allows 20 percent
10 retail. Also, they found that the retail is employment use.
11 BY MR. HARRIS:
12 Q Did --
13 MS. ROBESON: What retail is employment use?
14 THE WITNESS: The --
15 MS. ROBESON: All the retail?
16 THE WITNESS: The 20 percent under the MXPDP that
17 was approved.
18 MS. ROBESON: Okay. So under the zone, it's
19 retail. You're saying under the zone, it's retail but under
20 the plan, it's employment?
21 THE WITNESS: The plan called for it as office,
22 light industrial --
23 MS. ROBESON: Okay.
24 THE WITNESS: -- or employment. They approved the
25 retail per the MXPDP, the 20 percent, and made the finding

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1 that that retail is also employment.
2 MS. ROBESON: Do we have that rezoning in the
3 record?
4 MR. HARRIS: I do not believe we do.
5 MS. ROBESON: Okay. Well, I don't want to delay
6 this while -- keep, keep going.
7 MR. HARRIS: Okay. Do you need it in the record?
8 I have it. I can make copies of both the resolution
9 approving the MXPD Zone and development plan including
10 retail and the Zoning Hearing Examiner's report.
11 MS. ROBESON: I would prefer just the resolution
12 because, but I'd rather not look through papers now.
13 MR. HARRIS: Okay.
14 MS. ROBESON: Because I'd like to get through
15 testimony so.
16 MR. HARRIS: Fine. Okay.
17 BY MR. HARRIS:
18 Q Mr. Unterberg --
19 MR. CHEN: Excuse me.
20 MS. ROBESON: Yes, Mr. Chen.
21 MR. CHEN: This has not been pre-filed by Mr.
22 Harris. Certainly, this is an effort to bluntly catch the
23 opposition off base. The documents should be in the record,
24 and I respectfully request the opportunity to review the
25 documents and reserve the right to recall this witness to

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1 cross-examine this witness on what his opinion is based upon
2 these applications that he's identifying now.
3 MS. ROBESON: You may reserve that right.
4 MR. CHEN: Thank you.
5 MS. ROBESON: The Washingtonian has been the
6 basis, as I read the statements, has been one of the
7 precedents for this, and it would be different if it was not
8 a public record but it is a public record so, but I will let
9 you reserve the right to cross-examine so you have the
10 benefit of that resolution.
11 MR. CHEN: And I ask that the reports that they
12 are referring to be made exhibits in the record. And I
13 might add the mention of the Washingtonian and the staff
14 report, which I recognize, it has not been identified as,
15 for this type of an analysis and this type of an
16 interpretation of Maryland law relative to the Zoning
17 Ordinance and the master plan. This is new.
18 MR. HARRIS: Madam Examiner, it's not new. Mr.
19 Chen was at the Planning Board hearing in July at which time
20 I mentioned it specifically, so it's not a, it's not new
21 information to him and if he didn't pull the documents and
22 look at them in the last two months --
23 MS. ROBESON: Well, okay. Let me --
24 MR. HARRIS: -- that's his fault.
25 MS. ROBESON: Let me end this debate.

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1 MR. CHEN: They were never mentioned at the
2 Planning Board hearing.
3 MR. HARRIS: The case was mentioned.
4 MS. ROBESON: Okay.
5 MR. CHEN: And it does not matter if it was
6 mentioned frankly.
7 MS. ROBESON: What I --
8 MR. CHEN: We're talking about this hearing.
9 MS. ROBESON: Okay. What I am going to do is it
10 does get too cumbersome to take official notice of 500
11 things that may or may not be, so every document that you
12 want to rely on I would like to have in the record if you
13 have them.
14 MR. HARRIS: I do.
15 MR. CHEN: What are their numbers?
16 MS. ROBESON: They're probably yours.
17 MR. HARRIS: No. If I have them.
18 MS. ROBESON: No. I don't -- we're not going to
19 do --
20 MR. HARRIS: They're not in the record.
21 MS. ROBESON: I can't do it right now. Then what
22 we're going to do is reserve the right to cross-examine Mr.
23 Unterberg solely on what he's saying about these documents,
24 okay? So, Mr. Unterberg, continue.
25 BY MR. HARRIS:

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1 Q Mr. Unterberg, would you look at the fold-out map
2 from the Gaithersburg Vicinity Master Plan from 1985?
3 MS. ROBESON: Wait. The Gaithersburg Vicinity?
4 MR. HARRIS: Yes. All right.
5 BY MR. HARRIS:
6 Q Which master plan applied to the Washingtonian
7 Center?
8 A As previously stated, this is the 1985
9 Gaithersburg Master Plan that applies to this, and this is
10 the fold-out map from that master plan.
11 Q And what does that map indicate as the land use
12 for the part of the Washingtonian Center where the original
13 retail was built and later retail was expanded?
14 A On this map, which is a light tan color for the
15 Washingtonian Center along 270, is noted as office/light
16 industrial.
17 Q And there --
18 MS. ROBESON: I do have to say this. Not to
19 complicate matters more but it's my recollection, having
20 just done a Gaithersburg Master Plan case, can you share
21 that map at some point with Mr. Chen?
22 MR. HARRIS: Sure.
23 MS. ROBESON: That is adopted by the Planning
24 Board and is their interpretation of what the master plan
25 but it doesn't agree in all instances with, with what the

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1 master plan said.
2 MR. HARRIS: I beg to differ. The map is part of
3 the master plan that is approved by the District Council and
4 later adopted by the Planning Board.
5 MS. ROBESON: Okay. Well, I just did a case, it
6 was G-910, where there were discrepancies between the map
7 and what was in the master plan.
8 MR. HARRIS: I don't disagree that there may be
9 discrepancies. There often are discrepancies within master
10 plans because they're not written as if they're legislation.
11 They're master plans.
12 MS. ROBESON: Okay.
13 MR. HARRIS: But the fact that there are
14 discrepancies doesn't mean that the map hasn't been adopted
15 as the map.
16 MS. ROBESON: Okay.
17 MR. HARRIS: And --
18 MS. ROBESON: I'm not agreeing with you,
19 necessarily. I'm just noting that. But we really need to
20 get through, I would like to get through Mr. Unterberg so.
21 MR. HARRIS: I understand. This is a critical
22 part of the case. As Mr. Unterberg is indicating, there's
23 very compelling precedent here.
24 MS. ROBESON: Okay. So what does it say, Mr.
25 Unterberg, for the Washingtonian site?

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1 THE WITNESS: The map and the master plan calls
2 for the office and light industrial, as just testified, and
3 the --
4 MS. ROBESON: Okay. And can you identify where
5 the Washingtonian is on that map?
6 THE WITNESS: With roads or by general location on
7 the map?
8 MS. ROBESON: General location, please.
9 THE WITNESS: Well, here's the map which is very
10 complicated, and --
11 MS. ROBESON: Well, we can figure it out.
12 THE WITNESS: Generally --
13 BY MR. HARRIS:
14 Q What's the name of the map first of all?
15 A The name is the Approved and Adopted Gaithersburg
16 Vicinity Master Plan, Montgomery County, Maryland January
17 1985. It's the land use plan. And generally, the
18 Washingtonian Center is in the middle of the map, roughly
19 the lower third. And Washingtonian is bounded on the east
20 by I-270 and to the north by Sam Eig Highway which is also,
21 I believe --
22 MS. ROBESON: Is that 300?
23 THE WITNESS: I'll leave it at Sam Eig Highway
24 because there is, there is --
25 MS. ROBESON: I just need --

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1 THE WITNESS: -- a highway number.
2 MS. ROBESON: Then can you just generally circle
3 it so I can know where it is when I look at the record?
4 THE WITNESS: I can.
5 MR. ROBINS: Do you have a highlighter?
6 MS. ROBESON: Are you circling it in black pen?
7 THE WITNESS: Black pen. I can do that or we can
8 find a highlighter which -- there's a, actually, there's a
9 red pen right here that might work better.
10 MS. ROBESON: Okay. So it will be circled in red
11 pen.
12 THE WITNESS: I've got this red pen, Steve, so I
13 will circle it in red pen a couple times to hopefully --
14 that should be distinguishable. It's not too bold but it's
15 circled in red pen.
16 MS. ROBESON: Okay. Thank you. And I'm going to
17 mark that as an exhibit, and that will be -- unless there's
18 an objection.
19 MR. ROBINS: May I approach for one moment?
20 MS. ROBESON: Yes, you may.
21 MR. ROBINS: I just want you to see.
22 MR. CHEN: Wait a minute. Whoa.
23 MR. ROBINS: I want her to see if she can see the
24 circle so it's identifiable.
25 MS. ROBESON: Come on forward. Okay. I'm going

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1 to mark this as Exhibit 80, land use map, Gaithersburg
2 Master Plan. No sidebars, please. Can I get that back? I
3 need to mark it.
4 (Exhibit No. 80 was marked for
5 identification.)
6 MR. CHEN: What is the exhibit number?
7 MR. HARRIS: Eighty, 8-0.
8 MS. ROBESON: All right.
9 BY MR. HARRIS:
10 Q So, Mr. Unterberg, does that master plan recommend
11 retail use in the Washingtonian Center?
12 A It does not. It clearly calls for office and
13 light industrial.
14 Q And the master plan document itself, what does it
15 say about retail in that area?
16 A It talks about office, residential uses, prestige
17 signature office, research development. It does not talk
18 about retail.
19 Q And are you aware whether -- well, I think you
20 testified that the development plan approval did approve
21 retail there?
22 A It did, which was 400,000 square feet in the
23 approval with the zoning, and that was due to the fact that
24 the MXP Zone allows up to 20 percent retail.
25 Q And the MXP Zone, does it require a master plan

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1 recommendation for that retail?
2 A The zone does not require recommendation for,
3 master plan recommendation for retail.
4 Q Let me turn your attention to another case, the
5 Seneca Meadows Project in Germantown. Are you familiar with
6 that project?
7 A I am familiar with it.
8 Q And was there a master plan or sector plan
9 approved that related to that project approval?
10 A That project, which is Seneca Meadows in
11 Germantown, the Germantown Sector Plan was adopted in 2009.
12 And that recommendation was for industrial office and
13 technology uses for Seneca Meadows and the zone is TMX-2.
14 Q Did --
15 A Transit mixed-use.
16 Q Did the master plan make any recommendation with
17 respect to retail and if so, what was it?
18 A It made limited respect to retail of specifically
19 street level retail for a mixed-use development.
20 Q I'm sorry. What did it recommend?
21 A Street level retail or minor retail within mixed-
22 use buildings.
23 Q Did it recommend an amount?
24 A It did not.
25 Q Let me turn your attention to page 67 of that

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1 sector plan, and would you read, for the record, the
2 underscored portion there?
3 MR. CHEN: Objection. Again, the document --
4 these documents should have been pre-filed. Counsel has
5 said this is a critical part of his case. It's his words.
6 Now, he's using documents for an expert just after
7 criticizing Mr. Kline. These documents should have been
8 pre-filed and they certainly, at this point, at the hearing,
9 should be made part of the record.
10 MR. HARRIS: There is no requirement to pre-file
11 documents. You have to pre-file reports. This is not a
12 report. It's a public document that, again, was referenced
13 at the Planning Board hearing and about which you've been
14 familiar for now two months.
15 MR. CHEN: No. No. That's not the case.
16 MS. ROBESON: All right.
17 MR. CHEN: We can argue about that but --
18 MS. ROBESON: Overruled. Continue.
19 BY MR. HARRIS:
20 Q Okay. Mr. Unterberg --
21 MR. CHEN: You're not going to require the
22 document to be put in the record?
23 MS. ROBESON: Well, I would like the, whatever
24 portion he's reading from put in the record and I'll take
25 official notice of the entire German, which one is this,

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1 Germantown Sector Plan. Which sector plan? Germantown has
2 a couple of sector plans.
3 BY MR. HARRIS:
4 Q What's the name of that sector plan?
5 A This is the Germantown forward approved and
6 adopted October 2009. And specifically, this is page 67.
7 MS. ROBESON: Okay. Can you provide, I'd like to
8 mark that as an exhibit. So this will be Exhibit 81,
9 excerpt or page 67. So it will be page 67 of Approved and
10 Adopted Germantown Sector Plan, for Germantown Forward
11 Sector Plan.
12 (Exhibit No. 81 was marked for
13 identification.)
14 BY MR. HARRIS:
15 Q And would you read that portion of that page that
16 as highlighted?
17 A This is under the land use heading. Concentrate
18 mixed-use development at the transit station with an average
19 density of 1.0 FAR on the Seneca Meadows property north of
20 the Crystal Rock Tributary (SM-1) to ensure the area retains
21 an employment profile developed with the minimum of 70
22 percent employment uses that include limited street level
23 retail and a maximum of 30 percent residential uses.
24 Q Okay. Mr. Unterberg, are you aware then --
25 MS. ROBESON: Yes. Can you show it to them, and I

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1 need to mark that exhibit.
2 MR. ROBINS: Actually, I already put that notation
3 on it.
4 MS. ROBESON: Okay. Go ahead.
5 BY MR. HARRIS:
6 Q Mr. Unterberg, are you aware whether the Planning
7 Board approved a preliminary plan for retail at that site?
8 A They did, and that included retail. And that
9 resolution is 10-156. Specifically --
10 MS. ROBESON: That's a Planning Board resolution?
11 THE WITNESS: Planning Board resolution for a
12 preliminary plan.
13 MR. CHEN: I object. This is a zoning case.
14 MS. ROBESON: Okay. I think I do see the
15 relevance of it because he's saying how retail versus
16 employment has been interpreted for -- was this an MXD Zone?
17 THE WITNESS: This is TMX-2.
18 MS. ROBESON: This is TMX.
19 THE WITNESS: For Seneca Meadows.
20 MS. ROBESON: And what's the resolution number?
21 THE WITNESS: The Planning Board resolution is no.
22 10-156.
23 BY MR. HARRIS:
24 Q And do you have the preliminary plan number as
25 well?

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1 A I do. Preliminary plan number is -- there's two
2 of them. Preliminary plan is 11998004A, and there's a site
3 plan that went with that that was at the same time. The
4 site plan is 820100140. And they're both in that same
5 resolution.
6 Q And did the Planning Board approve a retail
7 component as part of that preliminary plan and if so, what?
8 A Yeah. They approved approximately 207,000 square
9 feet of a retail center, which is the new Wegman's that is
10 being built in Germantown, and they found that to be
11 consistent with the sector plan recommendation concluding
12 that --
13 MR. CHEN: Objection. The document speaks for
14 itself. It should be in the record rather than being
15 characterized and interpreted by the witness.
16 MS. ROBESON: Well, I think that you are going to
17 provide the document, correct?
18 MR. HARRIS: Yes. I only have one copy now.
19 MS. ROBESON: Well, I don't know if you need the
20 preliminary plan, but the Planning Board resolution.
21 BY MR. HARRIS:
22 Q So, Mr. Unterberg, continue. What did they
23 conclude?
24 A They concluded that retail uses are employment,
25 and they further noted within that, within the --

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1 MS. ROBESON: Now, where is this where they
2 concluded that?
3 THE WITNESS: This is on page 4 of the resolution.
4 MS. ROBESON: Okay. So it's the resolution. So
5 that's what you're going to place in the record.
6 THE WITNESS: Yes. Further in the resolution,
7 they also concluded that master plans do not and cannot
8 specify all development possibilities. Just to summarize,
9 they did include the master plan called for employment and
10 mixed use, the Planning Board approved, specifically, retail
11 noting or concluding that the retail uses are employment.
12 MR. CHEN: Madam Chair?
13 MS. ROBESON: Yes.
14 MR. CHEN: You recognize the objection I've had.
15 MS. ROBESON: Yes.
16 MR. CHEN: Thank you.
17 MS. ROBESON: And I'll note it as a continuing
18 objection.
19 MR. CHEN: Okay. I don't want to cause a problem
20 with interrupting but as long as you recognize my objection
21 as being --
22 MS. ROBESON: I do.
23 MR. CHEN: Thank you.
24 MS. ROBESON: Okay. Continue, Mr. Harris.
25 BY MR. HARRIS:

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1 Q Mr. Unterberg, are you aware of how master plans
2 are interpreted by the Zoning Hearing Examiner's office and
3 the Planning Board in connection with the rigidity of their
4 recommendations?
5 MR. CHEN: Objection. Calls for a legal
6 conclusion at the least. It's now telling the Examiner what
7 is the practice of the Examiner's office.
8 MS. ROBESON: I think he's already testified, Mr.
9 Harris, that they're interpreted flexibly and it says so at
10 the beginning of the plan.
11 MR. HARRIS: Okay. I believe he did. Thank you.
12 BY MR. HARRIS:
13 Q Are you aware of a recent case that you handled
14 where that conclusion was reached as well?
15 A Yes. And I believe I already testified to that
16 point, G-881, which is the Butz property. They made that
17 conclusion on the flexibility of the master plan.
18 Q And do you have an opinion as to whether the age
19 of this master plan and the nature of its recommendations,
20 how they should be interpreted in this case?
21 A Yes, I do. It's my opinion that due to the
22 changes and particularly, the land use and market
23 circumstances over the almost 20 years and also from the
24 testimony of Mr. Bogorad and Mr. Kaplan, that the master
25 plan is flexible or should be flexible to accommodate these

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1 changes and particularly, which can be accommodated in the
2 MXPDP Zone.
3 MS. ROBESON: I couldn't hear the last, the what
4 in the MXPDP Zone?
5 THE WITNESS: These changes can be, can be
6 accommodated --
7 MS. ROBESON: Oh, I'm sorry.
8 THE WITNESS: -- within the parameters of the MXPDP
9 Zone.
10 BY MR. HARRIS:
11 Q Do you find anything in the Clarksburg Master Plan
12 that relates to that interpretation of flexibility besides
13 the page, Roman at 7, that you mentioned previously?
14 A Right. Two things in particular. We've talked
15 about a grocery store and the anchor of a grocery store.
16 We've heard testimony that that is not appropriate here and
17 actually, a third grocery store in Clarksburg is not
18 appropriate and would not be supported by the market
19 particularly in light of Wegman's and some of the Germantown
20 grocers who have come into town over the last 10 to 15
21 years.
22 Secondly, there's been a lot of discussion about
23 outlet retail or specialty retail or comparison retail.
24 This is allowed per the MXPDP Zone. It's silent in the
25 master plan, also silent in the Cabin Branch neighborhood,

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1 but to incorporate the amenities and features such as
2 restaurants and the other amenities that come with that,
3 it's appropriate to, in my opinion, to include that within
4 the parameters of the MXPDP Zone.
5 Q And do floating zones provide sufficient
6 flexibility to do that?
7 A Yes, they do. And particularly page --
8 MS. ROBESON: I'm going to note your objection.
9 MR. KLINE: Thank you.
10 MS. ROBESON: Really, he doesn't have to. I mean,
11 it is legally, that is a legal interpretation.
12 MR. HARRIS: I think he was going to specify one
13 place in the master plan where that interpretation is
14 underscored that I think is pertinent testimony.
15 MS. ROBESON: Is there anything else in the master
16 plan that would support?
17 THE WITNESS: Yes. On page 98. It reinforces the
18 flexibility of the MXPDP Zone and, quote, floating zones have
19 more flexible development standards but they may be approved
20 by County Council only upon finding that the development
21 will be compatible with surrounding land uses and is in
22 accord with the proposed clause of the zone, and that's on
23 page 98 which addresses that.
24 BY MR. HARRIS:
25 Q And do you have an opinion with respect to the

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1 extent to which this DPA satisfies that criterion?
2 A Yes. My opinion is that we are in substantial
3 compliance with the master plan. Particularly, we have
4 noted, with the flexibility of the master plan.
5 Q Okay. There are a number of findings that are
6 required under the MXPDP Zone so I'd like to review these
7 with you. It might be somewhat tedious but from your
8 viewpoint, is the development plan in substantial compliance
9 with the goals, guidelines and recommendations contained in
10 the Clarksburg Master Plan? A bit repetitive I know but I
11 want to make sure it's clear.
12 A Okay. And bear with me as I go through these but,
13 yes, it is to that question and for the reasons entered in
14 the record with my testimony. But particularly, the DPA is
15 substantially consistent with the use and density of the
16 master plan.
17 Q Do you have an opinion as to whether the proposed
18 use is compatible with approved and proposed uses in the
19 area?
20 A Yes. And it is my opinion that it is compatible.
21 Again, based on prior testimony. But I would like to point
22 out one thing, that the MXPDP Zone is intended to be flexible
23 and to promote the very things that are happening in
24 Clarksburg, or actually in Cabin Branch. The MXPDP Zone
25 encourages mixed use with the commercial component that can

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1 accommodate up to 20 percent retail uses. This is exactly
2 what is proposed in the DPA and the DPA, when implemented,
3 will produce a mixed-use environment that is specifically
4 envisioned by the MXPDP Zone with residential office,
5 neighborhood and specialty retail and community type uses.
6 The proposed DPA provides a realistic form of implementing
7 the goals and objectives of master plan taking into account
8 the changes of the character of the design and development
9 patterns, economy, current situation and needs of the
10 community.
11 Q I believe you already testified but since we're
12 going through these in sequence, I'll repeat it again. Will
13 DPA 13-02 comply with the standards and requirements for
14 approval of a development plan?
15 A Yes. It's my opinion that it does.
16 Q And would it comply with the purposes and
17 standards set forth in Article 59-C?
18 A Yes, it does and prior, primarily based on my
19 prior testimony.
20 Q Would it provide for the maximum safety,
21 convenience and amenity of the residents of the development?
22 A Yes, it does. And particularly, the circulation
23 systems have been organized in such a way to make certain
24 there's a significant meaningful connection between various
25 land uses that are safe, adequate and efficient.

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1 Q By its design, does this DPA minimize grading and
2 by other means, does it tend to prevent erosion and impact
3 on other natural features on the site?
4 A Yes, it does. And particularly, with this DPA,
5 there's no change per the prior approval and also, we have
6 various subsequent approvals such as approved storm water
7 plans, approved storm water management plans, approved water
8 quality plans that accomplish, excuse me, accomplish this
9 goal and provide for these two chapters, 22 and 19.
10 Q And has the District Council found that documents
11 showing the ownership or method of assuring perpetual
12 maintenance of any areas intended for use for recreation or
13 other common or quasi-public purposes are adequate and
14 sufficient?
15 A They have, and this has not changed.
16 Q Will the uses proposed be compatible with existing
17 and proposed adjacent and surrounding uses? Again,
18 repetitive I know.
19 A Yes, they do. Again, this is per my prior
20 testimony. It's also per the findings in 2003 for G-806
21 with the original approval and particularly, the MXPDP
22 compatibility standards of 59-C-7.55.
23 Q And will DPA-1302 adversely impact existing or
24 proposed public services and facilities?
25 A It will not, and there is an approved adequate

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1 facilities with ordinance or approval that was approved with
2 the preliminary plans. We also heard testimony from Mr.
3 Turnbull that the transportation, transportation facilities
4 remain adequate and will not adversely impact, will not be
5 adversely impacted.

6 Q In your opinion, will the approval of this DPA
7 provide for and encourage the coordinated, harmonious and
8 systematic development of the area and the regional district
9 as a whole?

10 A Yes, it will. The development envisioned by the
11 DPA truly will assist Clarksburg in becoming the place
12 envisioned by the master plan and will serve to promote and
13 to encourage the coordinated, harmonious and systematic
14 development of the area and retail district as a whole.
15 This was -- also, subsequent plans. This has been included
16 in an overall infrastructure site plan, an overall forest
17 plan, overall water quality and also, overall preliminary
18 plans that have been approved.

19 Q And do you have an opinion with respect to whether
20 this DPA, the granting of it, would be in the public
21 interest?

22 A Yes. It will be in the public interest, and this
23 was also a finding in 2003 with G-806. It has received an
24 APFO approval, which was in 2004 and then updated in 2008,
25 for the full density to get to 1,886 units, the 2,420,000

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1 square feet of commercial employment and the 500 senior
2 units. Roads and utilities are being built and paid for by
3 the developers. They're also primarily being dedicated to
4 public use. This development will also serve as a catalyst
5 for generating additional employment uses. It will serve to
6 complement and not distract from the town center. It will
7 generate fewer trips during the peak hour than was
8 previously approved, and it will provide for local and
9 specialty needs for the residents of Clarksburg and will
10 provide a significant economic benefit to Montgomery County
11 and the state of Maryland.

12 Q And finally then, just to reiterate, do you adopt
13 the conclusions in the technical staff report and by the
14 Planning Board as part of your testimony?

15 A I do, and that's been previously, previously
16 testified to.

17 MR. HARRIS: Okay. We have no further questions,
18 Madam Examiner.

19 MS. ROBESON: Okay. Mr. Unterberg, could you just
20 specify for me, you know, just because a master plan is old
21 doesn't mean its recommendation are always out of date and
22 what we generally look for -- I wasn't 100 percent clear on
23 your changed circumstances. Are your changed circumstances
24 making the former recommendations no longer relevant? Is,
25 is that based on the market conditions from Mr. Bogorad's

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1 testimony?

2 THE WITNESS: I think it's based on a number of
3 things. The plan in 2003 under the preliminary plan, the
4 primary use was going to be a hospital and to complement
5 that was going to be a neighborhood retail center of up to
6 120,000 square feet with a grocery store. Those
7 circumstances have changed and the hospital is now not
8 allowed to go forward so that --

9 MS. ROBESON: Well, doesn't the neighborhood
10 center complement the -- it seems to me the neighborhood
11 center would complement the homes and not necessarily the
12 hospital.

13 THE WITNESS: Well, and what, what we are
14 recognizing is one, that the grocery store is not warranted
15 and that's not only based on Mr. Bogorad's testimony but
16 based on there's one grocery store being built in Clarksburg
17 right now and the second one in, which should be in the town
18 center, that's still trying to happen.

19 The other thing is, which is recognized in the
20 staff report, we are proposing to do 50 to 120,000 square
21 feet of neighborhood retail with this development, and that
22 is to provide the neighborhood services for the
23 neighborhood. There is a demand for the neighborhood but it
24 does not include a grocery store.

25 MS. ROBESON: So you're saying essentially, the

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1 120,000 square feet mentioned in the master plan is a
2 minimum, was to ensure a minimum of a specific type of
3 retail and not a cap. Is that what you're saying?

4 THE WITNESS: I would not say minimum because I'd
5 say -- two scenarios. Under the RMX, it would be a cap and
6 up to 120,000 square feet. Under MXPDP, again, that would be
7 a range up to 120,000 square feet, and we've talk about 50
8 to 120,000 square feet as a range to provide for those
9 neighborhood services. The one thing that the master plan
10 is silent on is the additional square footage that's
11 provided for and allowed in the MXPDP Zone up to the 20
12 percent.

13 MS. ROBESON: And then you're saying the office
14 market, is that correct, has changed?

15 THE WITNESS: The testimony that I heard is that
16 an office market is very weak.

17 MS. ROBESON: Yes.

18 THE WITNESS: But also that with the specialty
19 retail and --

20 MS. ROBESON: No. So that's -- okay. I'm just
21 trying to clarify what your basis for -- your basis is Mr.
22 Bogorad's testimony regarding the office market.

23 THE WITNESS: Correct.

24 MS. ROBESON: Okay. All right. I just wanted to
25 clarify that. Now, you're sitting in different places

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1 today. Mr. Kline.
2 CROSS-EXAMINATION
3 BY MR. KLINE:
4 Q MR. Unterberg, you made a comment today about
5 figure 26 on page 65 of the master plan. Could I draw your
6 attention to that? Is that it, that page?
7 A Can you say that again, please?
8 Q I believe you were talking about a graphic on page
9 65 of the master plan.
10 A Okay. I'm on page 65.
11 Q Okay. In the legend at the top, in the upper
12 left-hand corner, the bottom of the column it says, it has a
13 cross-hatch pattern and says neighborhood retail.
14 A Okay.
15 Q Okay. And I believe your point was you were
16 trying to tell us where Cabin Branch used the term
17 neighborhood retail. What I don't see is I don't see
18 anywhere where that cross-hatch pattern is found anywhere in
19 figure 26.
20 A That actually has been interpreted by Park and
21 Planning. That cross-hatch pattern is that black dot in the
22 middle of the diagram and I believe what has happened is
23 that graphically, the cross-hatching is condensed to a black
24 dot or black circle just south of Clarksburg Road on that
25 diagram.

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1 Q And you say Park and Planning has interpreted it
2 that way. What's the foundation for that?
3 A Discussions with staff.
4 Q So we have a very clear exhibit that has a very
5 clear legend reference and yet, it doesn't appear anywhere
6 on this unless you say a black dot, which isn't defined
7 anywhere on this legend, is supposed to replace that.
8 A Um, hopefully, I can clarify that. If you go to
9 the fold-out, can I have the black and white fold out?
10 Q Why don't we use the colored one that we gave the
11 Hearing Examiner instead.
12 A Let me see if these are the same.
13 MS. ROBESON: Well, there is -- okay.
14 MR. KLINE: The record should reflect that we're
15 looking for --
16 MS. ROBESON: Wait. I have it.
17 MR. KLINE: -- land use plan side, the fold-out
18 plan that you marked as Exhibit No. 80, is that correct?
19 MS. ROBESON: No, 60A.
20 MR. KLINE: Sixty, okay.
21 MS. ROBESON: Is the master plan. Let me
22 separately mark this as exhibit -- oh, it is marked. It
23 should be marked as Exhibit 60B, so that's the fold-out map.
24 THE WITNESS: In the legend, red is neighborhood
25 retail. The circle that is red is neighborhood retail.

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1 BY MR. KLINE:
2 Q I understand. Thank you. So there is a, it is
3 correct there is a discrepancy between what's in the plan
4 and what's on here.
5 MS. ROBESON: Although the neighborhood retail on
6 Exhibit 60B is in the residential portion of the site.
7 BY MR. KLINE:
8 Q Mr. Unterberg, do you want to explain why that's
9 the case?
10 A Um, this goes back to the discussion with what
11 would be allowed under RMX. RMX requires a specific
12 location and number recommended in the master plan for
13 retail. If this was to go forward as RMX, which it didn't,
14 then this location, general location and the 120,000 is what
15 you could do in RMX under the optional method.
16 Q So Exhibit 60A is essentially just the same thing
17 that we're seeing on page 66 of the plan for your 27 where
18 we have something called retail corps. Those are
19 essentially supposed to be equivalents?
20 MS. ROBESON: Sixty-five in the --
21 THE WITNESS: This is equivalent to 65 but if you
22 turn the page to 66 --
23 MS. ROBESON: Oh, I'm sorry.
24 THE WITNESS: -- there is a more detailed, and the
25 retail --

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1 MS. ROBESON: I see.
2 THE WITNESS: The retail corps corresponds to the
3 neighborhood retail shown on that exhibit.
4 BY MR. KLINE:
5 Q Mr. Unterberg, could you put up the drawing you've
6 got that says the north district on it?
7 A This is, this is part of the, this is a slide from
8 the Power Point that was previously submitted, and I have to
9 go back a few days to find the exhibit number.
10 Q Well, I don't have my glasses with me but that one
11 says in the upper left-hand corner Cabin Branch, correct?
12 A Correct.
13 Q Do you have one with you here today that says
14 north district?
15 A I do not, but that is included in the Power Point.
16 I think I have the 8.5 x 11 version of that.
17 Q Yes. It's obviously better if we can all be
18 looking at it at the same time, and it's probably too --
19 MS. ROBESON: Could it have been Exhibit 45?
20 BY MR. KLINE:
21 Q Yes. It's an excerpt in Exhibit 45, but is it a
22 big production to set up the Power Point so we can all see
23 it simultaneously? Do you have that capability today?
24 A I do not. Can we speak from this slide or are
25 you, can we speak from this slide or do you want to -- this

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1 is for the whole property. Not --
2 Q Well, if I have it, I'll get it.
3 MS. ROBESON: Well, let me --
4 THE WITNESS: -- specifically the north.
5 MS. ROBESON: Let me suggest if I think Mr. Chen
6 wanted to reserve cross-examination on some of these
7 background documents that have been cited. If you want to
8 bring the full presentation on Friday, we could include that
9 with the, that cross-examination or you can work with this.
10 MR. KLINE: Actually, I guess I want my cake and
11 eat it too. In the sequence of the way I'd like to process
12 this, I really would like to kind of get this subject on the
13 floor but I'd like to reserve the right to go into more
14 detail on that drawing which has essentially all the red in
15 the northern end in more detail.
16 MS. ROBESON: Okay.
17 MR. KLINE: And that's, that's important to some
18 of the things I wanted to ask.
19 MS. ROBESON: Any objection, Mr. Harris?
20 MR. HARRIS: This has the same thing there. It's
21 just a smaller scale. I'm not sure why we need the other
22 one.
23 MR. KLINE: Partly because I can't read it, see it
24 from here.
25 MR. HARRIS: You can approach it over there.

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1 MR. CHEN: Wait a minute. The applicant makes a
2 Power Point presentation. All --
3 MS. ROBESON: They should have it here.
4 MR. CHEN: Yes.
5 MS. ROBESON: I agree. So --
6 MR. HARRIS: Well, it's in the record.
7 MR. CHEN: No. The Power Point is not. You have
8 an 8.5 x 11 in the record.
9 MR. HARRIS: Well, why can't you use that?
10 MR. CHEN: Because some of this --
11 MS. ROBESON: Just a minute. Just a minute. I'm
12 going to let them use the Power Point so we can all see it
13 instead of huddling here, okay?
14 MR. KLINE: I'll do my overview questions.
15 MS. ROBESON: Yes.
16 MR. KLINE: And I'll use my laser, and I apologize
17 if I inadvertently blast anybody.
18 THE WITNESS: Don't blind me, please.
19 MR. KLINE: Mr. Harris very quickly moved back.
20 MR. HARRIS: So that I'm in direct view here.
21 MS. ROBESON: It's every man for himself. Go
22 ahead.
23 BY MR. KLINE:
24 Q Mr. Unterberg, I'm going to assume that you're the
25 right numbers guy on this because you probably remember the

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1 questions I asked Mr. Bogorad and I think you're going to be
2 able to give me more detail I was looking for, but in the
3 applicant's justification statement, Exhibit 20, we
4 essentially start of by saying that the mixed-use employment
5 area is approximately 450,000 square feet of employment-
6 based retail and if I understand it correctly from what you
7 were saying before, and I apologize for the shakiness of my
8 hand, that's basically the red area at the tip of the
9 property, correct?
10 A That, that is one scenario, yes.
11 Q Well, okay. All right.
12 MS. ROBESON: Is there another scenario?
13 BY MR. KLINE:
14 Q Yes. Let me just put it this way. You're talking
15 about basically what I understand the northern district is,
16 the 450,000 square feet of employment-based retail including
17 14,000 square feet in restaurants which if I recall, were
18 those two little red spots immediately to the south lower
19 left. Thank you. Right.
20 A You're talking about these two.
21 Q Sure. Okay.
22 A Yes.
23 Q All right. So --
24 MS. ROBESON: That's across -- what street is
25 that?

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1 THE WITNESS: We're going to call this Golden Eye.
2 MS. ROBESON: Yes.
3 THE WITNESS: Which is the street that's on the --
4 MS. ROBESON: So the southwest of Golden Eye.
5 THE WITNESS: Which is off the new roundabout off
6 of 121 which is the new 121.
7 BY MR. KLINE:
8 Q Let me phrase the question this way. I understood
9 from earlier testimony of you and others that the red area
10 at the northern tip of the property was 450,000 square feet
11 of mixed-use employment. What is the alternative scenario?
12 Well, is that correct under one of the scenarios?
13 A That's a scenario, yes.
14 Q Okay. All right. So what's another scenario?
15 A Keep in mind, I think this is appropriate because
16 underneath we have the development plan and we're talking
17 about area A and area B and then we can, well, we can go to
18 C and D also, but the boxes that are noted A, B, C and D,
19 they all have ranges which include retail, employment,
20 residential, public use --
21 MS. ROBESON: What exhibit are you referring to?
22 THE WITNESS: This is Exhibit 59.
23 MS. ROBESON: Okay.
24 THE WITNESS: I'll move this down for a second.
25 And this is how the development plan was set up. This is

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1 how the development plan was set up in 2003, the same boxes,
2 A, B, C and D and I'll pick B for instance as residential
3 detached, attached multi-family and the total and the range.
4 In this case, 275 to 750. Also has employment and under
5 that has office, retail and the total. In this case, office
6 ranges from 0 to 300,000. Retail, 0 to 150,000. Total
7 range of 0 to 450,000. If you add A, B, C and D up in the
8 higher the range, you're way over what has been approved.
9 The chart on the middle of the drawing underneath
10 the charts A, B, C and D has a maximum. It's called MXP
11 yield summary and this has the, the grand total or the
12 number not to exceed. In this case, particularly with
13 employment and retail, we have, under employment, we have
14 office not to exceed 1,936,000, retail not to exceed
15 484,000, which is 20 percent of the grant total not to
16 exceed 2,420,000. That's the overriding number or cap that
17 we're tracking on the development plan.
18 BY MR. KLINE:
19 Q Since there is no alternative scenario described
20 in the development plan or I'm sorry, the applicant's
21 justification statement, then I presume this justification
22 statement represents the preference and the likely form of
23 development.
24 A That's, I'd say that's a scenario. It may change
25 as the plan goes forward. Probably generally within those

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1 parameters. The as noted on A, the majority of the retail
2 is in between A and B with lesser retail in C but again, as
3 it goes forward through the preliminary plan amendment or
4 site plan for those particular areas, that will all be
5 tracked and it cannot exceed the 2,420,000 with either the
6 cap on the retail or the office.
7 Q Does not the statement of 450,000 square feet of
8 employment-based retail represent what the applicant feels
9 is the, what's the critical mass necessary to have an
10 effective premier outlet center?
11 A I do not know if that's that critical mass or not.
12 That is in the statement though, the 450,000 square feet.
13 Q Did you have a hand in constructing this
14 statement?
15 A Partially but particularly, you have a question
16 with?
17 Q I just asked if you had reviewed it and had
18 participated in its formulation.
19 A I have reviewed it, yes.
20 Q Am I not correct in characterizing it as the
21 preference of the applicant?
22 MR. HARRIS: Objection. He answered that
23 question.
24 MS. ROBESON: Sustained. He did answer it.
25 BY MR. KLINE:

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1 Q Of the 484,000 that would be of retail that would
2 be permitted in the plan, 8,600 of it, as you told us, would
3 be the Gosnell property that would be located across the
4 road, correct?
5 MS. ROBESON: Across Maryland, north of Maryland
6 121?
7 THE WITNESS: That is correct. There's an
8 approved site plan north of Maryland 121, Gosnell property,
9 SMTM, a partnership that is approved for 8,600 square feet
10 of retail.
11 BY MR. KLINE:
12 Q The justification statement, Exhibit 20, talks
13 about over the longer term as build-out occurs,
14 approximately 66,000 square feet of entertainment uses will
15 be added. You heard my questions to Mr. Bogorad about that.
16 I'm sorry, Mr. Kaplan. What is that and where is it going?
17 A Entertainment, again, we're capped at the 484,000
18 for retail and if it falls under retail, we're within that
19 cap that we have to work with. If it falls under
20 employment, and entertainment is a broad definition I
21 believe at this time, that would be an employment use. I
22 believe part of that discussion would be either could be
23 future density or square footage within this northern area
24 or northern district but again, it would have to work within
25 the parameters of what's set on the development plan.

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1 Q Can you give us an example of an entertainment use
2 that would be considered an employment use and not a retail
3 use?
4 A Let me give you, give you one of each, and these
5 would be, again, subject to checking with the Zoning
6 Ordinance and/or working within the parameters of that
7 484,000 square feet. There could be a movie theater as
8 entertainment for that probably retail use. And again, we'd
9 have to work within those parameters. There's other
10 entertainment venues such as a amphitheater. Well, a
11 theater or an indoor convention use is probably an
12 employment use that could be used for entertainment. So
13 depending on how the definitions were, you can have an
14 entertainment for employment or entertainment for retail.
15 MS. ROBESON: What definition?
16 THE WITNESS: I would defer to the Zoning
17 Ordinance and how they would define, we define that.
18 BY MR. KLINE:
19 Q Before I move on, I'm just having difficulty
20 understanding why there's, in the justification statement,
21 there is no suggestion that there is any other alternative.
22 I understand why you would put ranges but the ranges you
23 seem to be suggesting are greater than I would have
24 expected. So why are we not alluding in the justification
25 statement to there being maybe as little as 350,000 square

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1 feet of comparison of sort of mixtures, employment area.
 2 A The ranges are not dissimilar to what was approved
 3 before.
 4 Q I understand that.
 5 A And again, the higher --
 6 Q I'm just asking why they're not in the
 7 justification statement because they don't suggest that
 8 there is any other alternative on the table.
 9 A I, I don't know if they need to be in the
 10 justification statement but, I would defer to others on that
 11 question.
 12 Q We're allowed 484,000. You've I think used the
 13 phrase a minute ago of 50,000 square feet in what I'll call
 14 the central district if that's the right term, or the
 15 central node was I think the phrased used in the
 16 justification. Would you point to the location where you
 17 say there's going to be some more retail?
 18 A Are you talking about what I'm -- I'm calling the
 19 northern area the northern district.
 20 Q Yes.
 21 A And then -- which is areas A and B on the
 22 development plan.
 23 Q Okay.
 24 A And then what I'm calling the southern district
 25 which is C, on this plan, C and D. And you're speaking to

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1 this mixed-use area that's --
 2 Q Yes. The area marked in red on the exhibit titled
 3 Cabin Branch.
 4 A Cabin Branch.
 5 Q Right.
 6 A Which is also noted mixed-use in area C on the
 7 development plan.
 8 Q Okay. What does that represent?
 9 A This is a mixed-use area. Retail, neighborhood
 10 retail. Also employment. Particularly, neighborhood
 11 employment. For the scale, as it relates to -- this north
 12 south road is Cabin Branch Avenue. It is residential on the
 13 western side. This road with the roundabout is Skimmer
 14 which travels from east to west through the residential
 15 portion, terminates at the one end with the community center
 16 and the pool, and then the mixed use with the neighborhood
 17 retail services, including employment, is the area I believe
 18 you're speaking of.
 19 Q And how large is that shown to be on the plan or
 20 how large is it intended to be?
 21 A Again, it is going to vary because it's going to
 22 work within the ranges in the cap. One scenario is this
 23 could be anywhere between 50 to 100,000 square feet. That
 24 includes neighborhood retail which could be in the range
 25 from 30 to 40 to 50,000 square feet. And then the

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1 complement to that would be the employment which is banks,
 2 doctor's office, et cetera, that would also be within that
 3 mixed use center. There's also the option to have
 4 residential in this area above the employment or retail
 5 uses.
 6 Q Obviously, my question only relates to, in this
 7 case, to the retail use. Well, if we were to build out
 8 Cabin Branch as is suggested in the development plan
 9 amendment, you would have 450,000 square feet in the mixed-
 10 use employment area, right?
 11 A You're talking about the northern district which
 12 is the area A?
 13 Q Correct.
 14 MS. ROBESON: Wait. Is it A and B or just A?
 15 THE WITNESS: It's actually A and B together
 16 because in this case, Golden Eye, which is the road, is the
 17 boundary between A and B. And those will overlap with part
 18 of that in A and then part in this mixed-use area on B.
 19 BY MR. KLINE:
 20 Q Well, for purposes of my question, I'm asking if
 21 the red on the exhibit titled Cabin Branch is 450,000 square
 22 feet, which is what the justification statement suggests
 23 would be occurring, and you would have another 8600 square
 24 feet across the road on the Gosnell property, that would
 25 leave you how much of the 484 to put in the central

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1 district?
 2 A Again, I'm going to work in ranges because --
 3 Q No. I didn't ask for ranges. I took 450 plus
 4 8600. That leaves you how much of the 484?
 5 A Well, if you do 450, you're left with 34,000.
 6 Q And take out the 8600.
 7 A And you're down to I believe 25,400.
 8 Q Okay.
 9 A Of pure retail as a scenario.
 10 Q So when, when it's suggested there might be
 11 50,000, that's the other uses, not just retail, if you went
 12 strictly with the literal language in the justification
 13 statement.
 14 A Strictly from the literal, yes, but that's not the
 15 only option within the parameters of the development plan.
 16 Q Is it --
 17 A It probably will not be the only option as it
 18 moves forward.
 19 Q Did not the master plan contemplate that the
 20 retail would all be in one place and would be 120,00 square
 21 feet of neighborhood-oriented retail?
 22 A If the master plan, if you developed under the
 23 RMX, requires it to be in one place in one location.
 24 Q Why --
 25 A The MXPDP --

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1 Q Why RMX? Let me try the, let me be a little more
2 focused on the question. Doesn't page 67 of the master plan
3 tell us that 120,000 square feet of retail without any
4 relationship to the RMX now?
5 A My testimony was that is for, specifically for the
6 neighborhood retail.
7 Q Neighborhood retail.
8 A And with the RMX, it specifically would be
9 required in one location within that, within that cap of
10 120,000 square feet.
11 Q But the plan, in plenty of places, the plan talks
12 about having the neighborhood-oriented retail all in one
13 location, doesn't it? It's not a function of the RMX Zone.
14 It's a function of the plan.
15 A In some cases, it does but that's in contrast to
16 the MXPD that encourages mix of uses throughout the plan and
17 throughout the employment area.
18 Q Just so you won't have to repeat this, I
19 understand the value of the MXPD Zone. I'm asking you
20 doesn't the plan say that the neighborhood-oriented retail
21 that's recommended in the plan was to be in one location,
22 would be 120,000 square feet?
23 MR. HARRIS: Objection. Can you point to where
24 the master plan says it has to be in one location?
25 MR. KLINE: Sure. If you look on page -- do you

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1 mind, Madam Chair, if I --
2 MS. ROBESON: No. Go ahead.
3 BY MR. KLINE:
4 Q Why don't I ask the question this way, Mr.
5 Unterberg. Mr. Unterberg, can I draw your attention to page
6 70 of the master plan?
7 MS. ROBESON: Thank you.
8 BY MR. KLINE:
9 Q Okay. The first bullet in the middle of the page
10 titled create a strong neighborhood focal point by
11 concentrating public and retail uses in the same general
12 area. The sentence, the last sentence of that paragraph
13 reads this plan supports the concentration of these uses in
14 one central area to strengthen the neighborhood center
15 concept. So does that not tell us that the 120,000 square
16 feet of neighborhood-oriented retail was supposed to be in
17 one location?
18 A No, it does not.
19 Q Well, how do you disregard the letter concentrate
20 these uses in one central area?
21 A It says concentrate. It does not say all.
22 Q Okay. But concentrate --
23 A And I believe --
24 Q Concentrate would represent a substantial portion
25 of 120,000 square feet, would it not? Wouldn't the word

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1 concentrate suggest that?
2 A It could, yes.
3 Q It could. Doesn't it?
4 A Well, again, it says concentrate. It does not say
5 all.
6 Q And in fact, we were, we've already allowed 8600
7 square feet on the Gosnell so that's diminished the 120 of
8 that, so I'll grant you that. I'm just saying concentration
9 suggests a large bulk of neighborhood-oriented retail in one
10 location. Is that a fair, is that not correct?
11 A That's a fair representation.
12 Q You know, maybe I'm belaboring this justification
13 statement itself too much but kind of following up on a
14 conversation we just had, on page 11 of the justification, I
15 realize that's probably not something you have readily
16 available so I'm just going to read this paragraph to you.
17 A sentence in the second paragraph of page 11 of the
18 justification statement says the master plan calls for the
19 Cabin Branch neighborhood to be developed with a mix of uses
20 including 1950 dwelling units, 2,425,000 square feet of
21 employment, parenthesis, not designated by type, although it
22 is suggested that some of the employment be retail to serve
23 the local community. Doesn't that sound sort of a
24 misleading statement because in fact, the plan doesn't
25 suggest 120,000 square feet. It actually prescribes it on

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1 page 67, does it not, of the master plan?
2 A And my testimony was up to 120,000 square feet as
3 noted on page 67. It does not mean you have to do 120,000
4 square feet.
5 Q Would you agree with me that the text dealing with
6 the Cabin Branch Town Center, to the extent that it
7 addresses retail, addresses retail of a neighborhood
8 orientation?
9 A Which text are you referring to?
10 Q Let's see. How about on page 68 in the, what
11 would be the third paragraph down. We use the term
12 neighborhood core. On page 70, we use neighborhood focal
13 point. I'm just asking that when the plan was written, the
14 120 was anticipating neighborhood-oriented retail, was it
15 not?
16 A Can you say that again, please?
17 Q Okay. The references in the Cabin Branch section,
18 and I apologize because sometime during this I will say
19 Cabin John and I will apologize in advance, in the Cabin
20 Branch section of the master plan, pages 64 through like 70
21 or so, the neighborhood, let me rephrase that, the retail
22 that is alluded to in pages within that section has a
23 neighborhood orientation, does it not?
24 A It does.
25 Q Okay. And it does not mention any other type of

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1 retail, does it?
2 A It is silent as far as specialty or comparison
3 retail, but I've also had previous testimony to that.
4 Q Thank you. Page 66, which is graphic 27, has a
5 crossed-hatch, in the legend up at the top, there's a cross-
6 hatch there titled retail core. Page 68, in the third
7 paragraph down from the first line, the design concept
8 proposes a neighborhood core. So my question is what is the
9 urban core, what is the neighborhood core of the Cabin
10 Branch neighborhood under this development plan amendment?
11 A Well, under, under this development plan and under
12 this one scenario, the majority of the retail, the core if
13 you will, discussions with staff, this will change to mixed-
14 use which also allows residential, the majority of that core
15 is between A and B on the northern district.
16 Q How about doing me a favor and use the exhibit
17 titled Cabin Branch with the red because it's just too
18 difficult for me to understand where things are.
19 A The northern district, which is approximately a
20 million square feet, retail and employment and office. The
21 southern district is approximately 1.4 million square feet.
22 The main focal point linked to the community, concentration
23 of energies creating place is in this northern district.
24 One thing that we're piggy-backing on and extending from the
25 approved plan is Wellspring Road which is the road if you

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1 come south of 121 along Golden Eye. The roundabout right
2 above or north of the Stream Valley is Wellspring. That
3 road, there is a specific greenway along that road and
4 that's one of our primary links. It's a green link that
5 links the Byrne local park and the elementary school site to
6 the west through the residential.
7 The first north/south road, actually, the first
8 road is Byrne. This is Broadway which is a north/south
9 road. Continue going east, we get to Cabin Branch. That
10 road continues through to the roundabout. There is a
11 greenway planned for that which is one of our major links.
12 It's walkable and creates that sense of place. And there's
13 a series of nodes along that, particularly when we get to
14 our mixed-use areas. We have, right now we have residential
15 south of that with the mixed-use neighborhood areas with
16 retail, some residential. Also office. Not only the
17 neighborhood uses but mixed in with that, you also have the
18 employment uses.
19 You come to the roundabout and you come through,
20 this street also is single-loaded with the Stream Valley to
21 the south and that continues on down to a public space to
22 the south which Mr. Kaplan talked about which is an
23 amphitheater. In particular, we have one node that links to
24 the, primarily, the outlets that also overlap with the
25 retail and neighborhood uses that will be within this

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1 outlet, specialty retail. And the neighborhood retail uses
2 such as restaurants, coffee shop, there's a long list, Mr.
3 Bogorad spoke to those, those would be adjacent to this node
4 and this plaza where we're trying to create that sense of
5 place and then links to the Wellspring greenway.
6 That is a linear core and that's the focus and
7 concentration of how we're trying to create the place and
8 make this a mixed-use comprehensively designed community.
9 Q Look -- I'm sorry.
10 MS. ROBESON: I'm sorry. What do you consider
11 your civic uses because it does say in the core, you should
12 have civic uses?
13 THE WITNESS: Specifically for the core?
14 MS. ROBESON: No. It just says in the
15 neighborhood core.
16 THE WITNESS: This greenway, the Wellspring
17 greenway that connects through here is about 30 feet wide.
18 It's a linear greenway, landscaped, walking trails in
19 addition to the sidewalks on the road itself. We have a
20 couple focal points. One is the roundabout which is visual,
21 and then there's a plaza, which would be one of our civic
22 uses, right in this location, the northern tip of the Stream
23 Valley buffer, Stream Valley. If you continue all the way
24 around, one of the other civic uses which was talked about,
25 an amphitheater or an outdoor greenspace.

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1 All those combined in a series create those civic
2 spaces, and those are outdoor civic spaces. There can also
3 be indoor civic spaces. Those overlap public uses which
4 could be a church, could be daycare, something like that.
5 And again, that mix is --
6 MS. ROBESON: But they're not going to be in the
7 outlet center.
8 THE WITNESS: They, they could be in this
9 location. Again, along this linear greenway, they could be
10 in this area. Particularly, this mixed use area. They
11 could also be over in this blue area where employment, where
12 office uses could also be mixed in.
13 MS. ROBESON: I'm sorry to interrupt, Mr. Kline.
14 MR. KLINE: No. That's fine.
15 MS. ROBESON: Go ahead.
16 BY MR. KLINE:
17 Q The applicant's justification statement on page 1
18 talks about the central square of the food court will serve
19 as the neighborhood square and be easily accessible by area
20 residents. What you just told us is basically consistent
21 with what that says, is that correct?
22 A Yes. And that, again, this greenway which has the
23 pedestrian link, this northern area of the stream is that
24 central gathering place and then the food courts and the
25 restaurants are adjacent to that.

1 Q I'm going to ask a softball question that Mr.
2 Harris probably should be giving to you, but what I'm trying
3 to get is the essence of the character of what's going on in
4 front of the, we'll call it the outlet center on what's
5 called the, what's the phrase, the central square and what's
6 going on down in the commercial area, I'm sorry, the
7 neighborhood retail area in the central node? Give us a
8 characterization of those so we understand how they each
9 function.

10 A You're, you're speaking more to the plaza itself
11 or --

12 Q Well, I'm trying --

13 A Give me a little bit more softball explanation.

14 MR. HARRIS: Let me interject for a minute.
15 Although it's a softball question, you know, we're getting
16 into detailed site plan design issues. This is a
17 development plan. Mr. Unterberg has testified, has
18 testified repeatedly here how the plan will evolve in terms
19 of its built components.

20 MS. ROBESON: Right, but I think what Mr. Kline is
21 getting at, and I have the same question, is that I read
22 page 68 and the bullets in the middle of the page. What the
23 plan seemed to want to do was create a central focus point
24 where people could, with everything there where people could
25 gather that would be the center of the neighborhood but with

1 this, things are a little more spread out. Tell me if I'm
2 getting you wrong.

3 MR. KLINE: You're doing a better job than I am.

4 MS. ROBESON: And --

5 MR. HARRIS: I thought he --

6 MS. ROBESON: Well, no. I have a question though
7 because they wanted -- typically, you would have in a
8 neighborhood center your dry cleaners, your, you know,
9 dentist, your grocery store, your, everybody would come and
10 that's where your, you know, police station might be or, you
11 know, it would be the place to go. And so I guess my
12 question is is that going to happen in a regional outlet
13 center and what is that red in C, in section C going to be?

14 THE WITNESS: I believe all that's going to happen
15 and --

16 MS. ROBESON: You're going to get the dry clean --
17 well, then what's left for poor section C down there?

18 THE WITNESS: Well, let's go through that again,
19 and I'm going to speak to ranges because, and also, I had
20 testimony that there will be some uses in the outlet center
21 that are also neighborhood uses.

22 MS. ROBESON: Like the restaurants.

23 THE WITNESS: Like the restaurants.

24 MS. ROBESON: And that kind of stuff.

25 THE WITNESS: Yes. The -- to your point, if there

1 is a police station, that would fall under the public
2 category which there are opportunities for that type of use
3 to be included. Police, church, et cetera. This --

4 MS. ROBESON: So why even have that retail in
5 section C? Doesn't that draw away from having a focal point
6 in the community?

7 THE WITNESS: Actually, based on our vision for
8 the property, also discussions with Park and Planning, the
9 main focus, although as a comprehensively designed
10 community, it's over 500 acres, it's with the 1886
11 residential units, the 500 senior units, the 2.42 million
12 square feet, it's a large development. Primary focus is to
13 north and the northern district. Multiple opportunities
14 within this mixed-use area to complement and to achieve that
15 in addition to the outlets and there will be an overlap of
16 those uses with the restaurants and so forth.

17 There's been discussion also to the south. The
18 project is large enough. Plus, we want to provide with that
19 employment use another minor neighborhood center. The
20 majority is to the north to comply with the master plan.
21 We're providing a secondary mix use area and it's mixed-use
22 in particular on the development plan. It's integrated in
23 with the plan with our whole community, our system of green
24 links, and the project is big enough to support that.
25 Again, I think that, for mixing the uses, achieving the

1 overall purpose of the MXPDP, that helps to accomplish that
2 for the overall project.

3 MS. ROBESON: Mr. Kline.

4 MR. KLINE: Just try to get -- I lost myself for a
5 second.

6 BY MR. KLINE:

7 Q Well, yes. So I guess I'm, I had a question on
8 the table. I guess Mr. Harris objected to it so, because I,
9 I still don't think I have a good sense of the, I have a
10 sense of the energy and the activation but I don't have a
11 sense of the function so much of the two of them.

12 A You're talking -- when you say two of them, you're
13 talking north and south?

14 Q If that's the way you want to characterize.

15 MS. ROBESON: Are you talking the one in C and
16 that area, the mixed-use area in B?

17 MR. KLINE: Yes.

18 BY MR. KLINE:

19 Q I'm -- if, let me try and put this in a question.
20 In front of the outlet center, there is a town, town square.
21 Actually, I guess it's incorporated into the town center,
22 the outlet center. There is a town square.

23 A Which is right here on the northern end of the
24 Stream Valley.

25 Q Right. And that's your urban core. That's your

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1 center of your neighborhood core as you describe it.
 2 A That's one of the centers. We do have a linear
 3 core with this greenway and that is one of the focal points
 4 for gathering and activity, but there's also other
 5 opportunities along this greenway for other activities,
 6 minor and major, to activate this linear greenway. And for
 7 this mixed-use center in B, which includes all the uses
 8 which would include some of the neighborhood retail and so
 9 forth, will help to, well, define that core as you're saying
 10 and to the point, that core will be the buildings that line
 11 that greenway which goes through B and part of A. And not
 12 just the one. There will be a focal point but there will be
 13 a series of focal points.
 14 Q So then you would agree, then your statement is
 15 that we are diffusing the plan's recommendation of
 16 concentration. You're saying we're intentionally going to
 17 spread it out and put it in different locations.
 18 A The majority of the retail is concentrated in this
 19 northern district. I would not say it's spreading out. You
 20 have two, two large blocks that we are focusing on the
 21 retail and the activation of these areas, and I would not
 22 call that spread out.
 23 Q And so you're putting the neighborhood core in a
 24 location where it will, where it will basically be operating
 25 in conjunction with a regional destination center, correct?

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1 A This part will. The part in the which is in B
 2 will not which is adjacent to the neighborhood. We want to
 3 mix it and blend it together, integrate it as much as
 4 possible which is what's recommended in the MXPDP.
 5 Q Well, the 120,000 square feet is all physical.
 6 It's buildings. It doesn't relate to anything linear
 7 parkways and greenways, correct?
 8 A The --
 9 Q 120,000 square feet of retail is physical.
 10 A Yes.
 11 Q Right.
 12 A With the --
 13 Q So the physical core of the urban core is at the
 14 town, I guess what the justification statement calls the
 15 neighborhood central square.
 16 A It's not just at the central square which you keep
 17 asking but this is part of it. But it's also the mixed-use
 18 development along the Wellspring greenway between area A and
 19 area B and that combination of retail, office, employment,
 20 public uses, probably a number of things that could, well,
 21 that's not on this plan that could be options in the future.
 22 All those blend together to make a mixed-use center and
 23 that's what we're trying to achieve.
 24 Q And explain to me then how since that area is
 25 supposed to have a strong neighborhood orientation, so says

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1 the plan on page 70, and to put it at the front door of the
 2 outlet center, which is not neighborhood-oriented, how those
 3 two things can co-exist and accomplish the goal of having
 4 the neighborhood core in that location?
 5 A Well, I disagree with your statement because
 6 again, you're saying everything is at this focal point.
 7 It's not. And within the Wellspring greenway, the mixed-use
 8 of area B, that also creates that core mixed-use center
 9 concentration of uses.
 10 Q Well, I'm not the one who is saying it. I'm
 11 reading it from the applicant's justification statement says
 12 the central square will serve as a neighborhood square. It
 13 makes no reference to the peripheral areas where other
 14 activities may occur.
 15 A Again, as we go forward to site plan, that may
 16 change. That's one option. And that's an option consistent
 17 with this plan but that plan may change, but the overriding
 18 is that this northern district with the uses, with the
 19 retail, has the majority of the retail, will need to go
 20 forward and accomplish the guidelines of the master plan as
 21 it goes forward from preliminary to site plan.
 22 Q So what do you, is the term you give to the 25,
 23 using the maximum numbers for their stated, applicant's
 24 justification statement, what do you call the 25,400 square
 25 feet, your number, that's left in the central node?

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1 A That would be part of the neighborhood retail.
 2 Q And what do you call that?
 3 A And other than neighborhood retail?
 4 Q Okay. But it is in the neighborhood core. It's
 5 not a --
 6 A I would call it neighborhood retail. It's part of
 7 that 50 to 120,000. It's not, it does not necessarily have
 8 to be up to or the maximum 120,000. It could be less. And
 9 that mix between the northern district and the southern
 10 district, with the majority in the north, that's still
 11 flexible and to be determined at site plan.
 12 Q Without getting into at this time your analysis of
 13 why we had 120,000 square feet in the, in the basically,
 14 wrapped into the Cabin Branch approval, does the, does the
 15 master plan itself talk about the relative sizes of
 16 neighborhoods serving retail within the other, with any of
 17 the districts in the planning area?
 18 A Are you speaking to the square footage of the
 19 neighborhood centers?
 20 Q Yes. Yes. That's a good place to start, yes.
 21 A There are numbers with each of those
 22 neighborhoods.
 23 Q Well, how about get in your plan. Let's kind of
 24 talk about that then. Excuse me a second. Mr. Unterberg,
 25 actually, let me try and go at this a different way. I've

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1 got the staff report which is an exhibit in the record of
2 the case. Do you have ready access to that?
3 A I do. That's from the July 18th hearing?
4 Q Yes, sir. And just so somebody can follow it from
5 outside, that's Exhibit 50. Actually, let me take you to
6 the bottom of page 15 in the staff report, Exhibit 50. You
7 there?
8 A Yes.
9 Q Okay. The paragraph down at the bottom is titled
10 retail uses and the sentence is the Clarksburg Master Plan
11 provides for three neighborhood centers, Newcut Road,
12 Clarksburg Village, 109,000 square feet. If I went to the
13 master plan and looked at the Newcut Road section, would I
14 find that number?
15 A I presume you would but --
16 MR. HARRIS: Do you have a page?
17 MR. KLINE: Yes. I'll be right there.
18 MS. ROBESON: What page are you on in the
19 technical staff report?
20 MR. KLINE: Well, I'm reading from the bottom of
21 page 15 in the technical staff report which says there are
22 three neighborhood centers and within the, and I was asking
23 within the pages 58 through 63 of the plan, does the plan
24 recommend a specific square footage.
25 BY MR. KLINE:

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1 Q And I guess I'll draw your attention to page 62
2 which says 109,000 square feet.
3 A It does on page 62.
4 Q Right. And based on your professional experience,
5 is that a typical area for a local convenience neighborhood-
6 oriented center?
7 A Well, I do know the master plan proposed three
8 neighborhood centers. All three of them have different
9 zones and different requirements, and this is one of them.
10 Q Well, let's get an answer to the question first.
11 In your professional experience, and ULI tells us, what is
12 an average range size for a local convenient shopping center
13 with a neighborhood orientation?
14 A It varies and depends what's in that neighborhood.
15 Q I'm okay with a range.
16 A Anywhere from, general experience, 50 to 150,000
17 square feet.
18 Q Okay. In any event, for Newcut, 109,000 was
19 referenced on page 62. Page 62 of the plan.
20 A Page 62 says 109,000.
21 Q Okay. Does Newcut Village, or I'm sorry, Newcut
22 is now Clarksburg Village?
23 A Correct.
24 Q But in terms of marketing and subdivision
25 approvals?

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1 A I believe so, yes.
2 Q All right. And there is -- do you have any
3 knowledge of any plan approval for how much square footage
4 has been approved in Newcut?
5 A I do not know the exact square footage. I do know
6 there is a plan approved and that has a Harris Teeter
7 grocery store going in.
8 Q Okay. We're not sure of the square footage but we
9 know there's a grocery store.
10 A Yes.
11 Q Do you know the size of the grocery store?
12 A I do not.
13 Q Drawing your attention then to the town center, is
14 there any square footage recommendations for retail in the
15 town center? And in that regard, I'll draw your attention
16 to page 46 of the master plan, and look at the fourth
17 paragraph down talking about 153,000 square feet of
18 neighborhood retail uses.
19 A It does.
20 Q Do you concur that the plan suggests 150,000, give
21 or take, of neighborhood retail uses in the town center?
22 A Well, further down, which is the second bullet
23 from the bottom, it says a maximum square footage of retail
24 center is proposed up to approximately 150,000 square feet.
25 Q Okay. And is there an approval for a preliminary

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1 plan of subdivision for a retail center in the town center?
2 A I believe there is but I don't, have not seen the
3 approved plan.
4 Q Do you have any knowledge of the size of that
5 center?
6 A I do not.
7 Q And then last, on page 67, we have the number of
8 120,000 square feet for retail uses in the Cabin Branch
9 neighborhood, correct?
10 A Correct.
11 Q Are you familiar enough with all three of the
12 sections that I just referenced to be able to describe what
13 was the function of the neighborhood retail-oriented uses in
14 each of those two neighborhoods in the district, what their
15 function was to be?
16 A Are you referring to specific plans?
17 Q No. I'm asking you what does the text of the
18 master plan, if any, suggest as to why they want to create
19 somewhere between 109 and 150,000 square feet of
20 neighborhood-oriented retail?
21 A Independent of reading it, I don't know if there
22 is a specific rationale.
23 Q All right. So let me draw your attention then to
24 page, we'll sort of do it in reverse order, page 46 of the
25 master plan, fourth paragraph down, in the end of the third

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1 line, beginning of the fourth line after the number 153.
2 Neighborhood retail uses. Would you agree that a retail
3 center was proposed in the town center, recommended for the
4 town center to achieve neighborhood retail services for the
5 residents?
6 A Can you repeat that again? I was distracted for a
7 second.
8 Q Okay. I dropped -- yes. I was drawing your
9 attention to page 46, the fourth paragraph down. There is
10 a third line talking about the 153,000 square feet, which
11 you corrected me to say is really 150,000 based on the
12 bullet at the bottom of the page, of neighborhood retail
13 uses. So the plan is recommending that much square footage
14 to serve the neighborhood, correct?
15 A What are you defining as the neighborhood? If it
16 talks about neighborhood uses, yes, and that is for this
17 particular neighborhood in the master plan.
18 Q Well, actually, here right now we're talking about
19 the town center so that's not really classified as a
20 neighborhood, is it?
21 A But the town center is within the town center
22 neighborhood or town center district.
23 Q Well, how about if I draw your attention over to
24 page 40 where we have a distinct difference between Newcut
25 and Cabin Branch as neighborhoods and the town center as a

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1 district. And in fact, doesn't figure 18 on page 41 suggest
2 a hierarchy of the neighborhoods relative to the town
3 center?
4 A Can you say that again with your --
5 Q Okay, sure. Well, let me break it down.
6 MS. ROBESON: Let me interject.
7 MR. KLINE: Pardon me?
8 MS. ROBESON: Where are you going with this? I'm
9 not clear on where you're going. I'm following. I'm not
10 clear.
11 MR. KLINE: Sure.
12 MS. ROBESON: Can you --
13 MR. KLINE: May I proffer?
14 MS. ROBESON: Huh?
15 MR. KLINE: May I proffer?
16 MS. ROBESON: Yes.
17 MR. KLINE: Yes, sure. Essentially, I would like
18 to just get nothing more than a confirmation that there are
19 numbers suggested in the plan for the two neighborhoods and
20 the town center that suggest the amount of neighborhoods
21 serving retail or appropriate for each of those uses, 120 in
22 Cabin Branch, 109 in Newcut, 150 in the town center,
23 basically suggesting the hierarchy of those two different,
24 those three different areas. And two, what the plan felt
25 was the critical mass necessary to create an effective

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1 neighborhood retailing area.
2 MS. ROBESON: Well, I would suggest getting that
3 out of your own expert rather than Mr. Unterberg because
4 that's an interpretation of the plan. I'll give you some
5 leeway to do it but, and why do you -- oh, I see where
6 you're going now.
7 MR. KLINE: Well, and part, part of the reason it
8 seems a little out of whack is it was, these questions were
9 to be had been preceded by other questions about what's
10 going to go on in that town square that's on the exhibit --
11 MS. ROBESON: Yes.
12 MR. KLINE: -- that I don't have in front of me.
13 If I had that, I would have been a little more logical in
14 the way I'm doing this.
15 MS. ROBESON: Yes.
16 MR. KLINE: Because again, as a proffer, if I may,
17 I wanted to demonstrate that whereas the plan thought there
18 would be discreet neighborhood centers now in Cabin Branch,
19 they are fragmented and that what's going to occur in front
20 of the outlet center, is going to be much different than
21 what the plan had contemplated was going to occur in a
22 neighborhood orient.
23 MS. ROBESON: Yes. And again, I think you're
24 better off doing that, unless you want to -- you've asked
25 him several times what uses are neighborhood uses in, on the

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1 development plan and where they're located. I understand
2 your thought and I share the same concern but that may be
3 something, rather than trying to get at it through him, to
4 have your own witness bring in.
5 MR. KLINE: I'm not trying to ask trick questions.
6 I'm trying to --
7 MS. ROBESON: I know.
8 MR. KLINE: -- kind of put it all together. I'll
9 basically, I'll wrap it up at that and reserve the right to
10 go in a little bit more with better precision on Friday.
11 MS. ROBESON: Okay.
12 MR. KLINE: When I have that other exhibit in
13 front of me.
14 MR. CHEN: Can we have a break if we're not going
15 to break for lunch? We've been going since 9:40 this
16 morning and now it's after 12:00.
17 MS. ROBESON: We can break for lunch for 45
18 minutes, so we'll be back at 12:45. Now, I do have -- if
19 anyone is uncomfortable, I can move us to the Board of
20 Appeals room.
21 MR. HARRIS: This is fine.
22 MR. KLINE: This is fine.
23 MR. HARRIS: This is better.
24 MS. ROBESON: Okay. All right.
25 MR. HARRIS: Excuse me. Mr. Kline, are you

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1 finished with your cross-examination now?
2 MR. KLINE: Mr. Harris, I'm probably a quarter, a
3 fifth into my cross-examination.
4 MS. ROBESON: Wait a minute, wait a minute, wait a
5 minute. I thought that you were reserving the right to
6 cross-examine on the particular documents that he referred
7 to in, as far as interpreting the plans. You're also
8 reserving the right to cross-examine with the slideshow, the
9 Power Point. Are you saying that you still have more?
10 MR. KLINE: Oh, yes.
11 MS. ROBESON: Mr. Chen, do you, what do you expect
12 your cross-examination is going to be?
13 MR. CHEN: Frankly, he's covering a lot of where I
14 was going to be going so I, quite frankly, his examination
15 is probably going to cut down on mine substantially.
16 MS. ROBESON: All right. I'm going to keep you
17 to, you know, I really need to know where you're going.
18 You're not going to get him to say what your expert would be
19 better off saying.
20 MR. KLINE: And I'm suspending my questions in
21 that regard. I do want to go back and talk about what we
22 will see on the north district plan but I won't belabor this
23 issue.
24 MS. ROBESON: Well, wait. I thought we've been
25 over what you can, what we're going to see on the north

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1 district plan.
2 MR. KLINE: I basically asked some questions but I
3 think when we have the north district plan, you'll have a
4 better understanding.
5 MS. ROBESON: Oh, with the exhibit you mean.
6 MR. KLINE: Yes, yes. Right.
7 MS. ROBESON: Oh, okay. All right.
8 MR. KLINE: And I won't overlap.
9 MS. ROBESON: I thought you were going to continue
10 with the same exhibit. Okay. I understand. So you both
11 are going to have the opportunity, you both are going to
12 have the opportunity to cross-examine on the documents that
13 he referred to but my point is I'm, I don't want lengthy
14 cross-examination when you can present a point more
15 succinctly, all right?
16 MR. KLINE: I understand. Before you break, could
17 we ask, I'll call it a procedural question.
18 MS. ROBESON: Yes.
19 MR. KLINE: All right.
20 MS. ROBESON: You can call it that.
21 MR. KLINE: Mr. Soltesz advises us that on Friday,
22 he is in a court-mandated mediation hearing. He cannot
23 assure us that he will be able to get here say by Friday
24 afternoon.
25 MS. ROBESON: Is that Mr. Soltesz behind you

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1 shaking your head?
2 MR. SOLTESZ: Yes, ma'am. Jim Soltesz.
3 MS. ROBESON: Well, I really do not wish to delay,
4 add another hearing date but I --
5 MR. KLINE: Can I -- what I was going to ask, with
6 the consent of the applicant, that we just suspend the
7 cross-examination, get him out of here so we don't have to
8 ask for another day of hearing. Just get him out of here
9 and then go back to Mr. Unterberg when he's finished having
10 his say.
11 MS. ROBESON: Mr. Harris?
12 MR. HARRIS: Let me consult.
13 (Discussion off the record.)
14 MR. HARRIS: It has been suggested to me that
15 perhaps in order to keep some flow here, maybe we break for
16 lunch, continue with Mr. Unterberg's cross-examination until
17 say about 3:00, see where we stand then and if it's not
18 finished or about to be finished, then Mr. Soltesz could
19 testify then.
20 MR. SOLTESZ: 3:00?
21 MR. HARRIS: That's what I'm suggesting.
22 MR. SOLTESZ: Yes. I've -- this mediation, which
23 I want to say for the record has got nothing to do with me
24 coming here, it's a personal matter, so.
25 MS. ROBESON: Yes.

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1 MR. SOLTESZ: But it was set up three months ago
2 with, by Judge Mittelstadt (phonetic sp.) so, I mean, it's
3 an all-day mediation.
4 MS. ROBESON: All right.
5 MR. HARRIS: How long do you expect Mr. Soltesz's
6 testimony to be today?
7 MR. KLINE: Yes. I do not think Mr. Soltesz will
8 be up there for two hours so if you say that we'll stop at
9 3:00, if we're not finished, that's more than adequate for
10 both direct.
11 MS. ROBESON: I would prefer to keep some
12 continuity because re-reading the transcripts and jumping
13 around with all the individual witnesses, it, you know, you
14 can do it a little but it's not fair to the applicant to --
15 MR. KLINE: We understand.
16 MS. ROBESON: All right.
17 MR. KLINE: That's an adequate amount of time.
18 MS. ROBESON: So with that, it's now --
19 MR. CHEN: Ten after.
20 MS. ROBESON: Yes. We'll come back at 1:00, all
21 right?
22 (Whereupon, a luncheon recess was held at 12:07
23 p.m.)
24 MS. ROBESON: We're back on the record. We were
25 cross-examining Mr. Unterberg, and that's where we're going

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1 to begin.

2 MR. HARRIS: Before we do that, I have copies and

3 I've provided copies to opposing counsel, copies of the

4 Gaithersburg Vicinity Map to the plan that we referenced.

5 MS. ROBESON: You mean the excerpts that you

6 referenced?

7 MR. HARRIS: Yes. Correct.

8 MS. ROBESON: Okay.

9 MR. HARRIS: As well as the Zoning Hearing

10 Examiner decision and the staff report on the Washingtonian

11 case --

12 MS. ROBESON: Okay.

13 MR. HARRIS: -- that Mr. Unterberg referenced.

14 And then lastly, the resolution on the Seneca Meadows case

15 that he also made reference.

16 MS. ROBESON: Okay. Thank you. What is this MXPD

17 to --

18 MR. HARRIS: That is the Zoning Hearing Examiner

19 report. That was one of Mr. Klauber's specials where he put

20 a cover sheet on it with a poem.

21 MS. ROBESON: Okay. So Exhibit 82 will be the

22 Planning Board's resolution for Preliminary Plan No.

23 11998004A which is --

24 MR. CHEN: Could you give, I apologize, that

25 number slowly?

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1 MS. ROBESON: Preliminary Plan Number. Well, let

2 me do it this way instead. Exhibit 82 will be Planning

3 Board resolution 10-156, and that will be Seneca Meadows

4 preliminary plan.

5 (Exhibit No. 82 was marked for

6 identification.)

7 MS. ROBESON: And then Exhibit 83 will be the

8 Planning Board recommendation in G-8439.

9 MR. CHEN: G-8349?

10 MS. ROBESON: No. I apologize. It's G-439.

11 (Exhibit No. 83 was marked for

12 identification.)

13 MR. HARRIS: Washingtonian.

14 MR. CHEN: Is that the Washingtonian?

15 MR. HARRIS: Yes.

16 MS. ROBESON: Then Exhibit 84 will be the Hearing

17 Examiner's report and recommendation in LMA G-439.

18 (Exhibit No. 84 was marked for

19 identification.)

20 MR. CHEN: LMA G-349. Thank you.

21 MS. ROBESON: And Exhibit 85 will be an excerpt

22 from the Gaithersburg and Vicinity Master Plan. I guess

23 I'll have to --

24 MR. ROBINS: I think that's already marked as --

25 MR. HARRIS: No. The map.

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1 MR. ROBINS: No, but I thought we also had the one

2 page that was marked.

3 MR. HARRIS: No. That's one page from Germantown.

4 MS. ROBESON: Yes. So this will be, 85 will be

5 excerpts from the Gaithersburg and Vicinity Master Plan.

6 (Exhibit No. 85 was marked for

7 identification.)

8 MS. ROBESON: All right. Anything else? Okay.

9 Mr. Kline, I believe you are continuing your cross-

10 examination of Mr. Unterberg.

11 MR. KLINE: Thank you.

12 BY MR. KLINE:

13 Q Mr. Unterberg, were you provided a copy of the

14 Hearing Examiner's transmittal to Mr. Harris on the 26th of

15 August dealing with a request to have Mr. Carter testify at

16 the hearing? Did you see a copy of that?

17 A I did see a copy.

18 Q Okay. The last sentence says, in communicating to

19 Mr. Harris, does not intend to preclude you from making a

20 broader argument that while the overall goals of the master

21 plan should be adhered to, specific recommendations may be

22 considered flexible over time which is the position

23 technical staff adopted. And I presume that that is a

24 position that you would adopt as well?

25 A I've discussed how the master plan is flexible,

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1 yes.

2 Q We've had various allusions to the 2011 master

3 plan amendment titled the limited amendment to 1994

4 Clarksburg Master Plan. I believe that you anticipate its

5 being made an exhibit in the record of the case.

6 MS. ROBESON: If you have it, I will take it.

7 MR. KLINE: I have copies for everybody.

8 MS. ROBESON: I think he has a copy. Thank you,

9 Mr. Chen. So this will be 86.

10 MR. KLINE: And it's got, I should add that on the

11 back, it's actually got Council resolution of adoption as

12 well.

13 MS. ROBESON: Okay. So 86 will be the limited

14 amendment to the Clarksburg Master Plan, or 2011 limited

15 amendment to the Clarksburg Master Plan.

16 (Exhibit No. 86 was marked for

17 identification.)

18 MS. ROBESON: All right. Thank you. Are you

19 ready to proceed?

20 MR. KLINE: Yes, ma'am.

21 MS. ROBESON: Okay.

22 BY MR. KLINE:

23 Q By way of background to the Exhibit 86, Mr.

24 Unterberg, would you please take a look at page 190 of the

25 Clarksburg Master Plan of 1994?

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1 A What page?
2 Q 190.
3 MS. ROBESON: 190?
4 MR. KLINE: Yes.
5 BY MR. KLINE:
6 Q And down at the bottom of page 190, there's a
7 statement dealing with retail development in Newcut Road and
8 Cabin Branch neighborhoods should follow the development of
9 approximately 90,000 square feet of retail uses in the town
10 center. Without belaboring the point, would you just
11 explain what the rationale was for that recommendation and
12 plan?
13 A You're speaking to the last sentence?
14 Q Just the last sentence, yes. If you know.
15 A Offhand, I don't know.
16 Q Okay. Well, then let me draw your attention to
17 what's been marked as Exhibit 56, page 9 of the text of the
18 limited master plan.
19 MR. HARRIS: Exhibit 56?
20 MR. KLINE: Eighty-six. Eighty-six, I'm sorry.
21 Thank you.
22 MR. CHEN: The one you just handed out.
23 MR. HARRIS: Oh, okay.
24 MR. KLINE: Yes. Sorry.
25 THE WITNESS: What page?

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1 BY MR. KLINE:
2 Q Page 9.
3 A Okay.
4 Q The paragraph in the middle of the page titled
5 timing of retail through the town center and village
6 centers. Would you just look at that text and see if with
7 that background information you could answer my first
8 question?
9 A Are you referring to the timing of the retail town
10 center? That paragraph on page 9?
11 Q I'd say that I'm talking about the timing of the
12 retail and the neighborhoods as compared to the town center,
13 but explain it as you understand it.
14 MR. HARRIS: Madam Examiner, the language speaks
15 for itself here. He didn't testify to this to begin with.
16 If Mr. Kline wants to offer his expert to interpret this, I
17 don't have a problem with that but I'm not sure --
18 MS. ROBESON: Well, he -- it does speak for
19 itself. If you want to get to a question, you can ask him
20 to assume. I'm just -- what the intent is.
21 BY MR. KLINE:
22 Q Mr. Unterberg --
23 MS. ROBESON: He did testify to retail development
24 and his basis for changed conditions.
25 MR. HARRIS: That's correct.

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1 MS. ROBESON: Being economic, so I'm going to let
2 him continue.
3 BY MR. KLINE:
4 Q Mr. Unterberg, were there staging elements in the
5 1994 Clarksburg Master Plan?
6 A There are staging elements in the '94 plan.
7 Q Was one of the staging elements that no retail
8 development could occur in Cabin Branch or Newcut until
9 90,000 square feet of retail had been established in the
10 town center?
11 A There was a staging element in the '94 plan, yes.
12 Q Well, I asked was the staging element correlated
13 with 90,000 square feet of development in the town center?
14 A From the '94 master plan, yes.
15 Q And can you explain to the Hearing Examiner what
16 precipitated the limited amendment of 2011?
17 A What precipitated. My understanding, which is
18 only from reading newspapers and so forth, that the
19 Clarksburg Village and Newcut Road village center or retail
20 wanted to go forward and the town center was not going
21 forward which was prohibited by the master plan.
22 Q That staging element essentially frustrated the
23 delivery of any grocery stores or retail in Clarksburg
24 because the town center had not moved forward, is that
25 correct?

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1 A That sounds correct.
2 Q And the solution to eliminate that problem was
3 what?
4 A Well, that there was a master plan amendment that
5 was completed.
6 Q Let me draw your attention to what I think should
7 be the next to last page in the Exhibit 86 which you were
8 given which should be the second page to the Council
9 resolution. Are you with me, Mr. Unterberg?
10 A Is it page 2 of the resolution or is it -- the
11 second to last page is the elected and appointed officials.
12 Q Sorry. Maybe if you would identify or locate the
13 second page of the Council resolution.
14 A Okay. Page 2 of the resolution.
15 Q And the underlined language in the changes to the
16 text of the plan on pages 190, 196 and 196 all read the same
17 basically, do they not?
18 A The underlined is approval with a preliminary
19 plan.
20 Q Right. And can you explain to the Hearing
21 Examiner what that meant?
22 A Say that again?
23 Q What does that mean?
24 A The, well, the -- for the other retail to go
25 forward before the town center, the town center needs a

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1 preliminary plan approved I believe.
2 Q And does the town center have a preliminary plan
3 approved?
4 A My understanding is yes.
5 Q So we've -- the Council very simply inserted the
6 language and keyed it into approval of preliminary plan
7 rather than construction of 90,000 square feet to allow some
8 retail to go forward in other neighborhoods, correct?
9 A Correct.
10 Q But you're not familiar with whether or not the
11 town center has an approved preliminary plan?
12 A It's my understanding they do but I'm not positive
13 about that.
14 Q Okay. And in which case you probably don't know
15 how much square footage is associated with it then.
16 A Correct. I do not know that.
17 Q Fine. Was this 2011 master plan amendment a
18 prerequisite to the filing of this development plan
19 amendment?
20 A Was this a prerequisite? Not necessarily, no.
21 Q Because?
22 A Well, the development plan, actually, the
23 development plan was approved 10 years ago with the retail
24 and employment and, way before this happened, so a
25 development plan can be approved --

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1 MS. ROBESON: I think his question was the
2 development plan amendment, this development plan amendment.
3 Didn't you need this to be able to file the development plan
4 amendment?
5 THE WITNESS: No. We could still get development
6 plan approved. Whether or not you can implement it is
7 another step but you could get a development plan --
8 frankly, a development plan was approved with retail but
9 whether or not it could go forward prior to the town center
10 was the question because in 2003, a development plan was
11 approved with 120,000 square feet of retail.
12 BY MR. KLINE:
13 Q So under the applicant's theory of distinguishing
14 between neighborhood retail and whatever that other one,
15 comparative retail or specialty retail, could this
16 development plan amendment had gone forward in advance to
17 the 2011 master plan amendment?
18 A Yes, it could have.
19 Q Okay. And could the outlet center be actually
20 constructed in advance of the 2011 amendment?
21 A Based on the language 90,000 square feet of retail
22 uses, it could not if it was approved before this amendment.
23 Q So the 90,000 square feet of retail uses in the
24 town center would preclude the development of the 450,000
25 square feet of specialty retail.

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1 A It would not preclude the approval of the
2 neighborhood retail --
3 Q I understand.
4 A -- and specialty retail.
5 Q I said built.
6 A But hypothetically, based on the way it was
7 originally, yes, it would preclude the construction.
8 Q Well, what I understand you now is saying that the
9 language in the plan and in the 2011 resolution dealing with
10 retail is applicable to the specialty retail in the retail
11 outlet center whereas previously, I thought you were
12 distinguishing between the two and were arguing that one did
13 not preclude the other.
14 A State that again.
15 Q Sure.
16 A So I can process it.
17 Q Understand. Looking at page 190, which had a
18 staging limit of 90,000 square feet of retail uses, clearly,
19 that was a neighborhood-oriented retail function. And I've
20 understood the applicant's argument is the kind of retail
21 that's in those 109, 120 is only neighborhood retail and
22 didn't preclude the, didn't preclude the retail outlet
23 center, and now I hear you saying that the staging would not
24 have allowed the retail outlet center to occur, sorry, the
25 regional outlet center to occur whereas before, I understood

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1 you to distinguish between the two.
2 A I'm not following your question.
3 Q Then your answer is that the regional outlet
4 center could not go forward in light of the language in the
5 master plan without the 2011 amendment, is that correct?
6 A For this, any retail could not go forward
7 regardless if neighborhood, specialty, location, et cetera.
8 Q Okay. What I'd like to do is draw your attention
9 then to some other text in the plan. On page 10 --
10 MR. HARRIS: On the original plan or the amended.
11 MR. KLINE: I'm sorry. I'm sorry, yes. Thanks.
12 BY MR. KLINE:
13 Q Exhibit 86, the 2011 plan, page 10. Are you
14 there, Mr. Unterberg?
15 A I'm on page 10.
16 Q Okay, fine. The paragraphs down at the bottom,
17 close to the bottom, we have a bold statement called purpose
18 of the amendment. The first bullet states support the
19 plan's overall vision and then basically restates some
20 information from the plan itself dealing in designated
21 retail core areas. Am I correct in that reading?
22 A You're at the last paragraph, support the plan's
23 overall vision?
24 Q Right. Yes. What I'd like you to do is just read
25 the first sentence and tell me if that's consistent with

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1 your understanding of what the plan was intended, I'm sorry,
 2 the amendment of 2011 was intended to accomplish.
 3 A The plan, quote, organizes future development to a
 4 series of neighborhoods, end quote, with mixed-use centers
 5 including the town center, the Newcut Road and Cabin Branch
 6 Village centers with designated retail core areas per the
 7 '94 plan. You want me to continue?
 8 Q Well, I don't want to belabor it so go down to the
 9 bottom, the last sentence at the bottom of page 10.
 10 A Continue. It says while the plan envisioned
 11 development of the town center first, the mixed-use village
 12 centers are integral components of the Clarksburg community.
 13 The amendment supports the plan's provision that proposes,
 14 quote, proposes retail employment uses as a pedestrian scale
 15 oriented to the needs of the residents, end quote.
 16 Q And finally, on the bottom of page 11, the last
 17 paragraph before the bullets begins the amendment retains
 18 the plan's overall land use policies and objectives. That's
 19 what it says, correct?
 20 A The amendment retains the plan's overall land use
 21 policies and objectives per the '94 plan.
 22 Q Okay. I realize you probably -- well, actually,
 23 well, no. You wouldn't have the staff report associated
 24 with the 2011 amendment available to you and I should have
 25 brought extra copies but I was going to just read from it.

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1 I'll be glad to put this into the record.
 2 MS. ROBESON: Okay.
 3 BY MR. KLINE:
 4 Q Mr. Unterberg, on page 3 of the technical staff
 5 report dated April 27th, 2011 on the limited amendment of
 6 2011, the heading paragraph near the bottom of page 3 reads
 7 relationship of the amendment to the 1994 Clarksburg Master
 8 Plan.
 9 (Discussion off the record.)
 10 BY MR. KLINE:
 11 Q Am I correct in characterizing the first --
 12 MR. HARRIS: May we read it first?
 13 MR. KLINE: Oh, I'm sorry. Sure.
 14 MR. HARRIS: Are you referring to the paragraph
 15 relation to the 1994 Clarksburg Master Plan?
 16 MR. KLINE: Yes, sir.
 17 BY MR. KLINE:
 18 Q And if I might, while you're doing that, you might
 19 take a look at the text on the top of page 4 because I was
 20 going to ask a question about that also.
 21 MS. ROBESON: Does this have all the pages of the,
 22 does 86 --
 23 MR. CHEN: Eighty-six does not have the staff
 24 report. It has the draft and it has the resolution. It
 25 does have, does not have the staff report.

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1 MS. ROBESON: Okay.
 2 MR. KLINE: If it --
 3 MS. ROBESON: No. That wasn't what I was --
 4 MR. KLINE: If it seems short to you, it's because
 5 it was a fairly precise surgical --
 6 MS. ROBESON: Yes.
 7 MR. KLINE: -- amendment.
 8 MS. ROBESON: I was really asking why the first
 9 page is page 9 but I guess they included all the, the
 10 Planning Board resolution. I understand what they did.
 11 BY MR. KLINE:
 12 Q Mr. Unterberg, to try and speed this up a little
 13 bit since you had a chance to look at it, isn't it true that
 14 the, isn't it correct that the text on page 3 that I, the
 15 paragraph under the title relationship to the '94 master
 16 plan and the text on page 4, essentially says that this plan
 17 changes only the staging, the 90,000 square feet, and in all
 18 other regards, reiterates and confirms all of the land use
 19 planning principals of the 1994 plan? Does it not say that?
 20 A In general, it says that. No one changed the
 21 staging.
 22 Q Okay. So in that context then, we keep talking
 23 about everything being, all of our decisions being based on
 24 a 1994 plan but in fact, aren't we dealing with a plan
 25 that's really only two years old and not 19 years old

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1 because the Planning Board, in 2011, reconfirmed everything
 2 that it had concluded in the original '94 plan. Is that not
 3 correct?
 4 A I would not come to that conclusion.
 5 Q Because?
 6 A Because they're only addressing staging and
 7 they've noted that.
 8 Q But don't they, in a number of places, let's take
 9 a look at, well, the top of page 4. The amendment retains
 10 all recommendations for land use density, mix of uses and
 11 the building character and impact for the two village
 12 centers. So nothing about the '94 plan was intended to be
 13 altered by this document, correct? And in fact, it was
 14 intended to be confirmed.
 15 A Again, they addressed the staging and that's, I
 16 believe, what it says versus reconfirming the master plan.
 17 Q So this document, the 2011 plan does not confirm
 18 the land use planning principals of the 1994 plan?
 19 A I think it only addresses the staging, and it says
 20 that.
 21 Q And that's your position.
 22 A Yes.
 23 Q Okay. Thanks.
 24 MS. ROBESON: Well -- okay. Go ahead. There is a
 25 paragraph beginning at the bottom of page 11 that says the

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1 amendment retains the plan's overall land use policies and
 2 objectives. Well, in any event, continue.
 3 BY MR. KLINE:
 4 Q In light of the Hearing Examiner's comments, did
 5 you want to add anything, Mr. Unterberg, or is that still
 6 your position, that the 2011 plan did not in any way
 7 reconfirm the recommendations of the '94 plan?
 8 A It says --
 9 Q And it is the last time I'll ask the question.
 10 A It says it retains the plan's overall land use
 11 policies and objectives. It does not say whether they were
 12 revisited and/or reconfirmed. That's how I'm reading it.
 13 Q Thank you. Do you have any familiarity with the
 14 schedule for the adoption of the 2011 master plan, the
 15 limited master plan amendment?
 16 A This -- the plan that's been adopted?
 17 Q Yes, sir.
 18 A Not offhand, no.
 19 Q Okay.
 20 MR. KLINE: Madam Hearing Examiner, I'd like to
 21 provide a schedule taken from the records of Park and
 22 Planning Commission highlighting the schedule of 2011
 23 limited master plan amendment. And in light of what you
 24 just said a second ago, if you would have any reason to
 25 question the dates that are set forth in this exhibit, that

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1 I'd ask it be made an exhibit in the record.
 2 MS. ROBESON: Well, wait. Let's mark it as an
 3 exhibit first. It will be Exhibit 87. Do I have any
 4 objections? What do you call this exhibit?
 5 MR. KLINE: Schedule of 2011 limited master plan
 6 amendment.
 7 MS. ROBESON: I'll call it schedule of adoption of
 8 2011 limited Clarksburg Master Plan amendment.
 9 MR. HARRIS: I have no objection.
 10 MS. ROBESON: All right. That will be 87.
 11 (Exhibit No. 87 was marked for
 12 identification.)
 13 BY MR. KLINE:
 14 Q Mr. Unterberg, do you have any reason to object to
 15 the information contained in Exhibit 87?
 16 A No.
 17 Q Okay. You were present at the first day of
 18 hearings when I asked a representative of Adventist Hospital
 19 when its Certificate of Need was denied. Were you there?
 20 A I was.
 21 Q Did he give me a date?
 22 A I believe he did.
 23 Q Do you remember what that date was?
 24 A I do not.
 25 MR. KLINE: I'd like to make, mark as an exhibit

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1 in the record the final decision of Maryland Healthcare
 2 Commission and an application dealing with Holy Cross and
 3 Adventist Hospitals.
 4 MR. CHEN: Is that Exhibit 88?
 5 MS. ROBESON: Yes, it is. Any objections? Why
 6 don't we give Mr. Harris a minute to look over it.
 7 MR. KLINE: Sure. Sure. I understand.
 8 MR. HARRIS: I have no objection.
 9 MS. ROBESON: Okay. So 88 will be the Maryland
 10 Healthcare Commission denial of Certificate of Need.
 11 (Exhibit No. 88 was marked for
 12 identification.)
 13 BY MR. KLINE:
 14 Q Mr. Unterberg, could I draw your attention to the
 15 last page of 87, Exhibit 87?
 16 MR. CHEN: The last page of 88.
 17 MR. KLINE: Oops. I'm sorry.
 18 BY MR. KLINE:
 19 Q Eighty-eight. I stand corrected. And just --
 20 MS. ROBESON: Wait. I'm sorry. Where are -- page
 21 88 of what, or Exhibit 88?
 22 MR. KLINE: Yes. Exhibit 88 is the Healthcare
 23 Commission decision --
 24 MS. ROBESON: Right.
 25 MR. KLINE: -- of January 20th and I'm just --

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1 MS. ROBESON: What page is that?
 2 MR. KLINE: The last page is what I was --
 3 MS. ROBESON: Oh, okay. Go ahead.
 4 BY MR. KLINE:
 5 Q Okay. And can you read the last sentence of the
 6 last page of Exhibit 88?
 7 A And this is the last page. Down at the bottom, it
 8 says Maryland Healthcare Commission at the bottom?
 9 Q Yes, sir.
 10 A And it is further ordered that the application of
 11 Clarksburg Community Hospital Certificate of Need to
 12 establish an 86-bed acute care general hospital on a site
 13 located south of Route 121, Clarksburg Road and just west of
 14 the intersection of 121 and Interstate 270 is denied.
 15 Q And that would have been the hospital that was
 16 proposed to be established within the Cabin Branch
 17 neighborhood?
 18 A That is correct.
 19 Q Okay. All that is a question to ask if the
 20 applicant knew as of January 20th, 2011 that it would not be
 21 able to construct a hospital, are you aware of any effort to
 22 amend or to expand the 2011 limited master plan amendment to
 23 address the fact that there was not going to be a hospital
 24 on the property rather than just deal with the staging
 25 element of the retail issue? Are you aware of any effort to

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1 expand the plan?
2 MS. ROBESON: Do you mean expand the scope --
3 MR. KLINE: The scope of the 2011 --
4 MS. ROBESON: The land use recommendation.
5 MR. KLINE: Right.
6 THE WITNESS: Can you say that again, mister --
7 BY MR. KLINE:
8 Q Yes.
9 A I was distracted again here. I'm sorry.
10 Q Yes. Look, I realize I'm throwing a lot of stuff
11 at you. So if the applicant knew on January 20th that it
12 couldn't build a hospital and under the schedule three weeks
13 later, they were starting a limited master plan amendment
14 for Clarksburg, are you aware of any effort to expand the
15 scope of the 2011 limited master plan amendment to include
16 recommendations for the hospital property other than just
17 the staging element dealing with, as we've identified
18 before, getting around that 90,000 square foot limitation?
19 If you know.
20 A I'm not aware of that or if any, if there were
21 conversations at that time.
22 Q I'm sorry. I didn't hear the end of that.
23 A I'm not aware if there were conversations at that
24 time.
25 Q Thank you. I've got a series of questions, just

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1 so you know where I'm coming from, that essentially are
2 going to be oriented toward the aspect of the grocery store,
3 grocery stores in Clarksburg. Can I start by drawing your
4 attention to page 68 of the master, the 1994 master plan?
5 A Okay. I'm at page 68.
6 Q Approximately in the middle of the page, the third
7 bullet down, we have recommendations what should occur in
8 the neighborhood core of Cabin Branch, and one of those
9 things is locate a grocery store within the core. Would you
10 just restate the applicant's position with regard to whether
11 it is or is not going to provide a grocery store?
12 A The applicant is not providing a full-scale
13 grocery store with this application.
14 Q Okay.
15 A That has been stated in the testimony.
16 Q All right. And would you please -- well, help me
17 understand what full-scale grocery store means.
18 A My simple interpretation of that is a name brand
19 store such as a Safeway, Giant, Harris Teeter that's
20 anywhere in the 50 to 60-plus thousand range for square
21 footage.
22 Q That's fine. If there were to be -- so the
23 applicant is reserving the right to have some kind of food
24 provision, and I can't remember what the term you used is,
25 but you just don't want to call it a grocery store, that

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1 magnitude?
2 A And per the binding element also which caps 50,000
3 square feet, or leasable space at 50,000 square feet. There
4 can be retail uses, neighborhood retail uses that sell food.
5 An example of that would be a pharmacy such as CVS which my
6 understanding is in the 20,000 square foot range and they
7 sell food, but that's not a full-scale or full-size grocery
8 or supermarket.
9 Q If we have a spectrum of food providers, would you
10 be able to fit a Trader Joe's in there or something
11 comparable?
12 A Trader Joe's? It's my understanding Trader Joe's
13 is in the 20,000 square foot range. That, that might be an
14 option.
15 Q And where would that likely go within Cabin
16 Branch?
17 A Most likely, it would go in the northern district
18 where the majority of the retail is shown. There's an
19 option if it could go in the southern district in one of
20 the, the other area we talked about but one that's, it's
21 hypothetical whether that would be, that is an option but
22 whether or not it would happen is hypothetical.
23 Q Admittedly, my next question is based on my
24 understanding of what I thought was the design of the
25 regional outlet center, but if we were to go to Leesburg or

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1 Queenstown or Hagerstown, we would not find a grocery store
2 of any type integrated into those centers, is that correct?
3 A I believe there, in those three centers mentioned,
4 there's no grocery store or food store.
5 Q And you haven't made it a, the applicant has not
6 made it a binding element that it's not going to provide a
7 full-service store. You just are telling us you're not
8 going to do it.
9 A Correct, but also with the binding element that
10 was introduced by the Planning Board, we cannot do a 60,000
11 square foot store.
12 Q But you're not suggesting the Planning Board was
13 saying that you shouldn't have a grocery store. You're just
14 saying the 50,000 square foot would prohibit it as a grocery
15 store would --
16 A I think, I think they partly recognize that that
17 would prohibit a grocery store but a smaller store, would
18 not.
19 Q Well, okay. So that takes us essentially to the
20 next question of what's the underlying rationale for not
21 having a grocery store in Cabin Branch in the face of the
22 language of the master plan?
23 A Well, there has been prior testimony but to sum it
24 up, there's question for need right now. There's a grocery
25 store being built. Harris Teeter in the Newcut or the

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1 Clarksburg Village. There's been discussion how we want to
2 encourage and support a grocery store in the town center.
3 Also, there's been, you've heard testimony from Mr. Bogorad
4 about the market and the need for a third grocery store
5 within Clarksburg. And there's also been testimony since
6 '94, additional grocery that's come into the area,
7 particularly Wegman's, Walmart, Target, that's in Milestone
8 which is just a short distance from Cabin Branch and
9 Clarksburg.

10 Q But there is no empirical evidence, there's no
11 market study, there's nothing to contradict the information
12 from technical appendix saying that there should be a
13 grocery store there. It's just the gut reactions from
14 people with, with expertise.

15 A I would not call their expertise a gut reaction,
16 but I would also note that to go back to page --

17 Q Mr. Unterberg, is there any empirical evidence to
18 support the finding that there's no need for a grocery
19 store?

20 A Other than testimony provided, no.

21 Q Well, when you say other than testimony provided,
22 none of those people gave a report doing a market analysis
23 showing what the market demand for a grocery store would be.

24 A Well, I think that testimony speaks for itself
25 then.

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1 Q Meaning it shouldn't be given any weight.

2 A I'm not speaking to that. It should be given the
3 weight it should be given from the expert that gave it.

4 Q Well, in the face of the master plan language that
5 says put a grocery store there and you don't have any, any
6 professional studies that show otherwise, isn't the
7 applicant flaunting the recommendation in the master plan
8 rather than just saying we don't need it?

9 A No. On page 68, the paragraph above the bullet
10 points, the last sentence. The design of the neighborhood,
11 neighborhood should adhere to the following guidelines for
12 transit, pedestrian service. Those are guidelines. They're
13 not absolute. And the grocery store is one of those
14 guidelines and so again, it is not my opinion. It is not an
15 absolute to include a grocery store.

16 Q But we earlier went through the plan and we showed
17 that the plan did talk about retail in each of the centers.
18 Do you recall which of the two neighborhoods in the district
19 recommended a grocery store? Or let me rephrase that. For
20 which of the three planning areas we're focusing on were
21 there recommendations of grocery stores?

22 A Well, we've discussed the town center and we've
23 discussed Cabin Branch. But also, Cabin Branch is specific
24 that it's a guideline. It's not absolute.

25 Q It's not absolute. What I'd like to do is kind of

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1 try and compare these three. Let me start with Newcut. So
2 on pages 58 through 63 of the master plan, we have the text
3 dealing with Newcut neighborhood, and it's certainly
4 recommended to have a neighborhood-oriented retail center.
5 Is there any textual reference or any recommendation for a
6 grocery store in Newcut?

7 A Unless I'm missing it, there is not a
8 recommendation.

9 Q But as you describe, there is an approved, a
10 Harris Teeter store is approved?

11 A That's my understanding. That's under
12 construction right now.

13 Q All right. And then within the town center,
14 looking at page 46 particular, do we have a recommendation
15 for a grocery store?

16 A I guess the, that's the paragraph above. This
17 plan addresses a grocery store is particularly important
18 since the type of use can serve as a magnet for other
19 commercial operations.

20 Q And you may have indicated you weren't sure about
21 this but do we have a grocery store lined up for the
22 Clarksburg Town Center or not yet to the best of your
23 knowledge?

24 A I do not know but the last I heard, there was not
25 a grocery store lined up.

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1 Q And then finally, in Cabin Branch, we do have text
2 in the plan recommending a grocery store but you say that's
3 just a recommendation.

4 A It's a guideline.

5 Q It's a guideline. So let me review the bidding
6 this way. We have a plan that doesn't suggest, let me
7 rephrase that, it doesn't recommend a grocery store in
8 Newcut, now Clarksburg Village, and we're getting a Harris
9 Teeter. We have a plan that does say it would be a good
10 idea to have a grocery store in the town center and it may
11 or may not come. We have a plan that says put a grocery
12 store in Cabin Branch and that's the area that's not going
13 to get it. So isn't that basically flipping the whole
14 thing? Haven't you inverted the whole recommendation?
15 Doesn't the plan, the way it's structured, suggest a
16 priority where there should have been grocery stores and not
17 grocery stores and we're getting, in some ways, the reverse
18 of what the plan had intended?

19 A Not really because each of those neighborhoods,
20 per the master plan, has a set of recommendations. The
21 Newcut has a grocery store and to certain extent, that's
22 independent of Cabin Branch and likewise with the town
23 center.

24 Q Well, if we have a plan that said in Cabin Branch,
25 there should be a grocery store and in Newcut, made no

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1 recommendation at all, wouldn't that suggest that it was
2 more important to have a grocery store in Cabin Branch than
3 in Newcut?
4 A Not necessarily?
5 Q Well, why is it recommended in one place and not
6 at all in the other one?
7 A I think part of it is each one of those is a
8 different zone. We have Newcut's a PD Zone, town center is
9 RMX and Cabin Branch is now MXP. And we've testified
10 before, I've testified that under the RMX scenario, you need
11 a specific location and number for retail so I think, I
12 think that's my simple answer but it probably gets more
13 complicated from there once you start to dive into the
14 particulars of each zone and the particulars of each
15 neighborhood.
16 Q Can you, looking at the references to grocery
17 stores in the three neighborhoods or the two neighborhoods
18 in the district, tell me where any distinctions as to
19 whether or whether not there should be a grocery store are
20 correlated with the zones?
21 A Not offhand, but I do know that particular zones
22 allow you what you can or cannot do.
23 Q Well --
24 MS. ROBESON: Mr. Kline, I'm just going to point
25 out that it's almost 2:00 so, on your timeline.

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1 MR. KLINE: Oh, sure. Okay.
2 MS. ROBESON: Yes. Go ahead.
3 BY MR. KLINE:
4 Q In the applicant's view of services that the
5 residents of Cabin Branch should get, how do they feel they
6 are, they will be able to take care of their grocery store
7 needs?
8 A How do they feel --
9 Q How does the applicant expect the residents to
10 grocery shop?
11 A Well, the first, how that was phrased, I don't
12 know if I can speak for the residents of the neighborhood.
13 How did you rephrase the question?
14 Q If I live in Cabin Branch, where am I going to go
15 grocery shopping?
16 A You have several options. There will be certain
17 stores, neighborhood stores within the neighborhood, for
18 instance, to get a gallon of milk and some of the
19 essentials. And then there will be the Harris Teeter in
20 Clarksburg Village and there's Wegman's and the grocery
21 stores we talked about in Germantown. Ideally, there would
22 be a grocery center in the town center.
23 Q Given that the master plan recommends a grocery
24 store for Cabin Branch and the applicant is not providing
25 one, would you not agree with me that the application is not

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1 in substantial conformance, change that, is not in
2 conformance with the master plan at least on that limited
3 issue?
4 A Restate that question.
5 Q Do you agree with me that the plan recommends
6 there should be a grocery store in Cabin Branch?
7 A That question I do not. There's a guideline there
8 should be a grocery store but again, it's not an absolute
9 that there will be one.
10 Q All right. So you're telling me that the bullet
11 on page 68 is not a recommendation, it's a guideline that is
12 less binding than a recommendation?
13 A It says the following guidelines for the transit
14 and pedestrian serviceability.
15 Q But you say guideline does not have the same
16 meaning and weight and bearing as a recommendation?
17 A Correct.
18 Q I'm sorry. Did you answer that?
19 A Correct.
20 Q So then your conclusion is that on that subject of
21 a grocery store, it's still in substantial compliance
22 notwithstanding the fact you're not providing something that
23 is specifically referred to in the master plan.
24 A It is in substantial compliance, and the guideline
25 for the grocery store is not an absolute.

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1 Q Give me a second, please. Mr. Unterberg, can I
2 draw your attention to page 46 of the master plan?
3 A Okay.
4 Q The fourth paragraph down had the number in the
5 middle of the paragraph of 153,000 retail, I'm sorry, retail
6 study shows that 153,000 square feet of neighborhood retail
7 could be supported. You pointed out the bullet at the
8 bottom was limiting it to 150 but the, the paragraphs ahead
9 of it, in terms of commercial uses, up to 300,000 square
10 feet are proposed. What is your understanding of the
11 difference between the 150,000 that was recommended and the
12 300,000 that is also recommended?
13 A Well, the 153 talked about neighborhood retail and
14 we've spoken that those could be retail uses that support
15 the community. Commercial use is up to 300 square feet. A
16 broader term, commercial overlaps office, employment and so
17 forth.
18 Q All right. Isn't, actually, office treated in a
19 different category? Commercial is distinguishable from
20 office, is it not? If you take a look at the -- I'll just
21 leave it at that.
22 A You're speaking in terms of the master plan with
23 the --
24 Q Well, this is the first time I've heard the word
25 commercial being applied to employment. Are you saying that

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1 that paragraph deals with employment office uses as well?
2 A It can, yes.
3 Q If you continue to read that paragraph where the,
4 I guess I'll say the third sentence, additional square
5 footage would be desirable and would be consistent with a
6 plan and provide a pedestrian scale development in
7 accordance with the plan policies regarding mix of uses at
8 the neighborhood scale, doesn't, isn't that basically
9 following the phrase neighborhood retail uses suggesting
10 that that's a retail component, not an office or employment
11 component?
12 A It follows the retail.
13 Q I'm sorry.
14 A Well, it follows the retail sentence, but you're
15 saying that commercial uses are retail?
16 Q I'm asking you whether you're now saying that the
17 phrase commercial on page 46 does relate to office uses.
18 A It could relate to office uses.
19 Q All right. Well, let me take you to page 40 then.
20 A Uh-huh.
21 Q There's a table 2 on page 40 which is essentially
22 saying what the in-state development should look like. And
23 it says within the town center district, there should be,
24 there could be as much as 770,000 square feet of employment
25 and retail.

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1 A Okay.
2 Q All right. Isn't employment the office definition
3 and retail is the retail and commercial definition? And
4 unless you read the difference between the 150 and 300 as
5 being retail, how do you make up the total difference to get
6 up to 770,000 square feet of total office, employment,
7 retail in the town center?
8 A Offhand, I don't know. I'd have to do that math.
9 Q All right. So I don't belabor it, if there was to
10 be any other retail in the town center that wasn't found in
11 the neighborhood retail center itself of 150,000 square feet
12 or whatever is approved for the town center preliminary
13 plan, would you not expect that that would be a retail of a
14 type that couldn't, could compete with what would be found
15 in the regional outlet center?
16 A I don't know. Not knowing the specific of each
17 plan and not having specifics for the retail outlet --
18 Q Okay.
19 A -- there, that would be a hypothetical comparison.
20 Q In earlier testimony, you heard it suggested that
21 Washingtonian is a successful development, it's a town
22 center itself. Would you envision that it would be, that
23 the Clarksburg Town Center ultimately could be developed
24 like the Washingtonian Town Center?
25 A Again, it's hypothetical because you have

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1 different zones and different master plans. Frankly,
2 Washingtonian right now is even in the city of Gaithersburg
3 which makes it even more hypothetical so I don't think your,
4 they're comparable or you can compare the two as they
5 currently stand.
6 Q Well, you have professional and personal
7 familiarity with the uses that are found in the
8 Washingtonian Town Center, do you not?
9 A I do.
10 Q Okay. And aren't some of those uses the same uses
11 that are on the list of premier outlets that are found in
12 Leesburg? Jos. Banks, Loft. There's several of them,
13 correct?
14 A There could be several of them, yes.
15 Q So it's conceivable that in Clarksburg Town
16 Center, outside of the neighborhood retail center, there
17 would be uses that would also have been interested in
18 locating in the regional outlet mall, regional outlet
19 center.
20 A That is a possibility.
21 Q So there is a possibility of competition between
22 the two.
23 A There is a possibility of competition.
24 Q And are any of those shops that I mentioned, and
25 you are probably more familiar than I am in Washingtonian,

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1 are they larger than 50,000 square feet so they would be
2 precluded were the binding element worked out?
3 A Offhand, I don't -- with the ones you mentioned, I
4 don't know.
5 Q You can lean back, Mr. Unterberg, because this is
6 going to be an easy one. Did you have a chance to read the
7 memorandum of law I submitted on the binding element issue?
8 A I have.
9 Q I guess the question is have you ever read through
10 the Zoning Ordinance and found the term binding element and
11 said oh, that's my instructions of how I impose it on a 59-
12 D-1 development plan?
13 MS. ROBESON: Well, wait a minute. He didn't
14 testify on your memo it's my recollection. He didn't
15 address that in his --
16 MR. KLINE: No. I understand that. Maybe I just
17 phrased the question wrong. What I'd like to do is ask him
18 a series of questions, when he looks in the Zoning
19 Ordinance, where does he find the term binding element.
20 MS. ROBESON: And why are we going there because
21 he didn't testify --
22 MR. KLINE: Well, he's mentioned several times why
23 the binding element would basically bring the application
24 into compliance with the master plan. He's said, referenced
25 the 50,000 square foot binding element a number of times.

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1 MS. ROBESON: But what use is it? If you're
2 making a legal argument, what do you expect to extract from
3 this witness?
4 MR. KLINE: What I wanted to do is have him, from
5 his own professional experience, confirm what I've said in
6 my memo. Is it --
7 MS. ROBESON: Well, he --
8 MR. HARRIS: I'll de-confirm it. There isn't a
9 piece in that memo that is correct.
10 MS. ROBESON: Okay. No. Don't go there. I'm not
11 arguing the memo right now. I think you can, you can assert
12 that and I have it on CD and I can do a search and we'll all
13 know.
14 MR. KLINE: I did --
15 MS. ROBESON: So I'd rather not take Mr. Unterberg
16 through the Zoning Ordinance or argue your memo right now.
17 MR. KLINE: I wasn't arguing the memo. I was just
18 asking to confirm what I said.
19 MS. ROBESON: Well, unless he has the Zoning
20 Ordinance memorized, which that would mess your brain up, I
21 don't think he does but --
22 THE WITNESS: I cannot confirm that.
23 MS. ROBESON: So let's move on.
24 MR. KLINE: All right.
25 BY MR. KLINE:

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1 Q Can I draw your attention to page 6 of the master
2 plan? The 1994 master plan.
3 A Okay.
4 Q And just give us the buzz phrase out of paragraph
5 number, paragraph numbered 8.
6 A Well, 8 says that this plan emphasizes the
7 importance of I-270 as a high-tech corridor for Montgomery
8 County and the region and preserves key sites adjacent to I-
9 270 for future employment options.
10 Q And similar language is found on page 30 of the
11 plan under policy 8 employment, the first bullet.
12 A The first bullet, this plan continues the role of
13 I-270 as a high-technology center but proposes a scale and
14 intensity of an employment use that is consistent with the
15 town scale of development.
16 Q All those are, just create a foundation for
17 questions. Describe the topography of the properties, the
18 subject, what we're changing. Where I'll say the regional
19 outlet center would be located.
20 A You're talking about the northern district in
21 general?
22 Q Yes, sir.
23 A Okay.
24 Q Well, not even in general. Really just the red.
25 Just what you have in red.

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1 A The topography is, Maryland Route 121 is the ridge
2 or the higher elevations. The site slopes to the south,
3 drops in elevation to the Stream Valley. The Stream Valley
4 is low and then drains to the south.
5 Q So is -- well, let's put it this way. Will the
6 regional outlet center be visible from I-270?
7 A Parts of it will be visible from I-270, yes.
8 Q And when I come off the ramp here, if I'm in
9 northbound or southbound, that development's the first thing
10 I'm going to see when I get off the exit.
11 A Which exit? You're talking about all these ramps
12 or --
13 Q When I get anywhere on the west. As soon as I get
14 on the west side of I-270.
15 A As you come across? It would be one of the things
16 you'd see. There's a water tower, there's a hotel for the
17 Gosnells and then there would be the outlet center. And the
18 outlet center is in such a way that it is down-sloped from
19 the road so you'd probably see the hotel first.
20 Q Now that I get up closer, I can see it so much
21 better. Essentially, you have arcs of what appear to be six
22 buildings, is that correct? Well, this shows the footprints
23 of six buildings.
24 MS. ROBESON: Shown in red and in the northern.
25 THE WITNESS: Shown in, shown in red where you

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1 have 1, 2, 3, 4, 5, 6, yes.
2 BY MR. KLINE:
3 Q On the north side of building, well, I'll just
4 call it building 1/2, on the top arc, are those loading bays
5 facing 121 and I-270 or are those storefronts because
6 they're double-loaded both to the outside and the inside?
7 A A little bit of both. And again, the specific
8 design is not done yet. These would be storefronts.
9 Q I'm sorry. Can you tell us what you're pointing
10 at?
11 A This is the northern portion. The top of the
12 drawing would be storefronts. Also storefronts where we
13 have access and pedestrian access to the pedestrian mall
14 that's between the stores. The one design I've seen shows
15 architectural features that block the loading docks which
16 could be in some of these areas but it will be a
17 combination, and there's not final architecture yet.
18 Q And basically surrounding the regional outlet
19 center where my pencil is, I'll say northwest of the red,
20 immediately north of the red and southeast of the red, these
21 are, will start as surface parking lots, some of them to be
22 converted to structured parking if and when office buildings
23 are built.
24 A Generally correct, yes.
25 Q My question is how does this configuration with

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1 the surface parking, with all of the retail uses contribute
2 to the image of I-270 being a high-technology corridor for
3 those people who are driving up and down past this property
4 because that's what the plan wants to see happen on this
5 property?
6 A I don't know if it's just the image or the view
7 from 270 but overall, the employment corridor is everything
8 on the western side of Cabin Branch. Whether or not it's
9 visible from 270, that's the over, overarching vision for
10 the employment corridor.
11 Q There's nothing about the regional outlet center
12 itself that contributes though to the image of a high-
13 technology corridor. That may occur elsewhere but it
14 doesn't occur on that property.
15 A Based on your opinion on whether it does or not.
16 Q Well, I asked as a question is it your opinion?
17 A I think it will contribute to the high-tech
18 corridor image because, as testimony that's been heard, it
19 will attract those uses and contribute to that.
20 Q But that use itself has no high-technology
21 component that will tell you this is a high-technology
22 corridor.
23 A The outlet mall is retail, specialty retail is
24 specialty retail, yes.
25 Q Okay.

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1 MS. ROBESON: Mr. Unterberg, you said west of
2 Cabin or east of Cabin Branch. You meant Cabin Branch
3 Avenue or did you say west of -- where is the employment
4 going in this plan?
5 THE WITNESS: The employment combination of all
6 the blue buildings and then overlapping with the red with
7 the mix of uses, 270 and primarily everything that is west
8 of 270. And it does come over first roundabout on 121, the
9 second roundabout as Cabin Branch Avenue. Cabin Branch
10 Avenue comes down north to south. So from, primarily from
11 270 west to Cabin Branch Avenue is the employment corridor.
12 MS. ROBESON: Okay. Is it on that, is it
13 designated -- I'm having trouble seeing that. Is it
14 designated in a particular color on that exhibit marked
15 Cabin Branch at the top on that slide from 45?
16 THE WITNESS: Primarily, it was red for the retail
17 and the, or the couple types of retail. Then it's also the
18 blue which starts to blend in with some green background.
19 MS. ROBESON: Oh, okay. I see it. It's blending
20 into the -- I see it. Okay. All right. I'm sorry. Keep
21 going.
22 MR. KLINE: No problem.
23 BY MR. KLINE:
24 Q Mr. Unterberg, would you just confirm for us that
25 the sequence of the history of Clarksburg and this property

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1 is that in 1994, the master plan was adopted, then there was
2 an MXPD zoning application to implement the recommendations
3 at that time, is that correct?
4 A In '94, the master plan was adopted and 2003, the
5 MXPD was approved for this property.
6 Q And in your testimony the last, whenever the last
7 time we were here together, you were saying that the 120,000
8 square feet that's found in the MXPD Zone was sort of
9 carried over from the RMX Zone or please describe it the way
10 you'd like to describe it.
11 A This is pertaining to the 2003 approval?
12 Q Yes.
13 A The development plan at the time was approved with
14 120,000 square feet of retail.
15 Q You've said that you couldn't have built, you said
16 that the applicant's hands were tied and were locked into
17 120,000 square feet because that's all you could get under
18 the RMX Zone.
19 A I did not say that.
20 Q Okay. How about explaining your, your, repeat
21 your explanation for us then.
22 A Well, if we're speaking of the RMX Zone, if this
23 property went forward with RMX, optional method which allows
24 commercial, you could do 120,000 square feet which was a
25 specific number and location per the master plan. It does

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1 not apply to the MXPD.
2 Q And --
3 MS. ROBESON: Then why was it incorporated on your
4 MX, I mean, I know it doesn't from a zoning standpoint. The
5 MXPD doesn't require designation but then why was it a
6 binding element, excuse me, on your development plan?
7 THE WITNESS: I think it's always been considered
8 that MXPD gives you more flexibility and would provide a
9 better mix of uses with that zone.
10 MS. ROBESON: Yes, but why did you incorporate the
11 120,000, I'm sorry, limitation in your development plan?
12 THE WITNESS: At the time, that was what was
13 envisioned to do, a neighborhood center, 120,000 square
14 feet.
15 MS. ROBESON: Okay.
16 BY MR. KLINE:
17 Q Following up on that question, there has never
18 been a time when the applicant publicly stated that it could
19 do more than 120,000 square feet of retail until the filing
20 of this application, am I correct? If you know.
21 A State that question again.
22 Q Sure. Has the applicant ever publicly stated,
23 prior to the filing of this application for amendment, that
24 it could build more than 120,000 square feet of retail,
25 however we could classify that retail?

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1 MR. HARRIS: Objection. I don't know how he can
2 know what the applicant has said.
3 MS. ROBESON: Well, he can answer he doesn't know.
4 THE WITNESS: Well, yeah. As far as the
5 applicant, I don't know.
6 BY MR. KLINE:
7 Q In any planning documents or any planning efforts
8 that you've been involved in with Park and Planning
9 Commission, have you ever stated that the applicant could do
10 more than 120,000 square feet of retail?
11 A Yes. Recently, we have stated that.
12 Q No. Before the filing of this amendment.
13 A Have I stated that?
14 Q Yes.
15 A I don't believe I have.
16 Q Okay. So the question is explain why the 120,000
17 square feet is found in the master plan. I understand how
18 it got picked up in the MXPDP but I don't understand how it's
19 found in the master plan.
20 A And you're speaking to Cabin Branch and the page
21 67?
22 Q Yes, sir.
23 A Yeah. In my previous testimony, that it was a
24 neighborhood retail that was proposed at the time of the
25 master plan back in '94.

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1 Q Why does the plan use that number instead of
2 another number?
3 A It used the number because there was an option to
4 develop an RMX and that needs a specific number.
5 Q So did the RMX Zone limit the amount of
6 development to 120,000 square feet?
7 A If it went forward with the RMX with retail, it
8 would have, yes.
9 Q Do you have the Zoning Ordinance with you, sir?
10 A I do not.
11 Q I'd like to draw your attention to Section 59-C-
12 10.3.5 of the Zoning Ordinance titled Maximum Gross
13 Reachable Non-Residential Floor Area. The subject property
14 prior to, part of the subject property, prior to rezoning in
15 the MXPDP Zone was zoned in the RMX classification, correct?
16 A It's RMX/TDR.
17 Q Okay. And the table shown in Section 59-C-10.3.5
18 says that there, the maximum gross leasable floor area of
19 non-residential use could be as much as 200,000 square feet,
20 correct?
21 A Well, that's for R --
22 Q Correct?
23 A That's for RMX-1.
24 Q Yes.
25 A The property is zoned RMX/TDR, not RMX-1.

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1 Q So okay. Well, doesn't RMX-1 and RMX-1/TDR
2 underneath it, the 200,000 applies to both of those zones,
3 does it not?
4 A To the RMX-1 it does. RMX it's silent, and I
5 don't see RMX. The property is zoned RMX/TDR and that is
6 not in this chart.
7 Q I'm sorry. I'm looking right here and it says
8 RMX-1 underneath that RMX-1/TDR. Why does the 200,000 not
9 apply to the zone that was at one time on the property.
10 A That's my point. That is RMX-1. The zone on the
11 property is RMX, not RMX-1 is my understanding.
12 MS. ROBESON: So wait. You're saying that there
13 is no chart for RMX as opposed to RMX-1. Is that what
14 you're saying?
15 THE WITNESS: I know that the property is zoned
16 RMX/TDR, not RMX-1.
17 MS. ROBESON: Is there an RMX Zone?
18 THE WITNESS: There is a general RMX but this
19 chart is talking about RMX-1, 2 --
20 BY MR. KLINE:
21 Q I see your point. Okay. So you're saying that
22 the table on page 10-12 describes a limitation of 200,000
23 square feet on a zone that either doesn't exist at all or at
24 least doesn't exist on the property because this property is
25 RMX rather than RMX-1?

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1 A Correct.
2 Q Okay.
3 A That's my understanding.
4 Q All right. So as I look at all the other RMX
5 Zones that are listed on this page, is there any RMX Zone
6 shown at all?
7 A Not that I see. These all have a number
8 associated with them and my understanding is RMX with no
9 number.
10 Q Okay. And all of the use tables, they don't
11 describe any RMX Zone either?
12 A Correct.
13 Q Looking at the top of page 10-5, Section C-10.3.2,
14 the following uses are allowed in the RMX Zone under the
15 optional method, and they list RMX-1, 2, 3, 1-TDR, 2-TDR, 3-
16 TDR, and you're saying there is a separate RMX Zone that's
17 on this property that's not listed in the Zoning Ordinance?
18 A My understanding the zoning map says RMX/TDR which
19 is not consistent with this language.
20 Q Is that not just a simple mapping error then on
21 the zoning maps?
22 A I do not know.
23 Q Assuming it is a mapping error, why was 200,000
24 square feet not put into the Cabin, I'm sorry, put in the
25 master plan as potential development in Cabin Branch?

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1 A That I don't know.

2 Q Well, then how did you come up with 120,000 square

3 feet, which you say is all you could do on the property, if

4 we don't even have any development standards for the zoning?

5 A That's what was preceded at the time, to do a

6 neighborhood center 120,000 square feet.

7 Q Okay. Let me try one more time. All right.

8 You've told us that you could only import 120,000 square

9 feet to the MXP Zone because that's all that you were

10 allowed to do in the RMX Zone existing on the property,

11 correct?

12 A I don't believe I said that.

13 Q Okay. Would you please correct me and say it the

14 way you'd like to say it.

15 A Well, the plan was approved with 120,000 square

16 feet neighborhood center within the MXP in 2003.

17 Q This is circular.

18 MR. HARRIS: Madam Examiner.

19 BY MR. KLINE:

20 Q You've told us that before.

21 MS. ROBESON: Okay.

22 MR. HARRIS: Madam Examiner, may I object here and

23 make a point? Mr. Kline is not even reading the correct

24 section of the Zoning Ordinance here. If you look at

25 10.3.4, it says clearly, the dense, under maximum commercial

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1 density. The density of development approved by the

2 Planning Board must not exceed the density shown on the

3 approved and adopted master plan. The same provision is in

4 59-C-10.2.2. That's what limits it to the 120,000. This

5 chart has nothing to do with the question.

6 MS. ROBESON: I guess my concern is where is,

7 where are, if you're going to make an argument about the RMX

8 Zone, where is the zone defined? And -- well, I do have the

9 RMX.

10 MR. HARRIS: I don't know whether it's zoned RMX-

11 1, 2 or whatever.

12 MS. ROBESON: Well, I'm looking --

13 MR. HARRIS: But I do know that the --

14 MS. ROBESON: -- at the existing zone.

15 MR. HARRIS: The RMX Zone says in 59-C-10.3.4

16 that the maximum density of commercial is what the master

17 plan says. Our argument all along has been that that's a

18 different standard that in the MXP Zone and because of that

19 specific language in there and the language in the master

20 plan of 120,000 square feet of neighborhood retail, that was

21 the limit if it remained RMX Zoning.

22 MS. ROBESON: Okay. Well, that's an argument that

23 you can make. Right now, I think you've gotten as much --

24 I'm going to turn to the cross-examination. I think you've

25 gotten as much as you can. I understand your point, and

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1 let's move on to another point. You can renew that argument

2 but this is not the time for a substantive argument although

3 I am looking, just for the, I am looking on page 70, I mean

4 I'm sorry, 97 of the master plan and I don't see, I don't

5 see, all that's shown is a recommendation for an MXP but

6 even on the graph or the table, all I see is RMX-1/TDR and

7 RMX-2/TDR. I understand your argument, that neither one is,

8 that that isn't applicable, that, because of the limitation

9 in the other section.

10 MR. HARRIS: It doesn't matter which RMX Zone it

11 is.

12 MS. ROBESON: Yes, but if you're going to make an

13 argument on the RMX Zone, then it would be helpful to me to

14 know exactly which zone we're talking about so I can review

15 it myself and see what it is, all right?

16 MR. HARRIS: Personally, I think it's RMX-1/TDR.

17 That's what the plan at page 97 indicates. I don't have the

18 official Zoning Ordinance with, or zoning map with me.

19 MS. ROBESON: Well, see. I don't see that. I see

20 MXP.

21 MR. HARRIS: No.

22 MS. ROBESON: I see --

23 MR. HARRIS: On the left, the triangle. RMX-

24 1/TDR.

25 MS. ROBESON: I see that, but I see right next

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1 to --

2 MR. HARRIS: The zoning, see the area --

3 MS. ROBESON: Okay. That's -- just a second.

4 MR. HARRIS: Okay.

5 MS. ROBESON: I don't want to get into this now.

6 You can present it and clarify it for me at a later time. I

7 want to get through cross-examination.

8 MR. HARRIS: I do as well. Thank you.

9 MR. KLINE: I just hate to leave this though

10 because it's --

11 MS. ROBESON: You need to leave it.

12 MR. KLINE: Okay.

13 MS. ROBESON: Or you can wrap it -- how many more

14 questions because I think you've gotten what you've gotten

15 out of him and I, you've tried five ways from Sunday to get

16 him to a place and I think you're pretty much there so --

17 MR. KLINE: Would you allow us to reserve a 10

18 minute --

19 MS. ROBESON: No.

20 MR. KLINE: -- cross-examination on Friday on the

21 subject?

22 MS. ROBESON: No. No. We're not reserving

23 anymore except on the documents. You can ask, you can ask

24 your one more question. Is it one more question?

25 MR. KLINE: I guess it better be.

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1 BY MR. KLINE:
2 Q Mr. Unterberg, would you tell me, where is the
3 statutory authority that said there could only be 120,000
4 square feet of retail built in the RMX whatever zone it was
5 that basically became a limitation of the MXP Zone?
6 MR. HARRIS: Do you want the Zoning Ordinance?
7 THE WITNESS: Yeah. I thought I had my notes
8 here. 59-C-10.2.2.
9 MR. CHEN: Say it slowly, sir. I'm sorry.
10 THE WITNESS: 59-C-10.2.2. It's under optional
11 method. Under this method, general commercial uses and
12 higher density residential uses are allowed in the RMX Zones
13 provided that they are in accordance with the provisions of
14 Section 59-C-10.3 as well as the density numerical
15 limitations and other guidelines contained in the applicable
16 master plan approved by the District Council.
17 MR. KLINE: I agree that --
18 MS. ROBESON: You can have one more. You can
19 follow through, sir.
20 MR. KLINE: Thank you.
21 BY MR. KLINE:
22 Q Mr. Unterberg, the plan came first so I'm just --
23 MS. ROBESON: Wait. Which plan?
24 MR. KLINE: I'm sorry. Thank you.
25 BY MR. KLINE:

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1 Q The 1994 plan had the 120,000 square feet in it so
2 that number had to come from a source, and I'm asking you
3 what was the source of that number? I'm asking you
4 essentially what came before the plan that made you --
5 A The '94 plan and why it was in there? That,
6 offhand, I can't answer.
7 Q You can't answer why the 120,000 square feet is a
8 limitation in the, in the plan?
9 MR. HARRIS: That wasn't the question.
10 MR. ROBINS: That wasn't the question.
11 THE WIT: That wasn't --
12 MR. KLINE: I'm sorry. I'm sorry. You're right.
13 MR. HARRIS: That was --
14 MS. ROBESON: I thought it was the question.
15 MR. HARRIS: -- not the question. He asked where
16 the 120 came from.
17 THE WITNESS: Yeah.
18 MS. ROBESON: Well, I was --
19 MR. HARRIS: He just answered why it's a limit.
20 MS. ROBESON: Okay. Just a second. You ask again
21 and you answer. Ask it again.
22 BY MR. KLINE:
23 Q The 120,000 square feet that's a binding element
24 in the development plan came from what source?
25 A That 120,000 came from the master plan.

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1 Q Okay. And --
2 A To do neighborhood retail.
3 Q Why was it put in the master plan?
4 A Why was -- that's what I can't answer offhand.
5 Q Thank you.
6 MR. KLINE: No further questions. Thank you for
7 your patience. Actually, I -- no. Yes. Let me just ask
8 one more question.
9 BY MR. KLINE:
10 Q Mr. Unterberg, have you ever, in your professional
11 career, ever had to deal with anything titled specialty
12 retail or fashion retail or comparison retail? Do you find
13 it anywhere in the Zoning Ordinance?
14 A Was that one question or a couple?
15 Q I'll be glad to ask them individually. Have
16 you --
17 MS. ROBESON: Well, okay. Go ahead. List the
18 definitions that you want to know if are in the --
19 MR. KLINE: I'll snare it down.
20 BY MR. KLINE:
21 Q Have you ever, in your professional experience,
22 worked with an application where specialty realty, specialty
23 retail was considered distinct and different from retail of
24 any other kind?
25 A In my experience, no.

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1 Q Thank you.
2 MR. KLINE: No further questions.
3 MS. ROBESON: Okay. Mr. Chen, we have 25 minutes
4 and then you can resume.
5 MR. CHEN: And then who can resume?
6 MS. ROBESON: You. We're going to until 3:00 and
7 let Mr. Soltesz testify, correct?
8 MR. CHEN: Oh, I see what you're saying.
9 MS. ROBESON: Yes.
10 MR. CHEN: I may be --
11 MS. ROBESON: Before you go there, I just want to
12 make sure so you understand what I just heard. And I just
13 heard, based on Mr. Kline's testimony, that it was my
14 recollection when you originally testified on the 14th I
15 think it was, that you were saying the 120 was put in the
16 master plan because that was the maximum that could, that
17 would be the maximum permitted in the RMX Zone, and now
18 you're saying you don't know why it was in there.
19 THE WITNESS: I think those are two different -- I
20 think I've been consistent with the 120 --
21 MS. ROBESON: No. That's why I'm asking you.
22 THE WITNESS: And that's -- I think those are two
23 different questions if I understand the questions correctly.
24 The 120,000 with the RMX Zone is a maximum per the master
25 plan, and I think I've been consistent with that. I think

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1 the other question was, which I presume alludes before the
2 master plan how they came to that number and/or how they
3 came to other specifics. That's what I'm saying I don't
4 know what predates or what the discussions were that --
5 MS. ROBESON: I'll go back through that.
6 THE WITNESS: -- predates the master plan.
7 MS. ROBESON: All right. All right. I'll go back
8 through the transcript.
9 MR. HARRIS: Madam Examiner, it has to do with the
10 effect of the number. What he has been saying is the effect
11 of the number is that it is a cap. The cause, why the
12 number was 120 versus not 119 or 121, he said he doesn't
13 know, but the effect of the number, whatever the number was,
14 he has been consistent in saying it's a cap because of the
15 section he just cited in the Zoning Ordinance.
16 MS. ROBESON: Okay. I'm still missing the
17 connection of why they would designate it MXPDP and keep the
18 cap in the master plan. Why would they do that?
19 MR. HARRIS: Because the, the MXPDP was a
20 recommendation, not a mandate.
21 MS. ROBESON: Okay. Well, I, we --
22 MR. HARRIS: They didn't know whether the MXPDP
23 would ever be applied or not.
24 MS. ROBESON: And then I have the further -- don't
25 answer now. I'm giving you my thoughts because I want to

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1 give you the opportunity to respond because I don't want to
2 get into argument, legal argument now. But what I'm saying
3 is if it was a cap, why did you have it in the MXPDP plan
4 too? Just --
5 MR. HARRIS: Okay. We'll answer that again.
6 MS. ROBESON: Well, I'm not clear on --
7 MR. HARRIS: I can understand.
8 MS. ROBESON: I'll be honest. When I read this,
9 and particularly like Policy 7 which is pedestrian, transit
10 and pedestrian oriented neighborhoods, and I know you've got
11 all these greenways but when you put all, all the things
12 together with regard to the neighborhood centers, just
13 without a lot of, I think you could make an argument that
14 these were just supposed to be neighborhood serving retail
15 and not a regional retail outlet. Now, whether you can
16 argue in a broader sense that it's going to serve the plan,
17 but I think that that's where Mr. Kline's questions were
18 going because when you read the town center section and you
19 read the various neighborhood center sections, I think that
20 you could certainly make an argument that they were
21 contemplating a much smaller scale retail.
22 And I don't want to argue it now. I'm telling you
23 what my thoughts are so that you can address it through
24 testimony either on rebuttal or whenever it's appropriate in
25 this hearing.

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1 MR. CHEN: They haven't finished yet. They're
2 still in their case.
3 MS. ROBESON: I know that. That's why I said
4 redirect. So I'm just saying that. And I think you could
5 also make an argument that for the MXD, the 120 is in there
6 because that's what the master plan said regardless of
7 whether the property was going to be RMX or MXPDP. You can
8 make an argument that your binding element is in there
9 because it was supposed to be a neighborhood retail and they
10 just accepted that, so that's why I'm telling you what, what
11 my thoughts are.
12 And especially on Policy 7. I think policy, when
13 I read the 2011 master plan limited amendment, what it
14 incorporates is pages 16 through 34 which are those overall
15 policies. If you look at page 11 of the limited amendment,
16 it retains the plan's overall land use policies and
17 objectives, and those are those larger policies on page 16,
18 Policy 1, 2, 3, 4, 5, which includes that pedestrian
19 oriented and they keep using pedestrian scale, whatever that
20 means. So you may want to address the regional outlet
21 center is not just -- I'm not, by any chance, making, saying
22 which way. I am listening to every piece of evidence. All
23 I'm saying is it doesn't suggest to me the pedestrian
24 oriented retail.
25 So now, with that, Mr. Chen.

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1 MR. CHEN: Okay.
2 MS. ROBESON: Would you like to do this, Mr. Chen?
3 Would you like to put Mr. Soltesz on now because you only
4 have 20 minutes?
5 MR. CHEN: I don't even have that, but that might
6 make sense.
7 MS. ROBESON: And then you can come back and have
8 a more continuous --
9 MR. CHEN: Mr. Kline would like to put Mr. Soltesz
10 on.
11 MS. ROBESON: And are you agreeable with that?
12 MR. CHEN: Yes. Yes.
13 MS. ROBESON: Okay.
14 MR. CHEN: In fact --
15 MS. ROBESON: Mr. Harris, are you agreeable with
16 that?
17 MR. HARRIS: Sure.
18 MS. ROBESON: Okay. Come on, Mr. Soltesz.
19 MR. SOLTESZ: Where should I sit, in the middle?
20 MR. HARRIS: Yes. That's fine.
21 MR. SOLTESZ: All right.
22 MS. ROBESON: Good morning, or good afternoon.
23 MR. SOLTESZ: Good afternoon. It's been a long
24 one.
25 MS. ROBESON: Please raise your right hand.

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1 (Witness sworn.)
2 MS. ROBESON: Okay. Before you state your name
3 and address for the record, were you here for the entire
4 discussion earlier that you are here as, by stipulation of
5 the parties, as, solely as a fact witness, factual and not
6 an expert witness?
7 THE WITNESS: I was not. I arrived here about I
8 guess 10:30.
9 MS. ROBESON: You are here not as an expert.
10 According to Mr. Kline, you are here solely to explain the,
11 your involvement with the Miles Coppola property.
12 THE WITNESS: Okay. That's fine.
13 MR. KLINE: If I might, what I did say, unless all
14 the parties agree that there is something that would be
15 worthy of having his expert opinion on.
16 MS. ROBESON: That's correct. Okay. Which good
17 luck getting that. But so --
18 THE WITNESS: Encouraging.
19 MS. ROBESON: So do we need his resume?
20 MR. KLINE: It's not a bad thing to have anyway.
21 We might get to that.
22 MS. ROBESON: I'll let it in not as a, simply as
23 to the weight of his testimony but not as an expert. So
24 you're not qualified as an expert.
25 THE WITNESS: I will accept that. Thank you. So

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1 noted.
2 MS. ROBESON: This is page, Exhibit 89. Resume of
3 James Soltesz.
4 (Exhibit No. 89 was marked for
5 identification.)
6 MR. HARRIS: I don't object to it but I would note
7 that I would disagree with the fourth paragraph stating his
8 expertise in the local land use market and entitlements. He
9 is a civil engineer. I certainly appreciate that and but in
10 any respect.
11 MS. ROBESON: Okay. Well, that is objection is
12 noted but he's not here to --
13 MR. HARRIS: Correct.
14 MS. ROBESON: -- opine on that. All right. Mr.
15 Kline.
16 DIRECT EXAMINATION
17 BY MR. KLINE:
18 Q MR. Soltesz, would you please state and spell your
19 name and give us your business address?
20 A It's Jim Soltesz, S-O-L-T-E-S-Z. I handed my
21 business card in. And my office is 2 Research Place,
22 Rockville, Maryland.
23 Q I guess I can't ask you your profession but what
24 do you do for a living?
25 A I am a civil engineer and have practiced civil

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1 engineering for 30-plus years, probably 25 years plus in
2 Montgomery County. I own and run a civil engineering land
3 planning and surveying firm that's been located here among
4 other offices in Montgomery County for 33 years.
5 MS. ROBESON: Okay.
6 BY MR. KLINE:
7 Q And you and your firm have had professional
8 involvement with many of the properties that have been
9 discussed today such as the Cabin Branch, or I'm sorry, yes,
10 the Cabin Branch property --
11 A Uh-huh.
12 Q -- the Miles Coppola property.
13 A Yes.
14 Q What I'd like you to do is if you brought
15 something with us today that kind of orients that larger
16 neighborhood because, and I say that because I understood
17 the Hearing Examiner to say there's something I'm missing
18 what's going on. I was trying to give you a larger picture.
19 MS. ROBESON: Well, it's been raised by a lot of
20 witnesses. And I'll be honest, I haven't decided how
21 relevant it is but I, because it's been raised by a number
22 of witnesses, I'll take evidence on it and decide the
23 relevance later.
24 BY MR. KLINE:
25 Q Mr. Soltesz, did you bring an exhibit with you --

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1 A Yeah.
2 Q -- to sort of display the relationship of the
3 Cabin Branch neighborhood with some of the surrounding area?
4 A Yes. Yeah.
5 Q Okay. And what I'd like you to do first is just
6 hold it up and describe what it is before -- well, we're
7 going to put it on the board but I just want you to describe
8 what it is first so that Mr. Harris and Mr. Robins can look
9 at it before we put it in an exhibit. What I'd like you to
10 do. Okay. You can do them both -- all right. Fine.
11 A Yeah. I'll do it -- I mean, I can start and go
12 backwards and move down to --
13 Q So what you just put up on the board if I'm
14 correct --
15 MS. ROBESON: Okay. Do I need to mark that or is
16 that already one of the master plan maps?
17 MR. HARRIS: It's in the master plan
18 THE WITNESS: Yeah. It's in the master plan.
19 MS. ROBESON: Okay.
20 THE WITNESS: Should I go ahead and start on this?
21 MR. CHEN: Madam Examiner, are you going to give
22 it 90 and just, blow up --
23 MS. ROBESON: Let me give it 90, and is this map
24 of Clarksburg study area?
25 THE WITNESS: It says Clarksburg Master Plan,

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1 Hyattsville Special Study Area.
2 MS. ROBESON: Now I have to ask you we're poor so
3 you have to mark it yourself.
4 (Exhibit No. 90 was marked for
5 identification.)
6 MR. HARRIS: Ninety.
7 BY MR. KLINE:
8 Q And, Mr. Soltesz, my understanding of what you
9 just put up and marked as Exhibit 90 is a blow-up of figure
10 18 called analysis areas found on page 41 of the 1994 master
11 plan, is that correct?
12 A That's absolutely correct.
13 Q Okay. Tell us where everything sits in the world.
14 A Okay. I think this is a good exhibit that sort of
15 shows what is Clarksburg, and it follows the master plan.
16 It talks about, I'll start over here, Ten Mile Creek
17 Hyattsville special area.
18 Q Mr. Soltesz, you're going to have to kind of say
19 I'm looking at the left on Exhibit 90 at the area so that
20 the record will reflect what you're pointing to or
21 highlighting.
22 A How about if I start at the northwest area and
23 work counter-clockwise.
24 MS. ROBESON: That's fine.
25 THE WITNESS: Hyattsville special study area

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1 starting at the northwest corner. To the south is an area
2 called Ten Mile Creek area. Next to that is the Cabin
3 Branch neighborhood. Skipping across 270, Brink Road
4 transition area. Then we move further north, transit
5 corridor district. To the east is the Newcut Road
6 neighborhood. To the north of that is the Ridge Road
7 transition area and then, and up is the town center
8 district.
9 This basically is, we're talking about the master
10 plan, and it sets forth the distinguishing zones of the
11 master plan being neighborhoods, being Ten Mile Creek area
12 and being other study areas and then the town center
13 district. And sometimes, let me just clarify this, when I
14 say town center district versus town center, the master plan
15 also sort of uses those words interchangeably, but the area
16 that's right, I'm circling which is sort of in the middle of
17 the area and the planning area is called the town center
18 district. And keep going?
19 BY MR. KLINE:
20 Q No, I'm sorry. You keep talking.
21 A Okay. Let me keep talking. The question was what
22 have we been involved in. We are involved with, in the Ten
23 Mile Creek area, with the Pulte company. They have the --
24 MS. ROBESON: Who is we?
25 THE WITNESS: I'm sorry. Our firm, Soltesz

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1 Company.
2 MS. ROBESON: Okay.
3 THE WITNESS: So when I say we, I'm referring
4 to --
5 MS. ROBESON: Your firm is working on projects --
6 THE WITNESS: Correct.
7 MS. ROBESON: -- with Pulte in the Ten Mile Creek
8 area.
9 THE WITNESS: Correct. Yes.
10 MS. ROBESON: Okay.
11 THE WITNESS: So we work in the Ten Mile Creek
12 now. We did work in Cabin Branch. We did infrastructure
13 work there as well as design work. In the transit district
14 corridor, we've did a couple of projects. I think it's
15 Miller & Smith. In the Newcut Road area, we've done work
16 for Elm Street. Clarksburg Village is how it's referred to.
17 And in the town center, we've done work on behalf of the Bob
18 Egan (phonetic sp.) Barbecue site which Brookfield is,
19 that's under control. I haven't seen the contract. And
20 then in the town center district, worked with Miles Coppola.
21 So within the area of Clarksburg, we've done a good bit
22 of engineering work and our firm has been finding work
23 throughout the area. And so our experience goes back at
24 least 10 or 12 years ago when we started to work and it's
25 been pretty constant all the way through.

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1 Recently, we've been involved in the master plan
2 update which is for the Ten Mile Creek area. Interesting.
3 It's a little confusing so I'd like to explain it. The
4 stage 4 area which is referred to as Ten Mile Creek, stage 4
5 includes pretty privately, private-owned properties,
6 developer --
7 BY MR. KLINE:
8 Q Mr. Soltesz, would you go back first to just
9 explain stage 4, what's stage 1, 2 and 3?
10 A Clarksburg was set up, which is pretty
11 interesting, in the master plan stage. And the staging in
12 stages 1, 2, 3 and 4 was there for specific reasons
13 according to my reading of the master plan. Now, stage 4 is
14 the last stage. I think Cabin Branch is stage 3. I think
15 Newcut, that area is stage 2 and I believe the town center,
16 part of the town center district is stage 1. Stage 4 is the
17 Ten Mile Creek area. And we, the Miles and Coppola family
18 contacted me probably 10, 12 years ago and had interest in
19 them doing something with their property and so that's when
20 I got involved in the stage 4 monitoring and there were --
21 MS. ROBESON: Okay. Where is the Miles Coppola
22 property?
23 THE WITNESS: Let me go to this exhibit. That's
24 probably better.
25 BY MR. KLINE:

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1 Q We're going to need to mark that exhibit, and tell
 2 the Hearing Examiner what it is.
 3 MS. ROBESON: Okay. That's 91.
 4 BY MR. KLINE:
 5 Q Why don't you start off by telling us where Cabin
 6 Branch is since that's the thing we've been talking about
 7 for three days.
 8 MS. ROBESON: Wait. Just a second. This is going
 9 to be called illustration of Miles Coppola property.
 10 THE WITNESS: No. It's probably best, and we
 11 labeled it that way, town center district.
 12 MS. ROBESON: Illustration of town center
 13 district.
 14 THE WITNESS: Right.
 15 (Exhibit No. 91 was marked for
 16 identification.)
 17 THE WITNESS: So within the master plan, the
 18 limits here in very dark bold which show what was visible.
 19 Madam Examiner, that is the town center district as outlined
 20 in the master plan. And to answer your question, Jody,
 21 Cabin Branch would be down over here off the page.
 22 BY MR. KLINE:
 23 Q Off the bottom.
 24 A Yeah. So here's --
 25 MS. ROBESON: So it's at the very bottom where the

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1 V is, that's the intersection of 121 and I-270?
 2 THE WITNESS: Yep. This is the interchange.
 3 MS. ROBESON: Okay. But looking at 91.
 4 THE WITNESS: It would be --
 5 MS. ROBESON: The V at the bottom is the
 6 intersection of I-270 and 121.
 7 THE WITNESS: Right. I think it's Clarksburg
 8 Road, 121, 270. That's the interchange. So this exhibit,
 9 which we were asked to prepare to sort of clarify the
 10 geography here, this is the town center district and if I
 11 can kind of go through it and describe generally where
 12 things are. And that's why these words town center, town
 13 center district and town center and town get a little
 14 interchanged so if I say something, please ask a question
 15 but they're all somewhat related.
 16 This is the development which I believe was called
 17 town center. The property, and I'll be real clear, this is
 18 the Elm Street property.
 19 BY MR. KLINE:
 20 Q Mr. Soltesz, could you --
 21 MS. ROBESON: Now, when you say --
 22 BY MR. KLINE:
 23 Q Why don't you refer to colors since you correlated
 24 with the legend on the left.
 25 A Okay. It says mixed-use retail. It's this red

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1 color.
 2 MS. ROBESON: Okay.
 3 THE WITNESS: So that is --
 4 MS. ROBESON: The lighter red.
 5 THE WITNESS: Yeah. This is -- yeah. The lighter
 6 red.
 7 MS. ROBESON: That's red and the other is brown.
 8 THE WITNESS: Close. Yeah. Right there.
 9 BY MR. KLINE:
 10 Q And that's, what we call in the master plan Newcut
 11 is now Clarksburg Village.
 12 A No. That --
 13 Q Okay. That's the town center?
 14 MS. ROBESON: Okay. Let him testify.
 15 THE WITNESS: It gets confusing so. The town
 16 center, the Newcut Road area, I hate to go back and forth.
 17 MS. ROBESON: Go back.
 18 THE WITNESS: Okay. That's probably good. Newcut
 19 Road area, Newcut Road neighborhood.
 20 MS. ROBESON: Looking at Exhibit 90.
 21 THE WITNESS: Back to 90. Newcut Road is a
 22 neighborhood within the Clarksburg planning area which is
 23 part of the master plan, okay? That's right here. Newcut
 24 Road.
 25 MS. ROBESON: Right.

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1 THE WITNESS: I think it was stated earlier, Elm
 2 Street I believe owns most of that and they named that
 3 Clarksburg Village. So in Clarksburg Village, that is where
 4 there was a designated neighborhood center and that's the
 5 one I think Gary or someone, Gary stated that that --
 6 MS. ROBESON: Unterberg.
 7 THE WITNESS: Gary Unterberg stated that that was
 8 the Harris Teeter center which is up in here but in the
 9 master plan, they call it Newcut Road until they --
 10 MS. ROBESON: Okay. When you say up in here, you
 11 mean up in the northern part of the Newcut neighborhood.
 12 THE WITNESS: Correct.
 13 MS. ROBESON: Okay. Go ahead.
 14 THE WITNESS: So that, that's where the Harris
 15 Teeter was and that's where there was a neighborhood center.
 16 The other neighborhood was Cabin Branch which is labeled
 17 Cabin Branch on here, and that's where the other
 18 neighborhood center was. This is the town center district
 19 which is Exhibit No. 91. So in the town center district,
 20 this read piece is the detailed property which Mr. Flanagan
 21 bought for a dollar. What I heard. That is where he is
 22 planning his neighborhood center.
 23 MS. ROBESON: Which is where the grocery store
 24 will be.
 25 THE WITNESS: Whatever goes there, ma'am, yes.

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1 I'm not sure exactly.
2 MS. ROBESON: Yes.
3 THE WITNESS: But that's the piece and I think
4 it's 12, 14 acres, something like that. Similar size to
5 the, to the Cabin Branch neighborhood site which I think is
6 about 15 acres but, yeah. They're comparable in size. And
7 so that is placed right here. The civic, civic area I don't
8 think civic building which is light green or whatever,
9 medium green. I've heard maybe that's a library to make it
10 civic space, whatever it is, but then it's surrounded by
11 residential, and here's additional residential.
12 Now, the other thing I want to bring out just for
13 geographic proximity is the historic area, and that was
14 defined in the master plan and so this aerial simply scribes
15 out what is considered as the historic district. And that's
16 in the master plan called out as an element that is to be
17 honored and to be serviced and to be --
18 MS. ROBESON: We've read --
19 THE WITNESS: You've read that.
20 MS. ROBESON: Yes.
21 THE WITNESS: Okay.
22 MS. ROBESON: We've read that part. I just want
23 to know where. Keep going.
24 THE WITNESS: Then there's a school located off
25 future Observation Drive. Future Observation Drive becomes

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1 the transit way. That's where the CCT is. Been called a
2 lot of things, trans way. But the CCT goes, supposed to go
3 to the median of Observation Drive and then there's a
4 transit center station location which actually is on the
5 property which the Miles Coppola family owns and that the
6 Peterson Companies with Tanger have under contract, and
7 that's identified with this circle.
8 BY MR. KLINE:
9 Q You need to describe who Tanger is.
10 A I'm sorry. Tanger is an outlet center developer.
11 Up in this area is Bob Egan's Barbecue. I think it's called
12 High Point Farms, and Bob has a barbecue place there at the
13 top. He's been working with Brookfield Homes for which
14 we're doing the engineering and planning work for a
15 residential project. That I think, believe is Zone R-200
16 and it's got a PD4 on it but that is part of the Ten Mile
17 Creek area. Let me, let me describe it. This is also, gets
18 very confusing. Miles Coppola, which is in this purple
19 color, it's roughly 100 acres of land, it is in stage 4 but
20 it is in the town center district. Two pieces of property
21 exist in the town center that are in Ten Mile Creek.
22 MS. ROBESON: The watershed you mean?
23 THE WITNESS: The watershed.
24 MS. ROBESON: Okay.
25 THE WITNESS: Ten Mile Creek. And the ridgeline

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1 sort of comes up, goes pretty much up through here, follows
2 355. So these properties right here drain into Ten Mile
3 Creek, and he had to clear part of the town center in the
4 master plan. Now, on the -- Miles Coppola again is purple.
5 Now, on the staging, which is pretty critical, there were
6 several traders that had to be fully complied with before
7 you could proceed with stage 4. One was a baseline
8 environment study which the county did a long time ago.
9 The second one was water and sewer facilities.
10 There had to be a water and sewer plan which we did on
11 behalf of Miles Coppola family probably seven, eight years
12 ago. That was approved so we figured out how to get water
13 and sewer to the area. Interesting, even though we filed
14 that on behalf of Miles Coppola, the WSSC wanted a broad
15 water and sewer facility study for all of the properties
16 which included, it was a big effort, included all the Pulte
17 properties, it included the county properties which they
18 purchased which is, it's on the west side of 270 south of
19 the jail. And then the water and sewer study that WSSC
20 wanted had to obviously address the facilities for Miles
21 Coppola and for Egan High Point Farms and also for the
22 historic area because that was all part of the Ten Mile
23 Creek Watershed, and so we did that study.
24 The next one, which was interesting, you had to
25 have 2,000 permits. Let me go back if I could.

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1 MS. ROBESON: To 90?
2 THE WITNESS: To No. 90. There were -- I'm going
3 to get some water. I am, have a cold. There had to be
4 2,000 building permits issued either in the town center
5 district or the Newcut Road neighborhood and the reason
6 they, we had to count that was that they wanted a synergy of
7 the community to be formed over on this side of 270. And so
8 we counted permits and actually, I think we were working
9 with Mr. Harris back then so he remembers it, but I would
10 call Park and Planning about every quarter and get the
11 number of permits. And then following that 2,000, then the
12 last trigger was the water quality. You've heard about that
13 and read about it in the paper. And so --
14 MS. ROBESON: Well, I haven't actually but keep
15 going.
16 THE WITNESS: Okay. So then we had to do -- that
17 was when we had to prove that, you know, the water quality
18 at Ten Mile Creek would stay clean and so we embarked on
19 that. However, that got delayed because the Council wanted
20 to have a limited master plan update done in order to
21 address the issues that we were raising regarding proceeding
22 with Pulte's property, is Mr. King's farm part of it, Bob
23 Egan's barbecue with Brookfield and also with the Miles
24 Coppola with Peterson and Tanger.
25 So when we started to investigate moving ahead

1 with development plans on that, that is when the county
2 decided that, they looked at the master plan and they had,
3 obviously, the option to embark on a new study and they
4 decided to embark on a new master plan. And so that was
5 sort of put on hold from last November and should be done, I
6 believe, at the end of this year. So that is part of the
7 stage 4 Ten Mile Creek area. Even though it says Ten Mile
8 Creek area over here, it overlaps into the town center
9 district.

10 Now, going back to 91 --

11 MS. ROBESON: Exhibit 91.

12 THE WITNESS: I'm sorry. Exhibit 91.

13 MS. ROBESON: It's all right.

14 THE WITNESS: To get you the sort of proximity,
15 the Miles Coppola, the Miles Coppola family have owned this
16 roughly for I think 40, 50 years. Mr. Miles was a principal
17 in the public school system and he's down in Florida dealing
18 with it. They're scattered all over the country. And so
19 there -- they approached me back, I think it was about 2003
20 with about their development potential. Then the Peterson
21 Companies came in. I don't exactly know the year. Probably
22 would have been a couple years anyway. And they looked at
23 the property, and it was master planned MXPDP, mixed-use, and
24 so we looked into the master plan regarding the uses, et
25 cetera, and they are, they haven't filed anything because

1 they can't because of a, you know, limited master plan. And
2 so the Peterson Companies were proposing a mixed-use project
3 which would include a Tanger specialty outlet, hotel/office
4 and residential, and that is located in the purple area
5 right through here.

6 And so by way of geography, the sanitary sewer
7 lines and everything has been pretty much laid out. The
8 historic area, we've been working on sanitary sewer lines
9 for that piece and so that sort of sets the stage I think
10 geographically. When you talk about, Madam Examiner, the
11 town center district, town center and the town as far as I'm
12 concerned and the way I looked at the master plan, I thought
13 it sort of said it was in the old days, ground zero was at
14 Clarksburg 121 and 355 and this area is considered town
15 center district.

16 MS. ROBESON: Mr. Kline?

17 THE WITNESS: Um --

18 BY MR. KLINE:

19 Q Let me -- go ahead.

20 MS. ROBESON: Keep in mind just factual. Just a
21 factual witness.

22 MR. KLINE: Yes.

23 THE WITNESS: I wasn't here this morning so I
24 wasn't quite sure about the factual piece of it. But
25 anyway, so when, when the family approached me and they

1 wanted to develop the property, obviously, the first thing
2 they did was look at the master plan and I told them that
3 under an MXPDP Zone, you know, it's a mixed-use zone, et
4 cetera, it's a stage 4 property. Actually, they asked if
5 they could do a grocery store. I don't know why but they
6 thought a grocery store was there. And I looked at the
7 master plan and I noticed the other grocery stores in the
8 area and I told them no about that.

9 And then they asked me about an MXPDP, what that
10 would include and I said it's a mixed-use project, office,
11 residential, retail, commercial, and I thought it was a
12 pretty wide open area and so we started to develop those
13 plans and that's when the Council said hold on, what we want
14 is a master plan amendment on that. But, you know, I think
15 I advised them that they, they asked me if they could zone
16 it to a bunch of uses. Again, you know, would a Walmart fit
17 in there, would, you know, a meat grinding factory.

18 MS. ROBESON: Well, I don't know if we need all
19 that and what their perspective uses were. I think that
20 that factual ground there is sufficient. So they have not
21 filed for rezoning yet because of the finishing the master
22 plan.

23 THE WITNESS: Correct. They have to finish --

24 MS. ROBESON: Amendment.

25 THE WITNESS: Right. They have to finish the

1 master plan and I told them that, you know, you can't move
2 ahead until that's done. They know that and obviously, they
3 contracted with the Peterson Companies and Tanger to do
4 their center there and so, you know, those plans now, with
5 the work that we've been doing required by the master plan,
6 we've done a lot of work on this site even though it's in a
7 master plan phase because, you know, the master plan, in my
8 opinion, Montgomery County, in my 30 years, master plans are
9 pretty specific regarding the uses.

10 And so we, in order to see what would fit on the
11 property, we have done a lot of environmental studies, we
12 did forest land delineations, we've done wetlands
13 delineations, we've done steep slopes, we've done stormwater
14 management plans. We've also laid out Observation Drive.
15 We met with Public Works on road radiuses and medians. We
16 did a study to show how you would extend sanitary sewer up
17 to the historic area. So although I don't want to give you
18 any disruption, they haven't filed anything, their layout
19 plans for an outlet center, for hotels, for restaurants,
20 sit, sit-down restaurants, residential has been finally laid
21 out because just the site and the constraints and, you know,
22 they, they've got some stream buffers on there, 175 feet,
23 which is the master plan requirement. There's no
24 flexibility in that I told them. I said, you know, what it
25 says there --

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1 MS. ROBESON: Okay. All right. So you've done
2 some preliminary engineering. You've done some preliminary
3 forest conservation plans and have some preliminary layouts
4 but no zoning. Do you have a preliminary plan approval?
5 THE WITNESS: No. We can't file it until the,
6 until --
7 MS. ROBESON: Until the master plan amendment.
8 THE WITNESS: Yeah.
9 MS. ROBESON: Okay.
10 THE WITNESS: I would say that the work that we've
11 done, in your terminology of preliminary, we're well beyond
12 that. The site's been, the site has been designed, graded,
13 utilities laid out, water quality devices. There's actually
14 been an RIFSD repaired although not filed but, yeah.
15 There's been a lot of work done on this site.
16 MS. ROBESON: And a number of people have come and
17 said well, Miles Coppola development is going to pay for
18 sewer coming to the historic district. They're not going to
19 pay for the individual system. What are they referring to?
20 THE WITNESS: Yeah. It's a good question. WSS --
21 the master plan said that in order for stage 4 to proceed,
22 there was a requirement for a facility study for the entire
23 Ten Mile Creek watershed which we did. Any property within
24 Ten Mile Creek, you are required to provide a design to
25 provide sanitary, public sanitary service.

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1 The historic area, and we know this because we've
2 done extensive environmental, the historic area has failing
3 septic fields. When those were installed back at the turn
4 of the century, the standards were nowhere near what they
5 are. I'll just say there probably weren't any standards
6 back then. And so the historic area has a number of old
7 structures with failing septic fields and quite frankly, the
8 waste, believe it or not, from those failing septic fields,
9 we've taken samples of water in the head waters of Ten Mile
10 Creek and we found feces in that.
11 So to answer your question, when WSSC required a
12 facility study, we were required to figure out how we
13 provide sanitary sewer service. Now, to answer your
14 specific questions, the way it's been set up, which is very
15 standard, we would run sanitary sewer gravity surface,
16 gravity sewer. There were discussions previously about
17 having all these people pay for little individual pump
18 systems which is hugely expensive. Plus, it's a maintenance
19 nightmare, plus, WSSC hates even though they're privately-
20 owned.
21 MS. ROBESON: Right.
22 THE WITNESS: You know that, I mean, because if
23 the power goes off, you're out of luck. But what we did was
24 we went in there and we laid out sanitary sewer lines, trunk
25 line extended and they would service the historic area.

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1 Now, the individual -- it's like, it's like in a
2 subdivision. If you have a sanitary sewer line in the road,
3 you pay for the house connection which is the pipe from the
4 main up to the house. So the running of the sanitary sewer
5 up through this area and into the public right-of-way or
6 through dedicated easements would be paid for by the
7 Peterson, Tanger Company, and then those folks could hook up
8 to it with the connection. The other thing that was --
9 MS. ROBESON: You're taking the connection past
10 the property line?
11 THE WITNESS: No. You take it up to the rear of
12 the property line or the front. Whatever the --
13 MS. ROBESON: No, no, no. No. Where are you
14 putting the line?
15 THE WITNESS: It comes up through here to --
16 MS. ROBESON: Okay. When you say through here --
17 THE WITNESS: I'm sorry. There are, there are
18 reaches up through the Miles Coppola property which are
19 Stream Valleys. Now, we're not going through the Stream
20 Valleys but the sanitary, gravity sanitary sewer lines will
21 in fact proceed to the northeast up to 355, down 355 and
22 down along the future right-of-way of Observation Drive.
23 Those gravity lines will be butted up to the properties and
24 those, either they've got a shop there or a house, whatever
25 it is, then all they've got to do is come out, disconnect

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1 their septic drain and connect it into the sewer line.
2 The other thing too I failed to mention is this is
3 where the proposed fire station is which Montgomery County
4 decided, they believe they need there. And that, right now,
5 is set up to have a pump system for gravity because there
6 was no gravity for sewer so we would, Miles Coppola would
7 include in their hookup the provision for the fire station
8 as well as the historic area.
9 BY MR. KLINE:
10 Q So next Tuesday evening, you're going to be
11 testifying before the Planning Board on the staff's
12 recommendations for land use recommendations for the
13 properties in Ten Mile Creek.
14 A Correct. Yes. That's right.
15 Q Can you describe for the Hearing Examiner what the
16 staff's recommendations is today for the Miles Coppola
17 property?
18 A Uh-huh. It's for a mixed-use project. It also
19 makes mention of specialty retail, i.e., the Tanger proposal
20 for, I think it's 250, 400,000 square feet of specialty
21 outlet retail. It makes mention of residential as part of
22 the mixed-use and it also makes a recommendation on office
23 or hotel. It's all part of the overall mixed-use concept
24 and so after working with staff intensely over the master
25 plan process, and to get through that in 12 months which is

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1 had Harris Teeter.
2 Q Let me try and be specific then to speed things
3 up, Madam Examiner.
4 MS. ROBESON: Yes, because I --
5 MR. KLINE: Sure.
6 THE WITNESS: Sorry.
7 BY MR. KLINE:
8 Q How much square footage of retail was proposed you
9 can judge with the Concordia proposal?
10 A I think it was about 110. Somewhere right in that
11 range. I can't remember but it was, it wasn't more than
12 120.
13 Q What was the resolution of -- you actually filed
14 an application with Park and Planning?
15 A Yeah. We had, we had a lot of meetings. A lot of
16 plans were filed.
17 Q What did you file?
18 A I'm sorry?
19 Q What applications did you file?
20 A We may have filed a pre-preliminary. I know we, I
21 don't know if we got to a site plan or not before things
22 fell apart for him, but we had lots and lots of layouts for
23 the retail center.
24 Q So there was never a decision made on it. It just
25 didn't proceed beyond a certain point.

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1 A No. No. It didn't proceed. I mean, there were a
2 lot of concepts regarding the parking in the front, on the
3 side, construction --
4 MS. ROBESON: Okay. This is beyond the scope of
5 what I asked.
6 MR. KLINE: Thank you. If we answered your
7 questions, I have no further questions of Mr. Soltesz.
8 MS. ROBESON: Okay. Mr. Chen?
9 MR. CHEN: No questions.
10 MS. ROBESON: Mr. Harris?
11 CROSS-EXAMINATION
12 BY MR. HARRIS:
13 Q Mr. Soltesz, you mentioned that the town center
14 was stage 2, that Clarksburg Village or Newcut was stage 3.
15 A No, I didn't.
16 Q Okay. What did you say then?
17 A I thought Cabin Branch was stage 3.
18 Q And what was Newcut?
19 A I think it was 2.
20 Q Okay.
21 A I think the town center was 1. I'm not sure.
22 Q Okay.
23 A I know --
24 Q Can I correct you? If you'd look at --
25 A Okay.

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1 Q -- page 215 of the master plan, would you agree
2 with me that you're mistaken?
3 A Let's see. Stage 3, yeah. Cabin Branch. I knew
4 that
5 Q Would you agree with me that contrary to what you
6 said, stage 1 was what was already built, town center is not
7 stage 1, it's stage 2.
8 A Stage 2, okay.
9 Q And stage 3 is both Newcut and Cabin Branch,
10 correct?
11 A Yeah.
12 Q Okay.
13 A Yeah. That's fine.
14 Q And the Miles Coppola property is stage 4 I think
15 you said, right?
16 A Yeah. And I said Miles Coppola, Miles Coppola as
17 well as Egan exactly, yeah.
18 Q Okay. And the master plan you mentioned
19 recommends MXPD zoning for the Miles Coppola property,
20 right?
21 A Yeah, uh-huh.
22 Q Today, it's zoned what?
23 A R-200.
24 Q Which is single-family residential, isn't it?
25 A Uh-huh.

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1 Q Okay. So today, it's not zoned for any commercial
2 use.
3 A Today, it's zoned for R-200.
4 Q Single-family residential.
5 A R-2 -- whatever is in R-200, Bob, that's what it
6 is.
7 Q Okay. Do you know what the R-200 Zone allows?
8 A Residential.
9 Q Okay. And the master plan places a limit on the
10 amount of development on the Miles Coppola property, doesn't
11 it, under the MXPD Zone?
12 A I'm not aware of any sort of limit on the Miles
13 Coppola property other than MXPD. I know that the land use
14 designations are being discussed as part of the master plan.
15 Q I'm talking about the current master plan.
16 A MXPD.
17 Q Would you agree with me that page 44 of the master
18 plan does impose a limit --
19 A May I sit down?
20 MS. ROBESON: Yes.
21 BY MR. HARRIS:
22 Q -- development there of 470,000 square feet?
23 A What page, Bob?
24 Q Page 44. If you look about five lines down. In
25 fact, you have it underlined there.

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1 A It says 470,000 square feet in the town center
2 district.
3 Q Okay. And that's referring to the Miles Coppola
4 portion of the town center district I believe, is that
5 correct?
6 MS. ROBESON: I'm sorry. What page are you on?
7 MR. HARRIS: Page 44, fifth line down.
8 THE WITNESS: Miles Coppola is in the town center
9 district.
10 MS. ROBESON: Oh, okay.
11 BY MR. HARRIS:
12 Q Okay. And would you agree with me that the
13 470,000 square foot recommendation here is for employment
14 use at the Miles Coppola property?
15 A Employment -- no. I wouldn't agree. I think I
16 said it, Bob. 470,000 square feet is the, recommends
17 employment site up to 470,000 square feet in the town center
18 district of which Miles Coppola was part of the town center
19 district.
20 Q Okay. So the 470,000 applies to all of what's in
21 the town center district there which includes the Miles
22 Coppola property. Is that what you're saying?
23 A The recommendation recommends, correct.
24 Q So some subset of 470 is what the Miles Coppola
25 would be entitled to, is that right?

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1 A Unless they change the master plan.
2 Q Right. Well, let's deal with this master plan
3 first.
4 A Okay. Maybe.
5 Q Okay. And then are you aware that the master plan
6 limits retail in the MXPDP Zone to a maximum of 20 percent of
7 the total density?
8 A I am not that familiar with the MXPDP Zone but if
9 that's what you say that's what it is under the proposed
10 current master plan, if that's what it is, that's what it
11 is.
12 Q And so, frankly, I'm bad on math, you're the
13 engineer, 20 percent of 470,000 would be about 94,000 square
14 feet of retail, is that correct?
15 A Twenty percent of what, Bob?
16 Q Of 470,000, the number that we just were talking
17 about on page 44.
18 A But that's, that supposes that the 470,000 is all
19 MXPDP. That's --
20 Q Okay. Well, then --
21 A You're mixing apples and oranges.
22 Q Then your denominator would shrink, wouldn't it?
23 If you took 100,000 of that 470 out because it's in another
24 zone, then you only have 370 in the MXPDP --
25 A But --

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1 Q -- and 20 percent of that is only --
2 A Is --
3 Q Is less, isn't it?
4 A Is employment, Bob, is that retail, is that
5 office, is that R&D? I don't know.
6 Q Well --
7 A It says employment. I mean, I always think of
8 employment, honestly, as R&D and office, and I think of
9 retail as retail.
10 Q Okay.
11 A And so if it says 470,000 square feet of
12 employment, then I think of that as 470,000 square feet of
13 office or R&D in the town center district.
14 Q So is there anywhere in the master plan that
15 recommends retail on that property?
16 A In what property?
17 Q The Miles Coppola property. Anywhere in the 1994
18 master plan that retail is recommended on the Miles Coppola
19 property?
20 A I think it recommends MXPDP.
21 Q Okay. And MXPDP is part of the 470,000 you said,
22 right?
23 A MXPDP -- no, Bob. What I said was the Miles
24 Coppola property is part of the town center district
25 recommended for MXPDP. You said that the 470,000 square feet

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1 of employment, which I assume to be R&D or office, makes up
2 part of the town center district.
3 Q Right. So part of the 470 at page 44 belongs to
4 the Miles Coppola property and part doesn't.
5 A Uh-huh.
6 Q Is that what you're saying?
7 A Yeah. Well, the Miles Coppola property is part of
8 the town center district but it's not, obviously, all of it.
9 Q Okay. Let's assume all of it belonged to Miles
10 Coppola, all 470. It doesn't because you're saying it
11 doesn't but let's assume all of it did, and let's assume the
12 MXPDP Zone limits retail to 20 percent of the total density.
13 How much retail could they do there? Again, assuming all
14 470 belonged to Miles Coppola.
15 A If the MXPDP Zone recommends a certain percentage
16 of retail, then whatever the math is times 20 percent, yes.
17 So if you were doing the simple math, yes, under the, under
18 the current master plan recommendations.
19 Q Okay. 94,000 would be a maximum, and that's
20 assuming none of this density belongs to other town center
21 properties.
22 A That's a bad assumption but --
23 Q Okay. So it's less than 94,000.
24 A Whatever it is, yes. So 470,000 square feet of
25 employment use is recommended here in the plan.

Page 202

1 Q Okay. And just to be certain, you're agreeing
2 with me that a maximum of 20 percent of that could be retail
3 in the MXPDP Zone.
4 A In the MXPDP Zone, if you're telling me that 20
5 percent of the maximum employment is retail, then your math
6 is correct under the master plan that exists today.
7 Q Okay.
8 A Which is the updated 2000 and whatever when they
9 did that amendment.
10 Q Okay. Is stage 3 supposed to precede in advance
11 of stage 4 under the master plan?
12 A Stage 3?
13 Q Yes.
14 A Yeah. There's staging requirements in there,
15 correct.
16 Q Correct. And those staging requirements were
17 based on a number of factors, one of which was to build out
18 Clarksburg in an organized fashion moving from stage 1 to
19 stage 4, is that correct?
20 A Yes. Correct.
21 Q Now, stage 4 is not yet open, is that correct?
22 A Stage 4 is not yet open. It is the subject of the
23 master plan which should be wrapped up here in a few months
24 we hope.
25 Q Okay. The master plan could recommend that stage

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1 4 not be open, couldn't it?
2 A Could recommend that.
3 Q And it could recommend any number of different
4 things ultimately, right?
5 A Uh-huh.
6 Q Yes?
7 A Yes. Yes.
8 Q She has a hard time picking up the uh-huh comment.
9 Wouldn't you agree with me that there is very heavy
10 opposition to the development that's proposed in the Ten
11 Mile Creek area including Peterson?
12 A No.
13 Q There's not heavy opposition?
14 A No. There's opposition, Bob. I've been
15 practicing in this county for 30 years. There's opposition
16 to when we built a townhouse.
17 Q Have people been demonstrating virtually every
18 Thursday at the Planning Board in opposition to Ten Mile
19 Creek development?
20 A I think I saw five or seven people there.
21 Q But pretty much every week.
22 A I've only been to a couple hearings. One --
23 Q When you've been there, have they been there?
24 A One, once I showed up there, Bob, there were about
25 10 people with white shirts on outside. The second one, I

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1 think I saw four people with the white shirt, but I didn't
2 see a, quote, demonstration.
3 Q Have there been groups formed like the Livable
4 Clarksburg Coalition that are organized and have been
5 fighting it?
6 MR. KLINE: Objection. We're getting into what's
7 the likelihood that the plan --
8 MR. HARRIS: No. That's a fact.
9 MS. ROBESON: No. No. Some of this is relevant
10 because of, probably, my questions about the stage of the
11 timing of it so I'm going to let him ask but I think you've
12 made your, I was getting your point, but go ahead and answer
13 this question.
14 THE WITNESS: The question was?
15 BY MR. HARRIS:
16 Q Are there groups, including Clarksburg Livable
17 Coalition, that are opposing the, the master plan for stage
18 4 for Ten Mile Creek?
19 A As well as groups supporting the Peterson, Tanger
20 proposal as well.
21 Q Which groups --
22 A Both sets of groups.
23 Q Which groups are supporting that?
24 A There's civic groups. People side --
25 Q Which ones?

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1 A Well, I don't have the names in front of me, Bob,
2 but I could be happy to, I guess, go back to the record and
3 see who has shown up to testify in support. I just don't
4 have them.
5 Q Where have there been hearings to testify?
6 A You were there.
7 Q I don't believe, I thought the first hearing is
8 September 10th.
9 A There were public sessions in front of the
10 Planning Board which you were there. You represent Pulte.
11 Q Those were not hearings.
12 A I'm sorry. I'm sorry.
13 MS. ROBESON: Work sessions?
14 MR. HARRIS: Yes.
15 THE WITNESS: Okay.
16 MS. ROBESON: Okay.
17 MR. HARRIS: Okay.
18 THE WITNESS: Sorry, Bob.
19 BY MR. HARRIS:
20 Q Would you agree with me that the water quality
21 issue is a serious issue in the opening up of stage 4?
22 A Oh, yeah. For sure. And that's the reason why we
23 have spent months and months and brought in experts from
24 every area of the country and that's why we've performed
25 water quality samples, that's the reason why we brought in

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1 renowned experts on BMPs and that's the reason why we've
2 done extensive watershed studies up and down the entire Ten
3 Mile Creek and that's the reason why I took apart Diane
4 Cameron (phonetic sp.), the Audubon Society's five, six page
5 memo of equally woods in good condition regarding nitrogen,
6 phosphorous and suspended solids, and it proved beyond a
7 shadow of a doubt that the development in Ten Mile Creek,
8 Bob, can be done and the water quality will not be degraded
9 or a step down from a 4 to a 3, whatever it is.

10 Q And I'm either agreeing or disagreeing with that
11 but that's your --

12 A Well, I hope, I hope you're not.

13 Q That hasn't --

14 A I hope you're not.

15 Q That hasn't been accepted by any, by the decision
16 makers at this point.

17 A Well, right now, Bob, the way it sits is that I
18 guess the validation will be what the County Council does.
19 And a master plan like this master plan, like the other
20 master plan, the ultimate decision is what is voted on by
21 the Council and if the Council believes that the analysis is
22 such that water quality is protected, then five of them or
23 more will have to vote for it.

24 Q So today, you can't tell us for sure whether stage
25 4 will be opened or not.

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1 A If I could, that would be truly miraculous
2 considering Montgomery County.

3 Q In addition to the environmental issues, aren't
4 there traffic issues with respect to the Peterson project?

5 A There -- no. I mean, when you say traffic issues,
6 there were some traffic analysis done. There's not been,
7 because it's not required, a full traffic impact study so
8 your, your suggestion is not correct because I don't believe
9 the studies have been done, but our firm is not doing the
10 traffic impact studies. As you rightfully know, Bob, when a
11 development plan application is submitted, they will do a
12 traffic impact study. When a preliminary plan of
13 subdivision is done, they'll submit that too.

14 Q So to my knowledge, and it sounds to me to your
15 knowledge, Peterson has not done a traffic impact study for
16 this property.

17 A I didn't say that. I did not say that.

18 Q Well, have they done one?

19 A I don't know.

20 Q You don't know.

21 A We're not traffic engineers, Bob, so I cannot
22 answer. I know that they've done extensive studies on the
23 property and they are proceeding with the master plan
24 process with the recommendation to do a mixed-use project
25 including a Tanger outlet.

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1 Q Wouldn't you agree with me that Eric Gray
2 (phonetic sp.), the transportation planner at Park and
3 Planning, has produced a report that shows that most of the
4 intersections immediately around there will be at
5 unacceptable levels of service with that level of
6 development there?

7 MR. KLINE: Objection.

8 THE WITNESS: I --

9 MR. KLINE: We've now gone from a debate about --

10 THE WITNESS: I am not --

11 MR. KLINE: Jim. We've now gone from a debate
12 about what's going on what's going on in the master plan to
13 basically -- we've made this dueling shopping centers and
14 that's not what I thought you wanted to hear.

15 MS. ROBESON: Well, I guess it goes to, to how,
16 whether Peterson is a viable option to even consider. Quite
17 frankly, I'm not sure how much relevance they would have to
18 this case anyway. I did ask for the background information.
19 Mr. Soltesz, if you -- I don't want to go into the traffic
20 report with a witness that doesn't deal with the traffic.

21 MR. HARRIS: Okay.

22 MS. ROBESON: He just said he didn't know what the
23 status was and I would prefer not to have to go into it. As
24 I said, I'm still thinking about the weight of what to give
25 the Miles Coppola project and that, and the real question

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1 here is whether your development meets the master plan.

2 MR. HARRIS: Thank you.

3 BY MR. HARRIS:

4 Q So but final question on it. If we introduce
5 evidence showing that the project would produce traffic
6 problems, you have nothing today that you can rebut that
7 with.

8 A Bob, I didn't come here with a traffic impact
9 study for Miles Coppola, okay? I'm not a traffic engineer.
10 You've known me for 25 years. Civil engineers --

11 MS. ROBESON: Okay. So your answer is you don't
12 know.

13 THE WITNESS: I, I don't know.

14 MS. ROBESON: You can't answer.

15 THE WITNESS: I mean, I --

16 MS. ROBESON: All right.

17 THE WITNESS: I'll ask him about, let me ask him
18 about water quality devices and BMPs.

19 BY MR. HARRIS:

20 Q I don't know. Exactly. I agree.

21 A You know, if, if the issue here is is, you know,
22 Miles Coppola property is suitable for a Tanger, Peterson
23 outlet and every study --

24 MS. ROBESON: No. That's not the issue.

25 THE WITNESS: Okay. Everything I've done supports

Page 210

1 that.

2 BY MR. HARRIS:

3 Q You were talking about, I'm going to approach the

4 exhibit over here, Exhibit --

5 MS. ROBESON: Ninety-one?

6 THE WITNESS: It's over in the left corner.

7 BY MR. HARRIS:

8 Q You were talking about where the sewer line would

9 go.

10 A Uh-huh.

11 Q If I remember correctly, you said it would start

12 basically on the Miles Coppola property.

13 A Uh-huh.

14 Q And then go towards Observation Drive and 355, is

15 that correct?

16 A Correct. It would proceed to the northeast,

17 correct.

18 Q Northeast corner of the Miles Coppola property?

19 A Well, it would proceed through the Miles Coppola

20 property further to the north and the east.

21 Q All the way up to 355?

22 A It depends if -- some of the properties in the

23 historic area may sewer the other way. The bulk of them

24 sewer, because of the ridgeline, back toward 270.

25 Q Well, first I want to understand the Miles Coppola

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1 sewer line. It would come up from southwest to northeast.

2 A Correct.

3 Q Up to 355?

4 A It depends, Bob. You know, if there is, if the

5 topography, the ridgeline, Bob, sort of jogs along sometimes

6 northeast of 355 and sometimes south. It's not, it's not a

7 straight line.

8 Q 355 though, more or less, is the high point.

9 A In some places, it is, yes. Yeah, yeah.

10 Q Between 270 and 355.

11 A Anything that falls, Bob, within the Ten Mile

12 Creek sewer basin would in fact be sewered by the proposed

13 sewer line extensions that are being offered by Miles

14 Coppola, Peterson, Tanger.

15 Q Not the Pulte property.

16 A Pulte is separate, Bob.

17 Q That's in the Ten Mile Creek Basin though.

18 A No. It's --

19 Q It's not?

20 A It is.

21 Q Okay. So it --

22 A Do you want me to stand up?

23 MS. ROBESON: Do you need to explain or can --

24 THE WITNESS: It would be helpful.

25 MR. HARRIS: Okay.

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1 MS. ROBESON: Okay. Go ahead.

2 THE WITNESS: As I said, one of the conditions of

3 the master plan of the master plan's staging was to put

4 forth a sewer facility study for all of stage 4. We ran

5 three or four scenarios probably seven, eight years ago via

6 WSSC. The old way, drag the sewer line up the Stream

7 Valley, would take down a bazillion trees. We knew that

8 wasn't going to work. So what we did, Bob, was we filed a

9 report that included all the Ten Mile Creek properties,

10 included the historic area, Egan, the whole thing. It

11 included the county properties which is where the bus depot

12 was going to go. Remember that deal?

13 MS. ROBESON: No. Where the fire station is?

14 THE WITNESS: No.

15 MS. ROBESON: No.

16 THE WITNESS: Different. Different.

17 MS. ROBESON: How are you going to I guess, what's

18 the proposal that you're, where is the sewer line that

19 you're proposing going to run and who's it, who's it going

20 to serve?

21 THE WITNESS: There's two options. There's a pump

22 station here or a pump station here.

23 MS. ROBESON: Okay.

24 MR. KLINE: You need to tell us where on this

25 exhibit.

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1 THE WITNESS: I'm sorry. There's a pump station

2 either on the west side of 270, which would be close to the

3 county detention facility, or there will be a pump station

4 generally over in the Miles Coppola property site.

5 MS. ROBESON: Okay.

6 THE WITNESS: Okay. Either one works. Bob's

7 question was what happens to Pulte.

8 BY MR. HARRIS:

9 Q Forget that question. I really wanted to

10 understand exactly the same thing that the Hearing

11 Examiner --

12 A Should I sit down?

13 Q Where exactly is the sewer line going to run that

14 will serve the Peterson project?

15 A The exact location, I don't have it engineered.

16 The studies we've done bring the sewer line up through this

17 property, up through this property -- I'm sorry. I keep

18 saying up through. It goes through the Miles Coppola

19 property, Bob.

20 MS. ROBESON: So it would begin at the --

21 THE WITNESS: Down at the low point.

22 MS. ROBESON: -- one of the two pumping stations,

23 proceed northeast generally.

24 THE WITNESS: From the, from the proposed pumping

25 stations, thank you, geography's right, proceeding north and

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1 east, those gravity sewer lines, Bob, would come up through
2 the property.
3 BY MR. HARRIS:
4 Q Pressure sewer lines.
5 A No. I see we're going to have to go back to a
6 sanitary.
7 Q Okay.
8 A I'm talking --
9 Q The topography is such that the, the Miles Coppola
10 property drains from northeast to southwest, correct? It
11 would drain down to a pump station there and then the pump
12 station would pump back up towards 355, is that correct?
13 A There's several options, Bob.
14 Q Okay.
15 A If it, if the pump station is located close to the
16 detention site, it can pump across into Observation Drive or
17 into this road. I'm not sure exactly which one it is.
18 Okay.
19 Q Okay. Let's --
20 A Or --
21 Q Let's deal with that option first. Okay. So it
22 pumped to Observation Drive. You just pointed to the south
23 side of what is I guess called Gateway Center Drive.
24 A Gateway Center Drive, yeah.
25 Q So okay.

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1 A There's a sewer line, I believe, in Gateway
2 Center.
3 Q Correct. Now, that doesn't touch any of the
4 properties in the historic district, does it?
5 A No. That's the out-fault line from the pump
6 station. That's the pressure sewer, Bob.
7 Q Okay.
8 A It's got nothing to do with the service. Bob,
9 there's two types of sewer lines. There's the gravity sewer
10 line which everyone likes.
11 Q Yes.
12 A Or your, you're on well and septic at your house.
13 Q Yes.
14 A My house is gravity.
15 Q Yes.
16 A There's a gravity sewer line which is where the
17 fluids come in. Those lines go through the Miles Coppola
18 property, through the property and they service the fire
19 station and a significant part of the historic district,
20 okay? Now, let me finish. Those will gravity drain and
21 follow the topography down to about where the property
22 borders I-270. Then with a WSSC pump station, the sewage is
23 put into a pressure main and then that is ejected through a
24 pressure sewer system into an existing gravity trunk line.
25 Q Okay. All right. I follow that now. So let's

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1 take a property in the historic district at the corner of
2 355 and this shows Stringtown Road there. I think it's
3 technically Gateway Center Drive in this place, isn't it?
4 A No. That's not -- no, Bob. That's not Gateway.
5 Gateway Center Drive is down --
6 Q Is this?
7 A No. No, Bob.
8 Q Okay. Which, is this --
9 MS. ROBESON: Let him answer.
10 BY MR. HARRIS:
11 Q Is this Spring --
12 MS. ROBESON: Let him answer.
13 BY MR. HARRIS:
14 Q Is this Stringtown Road?
15 A Let me give you --
16 Q Okay.
17 A Counselor, sit down. Let me give you a civil
18 engineering lesson.
19 Q What's the name of that road? That's not civil
20 engineering.
21 A This, this is Stringtown Road, Bob.
22 Q All the way to 355? I mean all the way to 270?
23 A Yeah. That's -- there was old 121, remember?
24 Q Correct.
25 A In the old days, we'd drive up through here, 121,

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1 okay?
2 Q Okay.
3 A Then this road is not in great shape so then they
4 put in Stringtown Road, right, and that ought to be 121 to
5 be honest.
6 Q Right.
7 A Gateway Center Drive is, is here.
8 Q Okay.
9 A And this is Observation Drive.
10 Q Okay. So then let's take the property at the
11 corner of 355 and Stringtown Road.
12 A Uh-huh.
13 Q Okay. In the historic district.
14 A Right.
15 Q Now, for that property to connect to the sewer
16 line that you were just discussing, you're saying a sewer
17 line has to run from that property over to the Miles Coppola
18 property, connect to the gravity sewer that's being built
19 there.
20 A No. That's not what I said.
21 Q Okay. Well, then tell me, tell me how this
22 property at the corner would be sewerred.
23 A Miles Coppola property would extend sanitary
24 gravity lines through their property either north, south on
25 Observation Drive or at Clarksburg Road or southeast down

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1 through the future right-of-way of the transit way
2 Observation Drive. Now, Bob, then once those gravity lines
3 are in the ground, the property owners can go and disconnect
4 their septic --
5 Q No. I don't want to go there yet. I just want to
6 understand where the line was. So you're saying Miles
7 Coppola will connect, will construct a gravity sewer line
8 that will connect the house at the corner of 355 and
9 Stringtown Road to the gravity system that's over in the
10 Miles Coppola?
11 A That's not what I said.
12 Q Well, then where, where will that, I'm trying to
13 understand where the gravity system line from that house
14 will go.
15 A You're not listening to what I say.
16 Q You're not answering the question.
17 MS. ROBESON: Wait. Just a second.
18 THE WITNESS: He --
19 MS. ROBESON: Okay.
20 THE WITNESS: I said to him --
21 MS. ROBESON: Okay. I don't want to hear what you
22 said.
23 THE WITNESS: Okay.
24 MS. ROBESON: What I want you to do is if there's
25 a house in the historic district at the corner of Stringtown

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1 Road and 355, is that going to be served by the sewer that
2 Miles Coppola is putting in?
3 THE WITNESS: Any houses, structures within the
4 historic area that fall within the Ten Mile Creek Shed will
5 have. Not all the historic area flows into the Ten Mile
6 Creek Shed.
7 MS. ROBESON: Okay. Before you go, what part of
8 the historic district flows into the Ten Mile Creek
9 Watershed, or sewage basin?
10 THE WITNESS: It's a mixed bag. I'd be happy to
11 submit, for the record, the layout of which properties.
12 There's no topo lines on here. I'd be happy to submit, if
13 it's appropriate, the sanitary sewer line that will service
14 those are for those structures located within the Ten Mile
15 Creek Drainage Shed. Some of the pieces --
16 MS. ROBESON: Can you give me an idea?
17 THE WITNESS: Yeah. Generally --
18 MS. ROBESON: Is it --
19 THE WITNESS: Generally, I think it's pretty much
20 right through here. It may not go all the way to the south
21 but it's pretty much right through here.
22 MS. ROBESON: And when you say through here, that
23 would be, I can't see what that road is.
24 THE WITNESS: That's, that's, 355.
25 MS. ROBESON: I know 355 but what's the, not

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1 Stringtown but the next one.
2 THE WITNESS: Clarksburg.
3 MS. ROBESON: No, no. To the north. To the south
4 of Clarksburg. There's a bold --
5 BY MR. HARRIS:
6 Q Right below the transit center.
7 MS. ROBESON: That one.
8 THE WITNESS: Redgrave.
9 MS. ROBESON: Redgrave.
10 THE WITNESS: Yeah.
11 MS. ROBESON: Okay. So roughly from Redgrave up
12 to --
13 THE WITNESS: I think --
14 MS. ROBESON: -- the yellow.
15 THE WITNESS: I think this property goes this
16 direction, this may not. Most of these do, this definitely
17 does.
18 MS. ROBESON: Okay. So --
19 THE WITNESS: The --
20 MS. ROBESON: Okay. Hold on one second. How are
21 those, where are you going to run your gravity line? You'll
22 have the pumping station but where are you bringing the
23 gravity line? How far to the northeast are you bringing the
24 gravity sewer line?
25 THE WITNESS: To the north and to east?

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1 MS. ROBESON: To the northeast. Generally, how
2 close to the historic district are you bringing the gravity
3 line?
4 THE WITNESS: To the historic district. To the
5 historic district.
6 MS. ROBESON: To 355?
7 THE WITNESS: In some cases, depending on the
8 topography, yes. Madam Examiner, the sanitary sewer service
9 is based on the topography of the site.
10 MS. ROBESON: Right.
11 THE WITNESS: And where that topography of the
12 site dictates within the historic district as well as the
13 fire station. Those properties which should drain into the
14 Ten Mile Creek Basin, they will be provided sanitary public
15 sewer accessibility.
16 MS. ROBESON: Okay. Mr. Harris.
17 BY MR. HARRIS:
18 Q And they will not have to construct anything other
19 than the sewer line on their own property to connect to
20 that?
21 A The answer is that right now, they'll have to make
22 their own connections which I said, yes.
23 Q The sewer will be brought to their front property
24 line or rear property line.
25 A Rear, yeah.

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1 Q Whichever it might be.
2 A Whatever it might be.
3 Q Okay. And Peterson is going to pay for all that.
4 A They have offered to pay for all of that, correct.
5 Q But the sewer line hasn't been designed at this
6 time I think you told me previously.
7 A We laid out the concept of the sewer line. It has
8 not been designed. It will have to go through WSSC approval
9 as you know.
10 Q Okay.
11 A So we will be providing sanitary sewer to those
12 properties.
13 Q Well, let's move to the road. You talked about
14 Observation Drive and I wasn't clear on that. Observation
15 Drive of course is a long road running all the way down to
16 Germantown, right?
17 MR. KLINE: Objection.
18 MR. HARRIS: He asked, he testified to that.
19 Well, what was your objection? I guess I should hear it
20 first.
21 MR. KLINE: Well, as I say, I mean, it's
22 essentially become a site plan hearing on another --
23 MS. ROBESON: No. I disagree because that is what
24 is implicit in a lot of the testimony that I heard
25 especially from individuals. So again, I don't know what

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1 weight I'm going to give it but I'm going to let him ask
2 questions on it.
3 BY MR. HARRIS:
4 Q Okay. So Observation Drive begins down in
5 Germantown I guess.
6 A I don't know where it begins.
7 Q Okay.
8 MS. ROBESON: Do you need to sit, Mr. Soltetz? If
9 there --
10 THE WITNESS: It depends how many more questions
11 he has.
12 BY MR. HARRIS:
13 Q Okay.
14 A I'm fine.
15 Q Let's take piece of Observation Drive between
16 Stringtown Road and 355, okay?
17 A Uh-huh.
18 Q Yes. From there. Okay. Part of that's on the
19 Miles Coppola property, part of it is not, is that correct?
20 A That is correct. Some of it is on school
21 property, yes.
22 Q Okay.
23 A Correct.
24 Q So let's deal first with even a subset. Are you
25 saying that the Peterson project will pay for 100 percent of

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1 the cost of Observation Drive on the Miles Coppola property?
2 A On the property which Miles Coppola has, it will
3 be, if Park and Planning and DOT require fringe road
4 improvements, the answer is yes and you know, Bob, that's
5 typically what they require. So the answer is yes.
6 Q Okay. And you would probably need it for traffic
7 capacity anyway and access, wouldn't you?
8 A I said I wasn't a traffic engineer so I can't
9 answer that.
10 Q You don't know whether you need it for access?
11 A Well, for access, break one to two, for access,
12 we've got several scenarios worked out. We can have it or
13 we can access off of another way which is off of Clarksburg
14 Road. Both work off.
15 Q This plan shows it accessing off of Observation
16 Drive, right?
17 A No, it doesn't.
18 Q The plan shows it could come out off of either
19 one. Bob, let me show -- here's Clarksburg.
20 A Isn't this Observation Drive?
21 Q Yeah. And here's Clarksburg.
22 A Isn't this an access road?
23 Q No. Bob, these are, these are pedestrian paths,
24 Bob.
25 A Okay.

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1 Q So it's not.
2 A All right. Then show me where the access would be
3 then to this pod of the Miles Coppola property.
4 Q It could be like this. It could be like this. It
5 could be anywhere.
6 A Okay.
7 Q Anytime you have --
8 A But the first like this was up Observation Drive,
9 right?
10 Q I'm sorry?
11 A The first option you said was like this and you
12 pointed from Clarksburg Road up Observation Drive.
13 Q You could come off of Clarksburg Road, which is
14 existing road frontage. You could come off future
15 Observation Drive. You can get access to the property
16 through a number of locations.
17 A Okay. So it's your position you don't need to
18 build Observation Drive even on your property to get access.
19 Q Do it with or without Observation Drive, correct.
20 A And you don't know whether Park and Planning is
21 going to make you pay for the road whether you need it for
22 access or not.
23 Q Typically, Park and Planning won't but whether the
24 county may, I don't know. It might be a proffer, may be in
25 the subdivision process, right?

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1 MS. ROBESON: No. You can't talk to the people in
2 the back.
3 UNIDENTIFIED SPEAKER: You don't ask me questions.
4 THE WITNESS: Oh.
5 UNIDENTIFIED SPEAKER: We're here to ask you
6 questions. You don't ask me questions.
7 BY MR. HARRIS:
8 Q So as I understand, you don't know whether you're
9 going to build or pay for Observation Drive on the Miles
10 Coppola property, is that correct?
11 A The Peterson companies have not filed a
12 preliminary plan of subdivision. They can in fact build the
13 road if in fact they need to build the road. And the answer
14 is we've done studies, Bob, because it is so important, Bob,
15 and I'm not the traffic engineer but I've been told by the
16 numerous meetings I've been with detractors and supporters
17 of the Miles Coppola, Tanger, Peterson project that the 355
18 Bypass known as Observation Drive is a very important
19 transportation element in Clarksburg. And with that, we've
20 looked at layouts, I've had meetings with Edgar, I've had
21 meetings with Park and Planning.
22 MS. ROBESON: Well, wait. What was your question?
23 BY MR. HARRIS:
24 Q My question was --
25 MR. HARRIS: Who's paying?

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1 BY MR. HARRIS:
2 Q -- whether they're going to pay, whether you know
3 whether they're going to pay for the portion of Observation
4 Drive --
5 MS. ROBESON: If you don't --
6 BY MR. HARRIS:
7 Q -- that fronts along the Peterson, the Miles
8 Coppola property.
9 A If it's a requirement for the project, they'll
10 have to pay for it. Subdivision plans have not been filed.
11 Obviously, construction plans have not been filed.
12 Obviously, it is a key element to moving forward just like
13 the sanitary sewer support to the historic area.
14 Q Okay. So if it's a --
15 A And if that is --
16 Q I'm sorry. Go ahead.
17 A May I finish? And if that is a requirement, we've
18 designed the road and we've met with Park and Planning and
19 with Edgar to make sure that we can get 355 Bypass,
20 Observation Drive constructed.
21 Q Okay. If it's not a requirement, the implication
22 I'm gaining is that you might not pay for it.
23 A I would guess right now, if I was a betting man --
24 MS. ROBESON: Well -- okay. Go ahead.
25 THE WITNESS: Peterson Companies will in fact

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1 build the road or part of the road or --
2 MS. ROBESON: But you don't know that for sure.
3 THE WITNESS: Yeah. I mean, if it's required, the
4 answer is they'll have to.
5 BY MR. HARRIS:
6 Q No. The question was if it's not required, what
7 will they do.
8 A I would assume they probably have to build it
9 because of the frontage accessibility. I think that's a key
10 element to the --
11 Q That's where I started. Thank you for finally
12 coming around to that. Now, let's deal with the part of
13 Observation Drive that is not along the Miles Coppola
14 property, the piece between Stringtown Road and Clarksburg
15 Road, 121.
16 A Uh-huh.
17 Q Are you planning to pay for that? Is Peterson
18 planning to pay for that?
19 A There actually are other options that we could use
20 Gateway Center Drive, and we've done studies. Again, it's
21 with Edgar.
22 MS. ROBESON: Wait. I don't know who Edgar is.
23 THE WITNESS: I'm sorry. Edgar Gonzales (phonetic
24 sp.). We all know him. He's, what's his official title,
25 Bob?

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1 BY MR. HARRIS:
2 Q I guess he's deputy director.
3 MS. ROBESON: Well --
4 THE WITNESS: Deputy director.
5 MS. ROBESON: -- of MDOT?
6 MR. HARRIS: MC.
7 MS. ROBESON: MCDOT.
8 UNIDENTIFIED SPEAKER: DOT of the county.
9 THE WITNESS: MCDOT.
10 MS. ROBESON: Okay. Yes.
11 THE WITNESS: To answer your question, okay, we've
12 done extensive studies and in the event that -- and there's
13 also an historic school there, got nothing to do with it,
14 okay? There was discussion previously with the civic groups
15 about moving that little school site. We've worked out
16 other, and other road alignments, Bob, that would take
17 Gateway Center Drive and basically make that connection
18 through to 355. So there are other options on the table
19 which would change the connection point from Observation
20 Center Drive to Gateway Center Drive, both of which were,
21 we've done grading studies, we passed those Department
22 Planning, we've done horizontal, vertical alignments. So
23 the answer is we can build, we can design an 355 Bypass
24 which is what people are screaming for, have been for 10
25 years, as part of the Tanger, Peterson project.

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1 BY MR. HARRIS:
2 Q Okay. Now, that's the piece between Stringtown
3 Road and 121 and the piece along the frontage. In both
4 cases, I've heard you say there are options you're studying
5 but nothing has been decided and the funding for it has not
6 been decided and probably wouldn't be until you know whether
7 you have to build it or not.
8 A I think what I stated was that those options are
9 being suggested by civic groups, supporters of the project
10 and that we can accommodate that connection. And see, Bob,
11 that's the important thing. It's not so much the location,
12 okay? 355 Bypass, the whole thing, Bob, is to get the
13 traffic from the north side of Clarksburg down to the
14 interchange, right? That's, that's the issue. How you get
15 there is somewhat immaterial to most of the people. We have
16 several options on the table that will allow the
17 construction of a road section that goes from the north side
18 of 355, bypasses this historic area and gets down to the
19 interchange.
20 MS. ROBESON: But okay. I --
21 THE WITNESS: All of which --
22 MS. ROBESON: I understand you have several
23 options, they may not be the master planned Observation
24 Drive, but you don't know who's going to pay for it,
25 correct? At this time, you cannot say for sure.

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1 THE WITNESS: I can tell you that it has been
2 suggested to Peterson, Tanger.
3 MS. ROBESON: No. Just answer my question. Do
4 you, you --
5 THE WITNESS: Yes.
6 MS. ROBESON: -- know for sure what the funding
7 is?
8 THE WITNESS: The funding? Okay. The funding, in
9 my opinion --
10 MS. ROBESON: No. Do you know for sure? You're a
11 fact witness.
12 THE WITNESS: Yes. There's no, there's no CIP
13 project. There are impact fees in Clarksburg for roads and
14 those roads, which is what Cabin Branch did --
15 MS. ROBESON: Yes what? Yes, they are going to
16 pay for it or no, they aren't going to pay for it?
17 THE WITNESS: My guess is they'll pay for a
18 significant part of it, either in the form of direct
19 contributions or the possibility of using the impact fees
20 which are required to pay for transportation. That's the
21 whole idea behind those transportation impact fees. So the
22 answer is that there's a strong -- my personal opinion,
23 because this --
24 MS. ROBESON: But you're here as a fact witness so
25 I can't get into your opinion.

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1 MR. CHEN: He's not asking the opinion on a
2 professional matter.
3 MS. ROBESON: Well, it's based on his experience
4 as an engineer in Montgomery County.
5 THE WITNESS: Yes. In that case, the answer is
6 they'll pay for it. But you just asked me --
7 MS. ROBESON: Okay. Just stop. Stop.
8 THE WITNESS: Okay.
9 BY MR. HARRIS:
10 Q I'll take an I don't know because I think that's
11 what you're effectively saying. You don't know which route
12 it will be and you don't know who will pay for it.
13 A Let me answer the question. There are several
14 routes, all of which work. The answer is it will be
15 constructed by a, several sources including a developer
16 contribution no doubt. Having 30 years in this county --
17 MS. ROBESON: Okay. That's --
18 THE WITNESS: -- looking to applicants --
19 MS. ROBESON: That's enough.
20 THE WITNESS: Okay.
21 BY MR. HARRIS:
22 Q Are you anticipating a contribution for that road
23 construction from the county funds?
24 A Define county funds.
25 MS. ROBESON: Okay.

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1 BY MR. HARRIS:
2 Q Money that comes out of the county budget. Are
3 you expecting the county to pay for part of that road
4 construction?
5 A I'm not counting on it, no.
6 Q And you're not asking them to pay for it?
7 A I'm not counting on it.
8 Q Are you asking them to pay for it?
9 A We haven't asked anybody for --
10 Q So you haven't asked the state whether they'll pay
11 for part of it, have you?
12 A It's not a state road, Bob. I doubt the state
13 would give any money.
14 Q Okay.
15 A Why would they?
16 Q Have you asked them?
17 A I would not ask the state for a contribution to
18 build a county road.
19 Q Okay. I understand. Have you asked them?
20 A No.
21 Q Okay. Have you asked the state for a contribution
22 for any of the infrastructure?
23 A No.
24 Q Have you asked the county for a contribution for
25 any of the infrastructure?

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1 A No.

2 Q Let's go to timing a minute. You observed that

3 you worked on the Cabin Branch project for a number of years

4 and certainly, we've worked together in many different

5 respects. Would you agree with me that many aspects of that

6 project --

7 MS. ROBESON: Just a --

8 MR. KLINE: No, no. That's okay. We'll let him

9 finish the question and then I'd like to say something.

10 MR. HARRIS: Okay.

11 MS. ROBESON: Okay.

12 BY MR. HARRIS:

13 Q Would you agree with me that many aspects of that

14 project, from site plans to infrastructure site plans to

15 water quality plans, have taken a considerable amount of

16 time to get approval?

17 A The development approval process takes a long

18 time.

19 Q Was the timing of those approvals at Cabin Branch

20 normal in your mind or did it take you longer to get those

21 approvals than normal?

22 A It was normal.

23 Q Normal. Okay. So if we took those same processes

24 and applied them to the Peterson project, we would assume

25 the normal time periods would apply.

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1 A Uh-huh. We hope.

2 Q Sure.

3 MR. HARRIS: Can you hear?

4 (Discussion off the record.)

5 BY MR. HARRIS:

6 Q So in terms of the process that the Peterson

7 project would have to go through, you already talked about

8 the master plan amendment.

9 A Uh-huh.

10 Q If I recall correctly, I'm seeing that the Council

11 is hoping to adopt a master plan amendment by January 2014.

12 Is that your understanding as well?

13 A Close, yes. I assume, yeah.

14 Q Okay.

15 A I don't disagree with that

16 Q And I think I saw that any sectional map amendment

17 that would come out of that they are anticipating adopting

18 by I think May of 2014.

19 A And I, their schedule is obviously up to them.

20 The master plan schedule I believe says that. It could be

21 earlier, it could be later but, yes. That's generally what

22 it says.

23 Q Okay. And then you have to get a water and sewer

24 category change approved, is that correct?

25 A Yes.

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1 Q And doesn't it take between six months and a year

2 to get a water sewer category change approved?

3 A No. I sent you a memo on this a couple days ago,

4 Bob. Matter of fact --

5 Q Normally. Normally.

6 A -- it might have gone out today.

7 Q Normally.

8 A The way we -- those applications have been filed

9 for about five years. Now, we have discussed with them and,

10 Bob, because you represent Pulte, I sent you an e-mail, I

11 think it went out yesterday or today, that said there's been

12 discussions among Pulte and Brookfield and Egan and Tanger

13 and Peterson that since this application had filed for five

14 years, the answer is there's a, there is a meeting set up --

15 is there any conflict here with anything?

16 Q No. You don't have to --

17 MS. ROBESON: Yes. I don't think --

18 THE WITNESS: The answer is --

19 BY MR. HARRIS:

20 Q I'm aware of the e-mail and I wasn't --

21 A Okay.

22 Q -- going to go there. I was --

23 MS. ROBESON: I think he

24 BY MR. HARRIS:

25 Q -- asking you just a normal time period.

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1 MS. ROBESON: I think he's just asking you in a

2 normal situation.

3 MR. HARRIS: Right.

4 MS. ROBESON: And not about this particular.

5 THE WITNESS: The desire would be to commence with

6 the actual formal application, which has been in hiatus for

7 five years, as in now so that the approval of the category

8 change, Bob, would come out more or less when the master

9 plan and the zoning is decided.

10 BY MR. HARRIS:

11 Q So it's my experience that, that category changes

12 can only approve, be approved once the zoning is in place.

13 Is that your experience as well?

14 A Approval, yes. Process, the request is going to

15 be that they start the processing. Since we, I guess, and

16 you'd be familiar with this because I am, because you're

17 working on the case, that because of the draft which is

18 coming out with the master plans and the recommendations,

19 that after waiting five years, that we start processing the

20 water and sewer category change and that's the request.

21 Q Okay. So --

22 A We've got a meeting set up on the 19th and you're

23 going to be there.

24 Q Let's assume the master plan gets adopted, we

25 don't know about that, let's assume it recommends the kind

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1 of zoning that you want there, we don't know that.
2 A Uh-huh.
3 Q That zoning would occur in May, approximately May
4 of 0214. So let's assume the water and sewer category
5 change is approved simultaneously because that's about the
6 quickest it could be.
7 A Uh-huh.
8 Q Would you agree with me?
9 A Yeah. Somewhere in that vicinity would be
10 advantageous, yeah.
11 Q Okay.
12 A It would be probably good if, I'm sure the Council
13 would like to see everything voted on at the same time.
14 Q Okay.
15 A Fewer votes are better than more.
16 Q Now, you have to have a natural resource inventory
17 and forest stand delineation approved before you can even
18 file applications.
19 A Uh-huh.
20 Q I think you mentioned earlier that you worked on
21 one but you hadn't processed it.
22 A I --
23 MR. KLINE: Objection. It just seems to me we're
24 getting down to who's going to get there first.
25 MS. ROBESON: Well, he did testify to that.

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1 THE WITNESS: I, I think I said we've done a lot
2 of studies on the property. I don't know sitting here today
3 but I could surely find out and let you know whether it's
4 been filed or approved, not but I know that we've done
5 extensive environmental studies for a year so.
6 BY MR. HARRIS:
7 Q Okay. You don't have any approval information
8 with you today.
9 A No.
10 Q Okay. So let's move on then. The water quality
11 plan.
12 A Uh-huh.
13 Q You're going to have to get a water quality plan
14 approved, is that correct?
15 A Yeah. It's part of the process.
16 Q And the normal time that occurred at Cabin Branch,
17 didn't that take about two years to get that water quality
18 plan approved?
19 A I don't know what it took at Cabin Branch.
20 MS. ROBESON: Well, you can introduce, if you want
21 to talk about Cabin Branch, you can do that through --
22 MR. HARRIS: Okay.
23 MS. ROBESON: -- another witness.
24 BY MR. HARRIS:
25 Q Doesn't a normal water quality plan take about two

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1 years to get approved?
2 A I don't -- well, I've seen them done shorter and
3 I've seen them done longer, Bob. It just depends. Now, in
4 this particular case, which I think you're sort of hinting
5 around, is how long it's going to take for Miles Coppola.
6 The fact is that we've been engaged for over a year in water
7 quality plan engineering in such that we have tantamount
8 done the work for the water quality plan right now. And as
9 you know, because you've sat through the hearings with me,
10 we've met with Park and Planning numerous times, we've even
11 met with Rick Brush's office and so lots and lots of those
12 issues have been flushed out as you're aware.
13 MS. ROBESON: And Rick Brush is with --
14 THE WITNESS: I'm sorry. Rick Brush is with --
15 MS. ROBESON: -- environmental --
16 THE WITNESS: Yeah.
17 MS. ROBESON: Yes.
18 THE WITNESS: He's with water --
19 MS. ROBESON: I'm getting my county acronyms mixed
20 up. Here it's DEP?
21 THE WITNESS: Yeah. He's with DPS Watershed but
22 he actually got promoted so but that --
23 BY MR. HARRIS:
24 Q But you haven't filed a preliminary water quality
25 plan and therefore, whatever work you've done, it still

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1 needs to go through the approval process. Even if it were
2 ready to file today --
3 A Uh-huh.
4 Q -- it would still have to go through the approval
5 process.
6 A Sure. It has to be filed.
7 Q And that approval process is a minimum of a year,
8 isn't it?
9 A I didn't say that
10 Q Well, what is the minimum amount of time?
11 A I don't know.
12 Q You don't know.
13 A I don't know what the minimum time is and I don't
14 know what the typical processing time would be.
15 Q Doesn't Soltesz do water quality plans regularly?
16 A Absolutely.
17 Q And you don't know how long it takes your firm to
18 do them?
19 A It depends on the site and depends on the --
20 Q Take an easy site. 100,000 square foot shopping
21 center on a flat piece of ground not in a special protection
22 area.
23 A Six, nine months maybe.
24 Q Six to nine months. That's an easy one. Okay.
25 And a hard one could be twice that or more. Okay. Yes?

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1 Was that -- a hard one could be twice that or more.
2 A Depends on the project, yes. I mean, they can go
3 anywhere from six months to two years using yours.
4 Q Okay.
5 MS. ROBESON: Okay. Mr. Harris, how many more
6 questions do you have down this avenue?
7 MR. HARRIS: About five.
8 MS. ROBESON: Okay.
9 MR. KLINE: Might I suggest one question, when are
10 you going to break ground on the property. That's what the
11 whole thing is leading up to.
12 MR. HARRIS: It's --
13 MR. KLINE: Why don't we just cut through the
14 chase to that?
15 MR. HARRIS: Well, I know --
16 MS. ROBESON: Well, you --
17 MR. HARRIS: -- what they'd say.
18 MS. ROBESON: -- can ask that on redirect.
19 MR. HARRIS: No. I'd rather go my way. Thank
20 you, Mr. Kline.
21 BY MR. HARRIS:
22 Q So you can't file a preliminary plan of
23 subdivision until you have a preliminary water quality plan
24 submitted.
25 A Uh-huh.

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1 Q Okay. So how long does a preliminary plan
2 normally take?
3 A To go through? Maybe, maybe six months, maybe
4 nine months, maybe twelve months.
5 Q Six to twelve months for a preliminary plan
6 normally.
7 A Uh-huh.
8 Q Okay. And you would also have to go through the
9 site plan process here, is that correct?
10 A Uh-huh.
11 Q So how long does the site plan normally take?
12 A It depends --
13 MR. KLINE: Objection because that would, that
14 would assume, I'm sorry, that would assume a -- we don't
15 know the zone in which the property is going to be developed
16 so we don't know whether it has a site plan requirement.
17 THE WITNESS: The question becomes again --
18 MR. KLINE: Just let the Hearing Examiner rule.
19 MS. ROBESON: Assuming there's a site plan
20 requirement, how long would that take?
21 THE WITNESS: The question is can you run it
22 concurrently with the preliminary plan or subdivision so,
23 you know, if you can run them concurrently --
24 BY MR. HARRIS:
25 Q So maybe that's a simultaneous six to twelve

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1 months if you run it simultaneously. If you're not, or you
2 don't, it would be an additional six to twelve months, is
3 that right?
4 A Yeah. If you can run them, run them concurrently,
5 then you can get through that process.
6 Q Okay. And then record plat, you can't build until
7 you have a record plat, is that correct?
8 A Uh-huh.
9 Q Record plat normally takes about four months I
10 think.
11 A That's about right.
12 Q Okay. And you don't have the water and sewer
13 lines approved by WSSC at this time, do you?
14 A The construction plans are not approved.
15 Q Okay. So how long does it take to get water and
16 sewer construction plans approved by WSSC?
17 A Which that would all be part of the final
18 engineering package and really, the question becomes when
19 could you start grading the site, and you don't need the
20 final engineering utility plans for that.
21 Q Okay. The road that might, you may or may not
22 need for access, Observation Drive, you've done designs for
23 it but there are no engineering plans for it at this point
24 in time, are there?
25 A For that road?

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1 Q For that road.
2 A What road?
3 Q Observation Drive.
4 A No. Today, construction plans don't exist.
5 Q So it takes about a year to do construction plans,
6 doesn't it?
7 A Um, construction plans take a year if you need the
8 access or you don't need the access. You may need the road.
9 You may need the road for access, you may not need the road
10 for access. We've actually looked at it without having to
11 have that road in place.
12 Q Okay.
13 A As a temporary issue.
14 Q And the road would take at least a year to build I
15 would assume because it's got a bridge, doesn't it?
16 A No. It's got culverts.
17 Q A culvert. Okay. I would estimate it to take
18 about a year to build.
19 A I am not going to venture a guess in how long it
20 would take.
21 Q Okay.
22 MS. ROBESON: Okay. I think you're getting to
23 your five.
24 MR. HARRIS: Okay. I'm getting to the point.
25 BY MR. HARRIS:

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1 Q The point is, Mr. Soltesz, would you agree with me
2 that when the Peterson Company told the community two weeks
3 ago that they would begin construction of this project in
4 summer of 2014, that's an impossibility?
5 A Ask them.
6 Q Well, is that possible?
7 A If they started to grade out the site, they
8 couldn't grade the site until they have an approved site
9 plan.
10 Q Correct. Which is at least a year off.
11 A Well, probably could be --
12 Q And --
13 A It probably could start grading the site in the
14 fall I guess if they file -- if they file the preliminary
15 detailed site plan, a grading permit in the spring and get
16 it processed because the zoning issues and land use are done
17 then, you know, probably toward the end of '14.
18 Q You won't even have zoning until May if all goes
19 right.
20 A Well, you know, there's been, there's been --
21 Q You're going to start grading it before you have
22 zoning?
23 A No. I said if in fact you started to file,
24 simultaneously, a preliminary plan and a grading site plan,
25 maybe you could start grading the site toward the end of '14

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1 but not in the summer, Bob.
2 Q Okay. We'll compare these time lines with what it
3 took at Cabin Branch that you said was a normal prop period.
4 A No. I did --
5 MS. ROBESON: Well --
6 MR. HARRIS: But we'll do that separately.
7 MS. ROBESON: Okay.
8 MR. HARRIS: That's our witness.
9 MS. ROBESON: Okay.
10 THE WITNESS: I did not say --
11 MR. HARRIS: No, no, no. Not this witness.
12 MS. ROBESON: Okay.
13 THE WITNESS: I did not say it was normal.
14 BY MR. HARRIS:
15 Q You did say Cabin Branch was normal.
16 A I said, you know, Cabin Branch also I believe but,
17 you know, look, Mike Connelly is back there, ask him. I
18 think the project, because of the recession, didn't proceed
19 quickly but I'm not going to make a statement as to what is
20 normal in Cabin Branch. I went through what I thought was
21 the development schedule and that's it, and so I said
22 breaking ground at the end of '14 would be reasonable.
23 Aggressive and reasonable.
24 MS. ROBESON: All right.
25 THE WITNESS: Is that it?

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1 MR. HARRIS: One second. Excuse me, please.
2 (Discussion off the record.)
3 MR. HARRIS: Oh, there is something else.
4 BY MR. HARRIS:
5 Q Initially in your testimony, you said that the
6 draft of the sector plan amendment provided Peterson what
7 they wanted to be able to go forward and then --
8 A Uh-huh.
9 Q Then Mr. Kline appropriately asked you a question
10 weren't there two options in the master plan.
11 A Uh-huh.
12 Q And then you admitted that there were two options,
13 right?
14 A Two, yes. There's two, right.
15 Q And one of those would not allow the project to go
16 forward, is that correct?
17 A I never said that. One of them would allow the
18 Tanger Outlet Center to be built. The other one was heavy
19 residential with less retail. I think I said that, Bob.
20 Q Okay. So the second one, the heavy residential
21 with less retail, would not support the Tanger project.
22 A No. I don't think. No.
23 Q You don't think so?
24 A No. I don't believe so. I mean, let me see it.
25 One was heavy residential. Option 2, mixed-use with a

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1 residential focus and offering additional households, et
2 cetera, floating zone of broad mix of housing types, up to
3 25 percent nonresidential which would be 25 acres and I
4 think, I don't think Tanger fits on 25 acres.
5 Q That's what I believe as well. And so if that
6 option is addressed, we don't even get to that time table
7 that I was talking about a moment ago. The Tanger project
8 is dead, is that correct?
9 A Your question is?
10 Q If the county adopts option 2 that's here --
11 A Right.
12 Q -- the Tanger project cannot proceed.
13 A If the county adopts option 2, the land uses that
14 fit with an option 2 are pursuable, and I cannot sit here
15 and tell you whether a Tanger outlet fits or doesn't fit in
16 some sort of structured device. I don't know. Obviously,
17 the first one, Bob, you know this, is the one that's more
18 slated toward a heavier retail use.
19 Q What acreage is the Tanger project proposing to
20 use today?
21 A I don't know what the square, exact square footage
22 is.
23 Q Approximately.
24 A I don't know. Call it 30 acres.
25 Q Thirty acres. Okay.

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1 A I think it's the same on, on the Simon piece
2 right?
3 Q I don't know what that acreage is.
4 MS. ROBESON: I couldn't hear what you said.
5 THE WITNESS: I said it's probably the same
6 acreage on the, on the Simon piece. Gary may know. I don't
7 know.
8 MS. ROBESON: Okay. You can't ask questions and
9 Gary, whoever he is --
10 THE WITNESS: Whatever that is.
11 MS. ROBESON: -- isn't on the stand so.
12 BY MR. HARRIS:
13 Q Under the second option, aren't they calling for a
14 townhouse floating zone? Isn't that what it says in that
15 paragraph?
16 A Yeah. Townhouse floating zone.
17 Q Townhouse floating zone. Townhouse floating zone
18 does not allow outlet retail, does it?
19 A I don't know. I doubt it.
20 Q Okay.
21 MR. HARRIS: I think that's it.
22 MS. ROBESON: I think that's --
23 THE WITNESS: What about Steve? He hasn't --
24 MR. HARRIS: No, no, no.
25 MR. ROBINS: We don't want that.

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1 MS. ROBESON: No.
2 MR. HARRIS: They double-teamed but we haven't.
3 MS. ROBESON: No. Okay. Redirect, Mr. Kline.
4 MR. KLINE: I think in light of Mr. Harris'
5 questions, I think I can do it now with one question.
6 REDIRECT EXAMINATION
7 BY MR. KLINE:
8 Q Peterson and Tanger do not expect to develop the
9 property in accordance with the MXPDP Zone, correct?
10 A That's correct.
11 MS. ROBESON: Wait.
12 THE WITNESS: That --
13 MS. ROBESON: I couldn't -- for some reason, I
14 can't, I'm having trouble hearing.
15 BY MR. KLINE:
16 Q My question was Peterson and Tanger do not
17 anticipate that they will develop the property, the Miles
18 Coppola property under the MXPDP Zone, is that correct?
19 A That's correct. I mean they, which is part of the
20 reason that a master plan process was undertaken, as you
21 guys all know, was to address environmental issues and land
22 use issues. And if in fact --
23 MS. ROBESON: Well, I don't know.
24 THE WITNESS: Well, that was in the order or
25 recommendation or proposal.

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1 MS. ROBESON: For the Ten Mile Creek plan.
2 THE WITNESS: For the master plan.
3 MS. ROBESON: Wait. Which master plan, the
4 Clarksburg one or the Ten Mile Creek amendment?
5 THE WITNESS: Well, the Clarksburg Ten Mile Creek
6 Master Plan Amendment.
7 MS. ROBESON: Okay.
8 THE WITNESS: Ten Mile Creek Master Plan Amendment
9 which is underway and should be wrapped at the end of the
10 year.
11 MS. ROBESON: So that includes not just
12 environmental but land use recommendations.
13 THE WITNESS: Correct. That's absolutely. Mr.
14 Harris read the land use recommendations and, Madam Hearing
15 Examiner, those options are there as part of the proposed
16 draft sent out, is it public hearing? I always get that
17 confused.
18 MR. HARRIS: Public hearing.
19 THE WITNESS: For public hearing.
20 MS. ROBESON: Okay. Mr. Kline, any other
21 questions?
22 MR. KLINE: No further questions.
23 MS. ROBESON: Mr. Chen, any questions?
24 MR. CHEN: No, ma'am.
25 RE-CROSS-EXAMINATION

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1 BY MR. HARRIS:
2 Q If not the MXPDP Zone --
3 MS. ROBESON: Okay. Go ahead.
4 BY MR. HARRIS:
5 Q -- what zone are you anticipating?
6 A What's in the report?
7 Q It doesn't recommend --
8 MS. ROBESON: No, no. Just --
9 BY MR. HARRIS:
10 Q Do you know?
11 MS. ROBESON: If you know, you say, answer the
12 question. If you don't know, just say you don't know.
13 THE WITNESS: I would, I don't know. I'd ask Mr.
14 Harris to refer to the draft.
15 MS. ROBESON: Okay.
16 BY MR. HARRIS:
17 Q If it's the CR Zone, would you agree with me that
18 the CR Zone requires a sketch plan in addition to those
19 various development approvals about which we were speaking
20 before?
21 A I think, Bob. It depends whether they're optional
22 or not, right?
23 MS. ROBESON: No, no.
24 MR. HARRIS: Okay.
25 MS. ROBESON: Just say what you know. Don't ask

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1 him.
2 BY MR. HARRIS:
3 Q Do you know?
4 A Sometimes it is, sometimes it isn't.
5 Q Okay.
6 MS. ROBESON: Okay.
7 MR. HARRIS: That's fine. No further questions.
8 MS. ROBESON: Okay. All right. All right, Mr.
9 Soltesz. We thank you for holding up.
10 THE WITNESS: I want to thank you and I appreciate
11 being able to give Mr. Harris a tutorial on sanitary sewer.
12 MS. ROBESON: He's not going to --
13 MR. HARRIS: And Stringtown Road. Or --
14 THE WITNESS: At 355 Bypass.
15 MS. ROBESON: Okay. You may be excused. And now,
16 Mr. Chen, we -- let's take a five minute break and then Mr.
17 Chen can continue with the cross-examination of Mr.
18 Unterberg.
19 MR. CHEN: I haven't even started yet.
20 MS. ROBESON: Well, what do you guys what to --
21 MR. HARRIS: I do.
22 MS. ROBESON: I would like to make use of every
23 minute we have.
24 MR. CHEN: When do you plan on going?
25 MS. ROBESON: I'm planning on going, Kathy, I'm

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1 planning on going to 5:15, so that will give you 45 minutes.
2 So we'll take a five minute break.
3 (Whereupon, at 4:31 p.m., a brief recess was
4 taken.)
5 MR. HARRIS: While we're waiting to convene here,
6 have we identified the 13th as a date if we need it?
7 MS. ROBESON: I talked --
8 MR. HARRIS: Oh, you said you couldn't.
9 MS. ROBESON: I think, I think our, that was not
10 -- our administrative assistant had put it on hold and put
11 it on the calendar but it wasn't a date that we had
12 discussed so I'm not going to do it now but at the next
13 hearing --
14 MR. CHEN: We may finish it Friday.
15 MR. HARRIS: Okay.
16 MR. CHEN: I mean, we may finish Friday.
17 MR. KLINE: What day are we talking about?
18 MR. HARRIS: The 13th is uncertain whether we even
19 have that.
20 MR. CHEN: I've got depositions on --
21 MR. HARRIS: He's -- yeah.
22 MS. ROBESON: We had it reserved but it's not --
23 MR. HARRIS: Oh.
24 MS. ROBESON: Somehow it got on our calendar, but
25 it wasn't formalized.

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1 MR. HARRIS: If we needed another date beyond the
2 6th, do you have a feel for whether it's the 13th, 14th,
3 15th, whatever? Do you have a feel for approximate point in
4 time?
5 MS. ROBESON: That I can't tell you because we
6 have Costco. What we have in September is Tuesday and
7 Thursdays but so many people have conflicts with the Council
8 or the Planning Board on those days that it's difficult to
9 schedule something, so I have to check the availability of
10 this room, all right? And I can check it for September but
11 I can't tell you at the moment.
12 MR. HARRIS: The 13th is a Friday. So are you
13 saying that we might have either the 10th or the 12th if we
14 could agree on that?
15 MR. ROBINS: You're going to have a problem on the
16 12th with Gary.
17 MR. HARRIS: Oh, okay.
18 MR. CHEN: I'm in --
19 MS. ROBESON: Let's go with Mr. Chen's schedule.
20 MR. HARRIS: Yes.
21 MS. ROBESON: Let's hear what date -- give us a
22 date that you would be available.
23 MR. ROBINS: I don't want to know what Mr. Chen's
24 schedule is.
25 MR. HARRIS: What's your first available date?

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1 MR. CHEN: It's October.
2 MR. HARRIS: Yes.
3 MR. CHEN: I am literally, every day I'm in
4 depositions. I have been in depositions for about three
5 weeks almost every day. I've got one Friday but I'm out of
6 town that Friday. I got tickets in New York for a Yankee
7 game so I'm going. I'm not here. But other than that, I've
8 got depositions.
9 MS. ROBESON: Well, wait. I'm not a Yankee fan so
10 -- no. Go ahead. Give us --
11 MR. ROBINS: Yes. What day is that?
12 MS. ROBESON: Give us your first available date.
13 MR. CHEN: Probably October 4th. I can try, maybe
14 the 3rd but they're talking about depositions on the 3rd. I
15 mean, you can see my schedule.
16 MR. HARRIS: You have a deposition on every one of
17 22 deposition days?
18 MR. CHEN: Yes. Take a look. Please, take a --
19 some days are two.
20 MR. HARRIS: I don't know what that scribble is
21 but I find it hard to believe anybody has 22 days of
22 deposition in the next month.
23 MR. CHEN: I've been in depositions for like three
24 weeks.
25 MR. HARRIS: Other than you.

1 MR. CHEN: Thank you. I have a witness.
 2 MR. HARRIS: Oh.
 3 MR. CHEN: I'm not exaggerating.
 4 MR. ROBINS: Any chance any of them can be moved
 5 because even I don't want to --
 6 MR. CHEN: We're fighting it, we're fighting as it
 7 is. In fact, I've been looking at my thing because we're
 8 going back and forth fighting over deposition dates already,
 9 but literally, every day. Every day. Starting with,
 10 including the 13th, the 9th, I mean.
 11 MS. ROBESON: Saturday?
 12 MR. CHEN: I --
 13 MS. ROBESON: No. No.
 14 MR. KLINE: Somebody needs to check the
 15 stenographer on that one.
 16 MR. HARRIS: I'm okay.
 17 MR. ROBINS: If you're serious about that, we're
 18 okay with that.
 19 MR. HARRIS: I'll do --
 20 MR. CHEN: Wait a minute. I mean, I'm out of town
 21 the weekend of the 20th. I'm going. I do weekends. I
 22 work. I'm in most Saturdays and Sundays anyway.
 23 MS. ROBESON: Well, I would have to coordinate
 24 with, I have to coordinate with security and the powers that
 25 be to get us in on a weekend but I would like to wrap it up

1 before October 3rd for sure.
 2 MR. HARRIS: Well, let's try to finish on the 6th.
 3 I will commit to trying to limit my cross-examination and I
 4 would invite my colleagues at the table here to do the same.
 5 MR. CHEN: We might be able to. We might be able
 6 to.
 7 MS. ROBESON: Well, I guess I'll have to talk to
 8 Deposition Services and see are you willing to go late, to
 9 see, on the 6th to see if we can finish it but I do find
 10 that once you get past like 6:00, things get very hazy, or
 11 at least for me.
 12 THE COURT REPORTER: I'm with you on the 6th and
 13 it's fine.
 14 MR. ROBINS: You can go late?
 15 THE COURT REPORTER: That's this Friday, right?
 16 Is that what you're talking about?
 17 MS. ROBESON: Yes.
 18 THE COURT REPORTER: It's fine.
 19 MS. ROBESON: Let me think about if there are any
 20 other options --
 21 MR. HARRIS: Okay.
 22 MS. ROBESON: -- we could get. The other option
 23 would be to start earlier on the 6th but I don't know if I
 24 can do that.
 25 MR. HARRIS: That too would be okay with us.

1 MS. ROBESON: Kathy, how are you about starting
 2 earlier?
 3 THE COURT REPORTER: That's fine. Whatever you
 4 decide.
 5 MR. HARRIS: Yes. I think our preference would be
 6 if we're going to do the 6th, if you would be willing to go
 7 late.
 8 MR. ROBINS: I will tell you I did send out an e-
 9 mail about an hour ago asking if I had any problems with the
 10 12th.
 11 MS. ROBESON: I think the reason, now that I think
 12 of it, the reason we start at 9:30 is there's no parking for
 13 witnesses until the juror lot opens up a lot of times.
 14 MR. HARRIS: Oh, no. There's lots. Plenty open
 15 early. The lot here? The gate isn't even there. I mean,
 16 you can just drive in easily.
 17 MR. CHEN: And if I may?
 18 MS. ROBESON: Yes.
 19 MR. CHEN: I also got an e-mail that somebody said
 20 that they couldn't do depositions that were scheduled for
 21 the 10th so, and I'll know like by Friday.
 22 MS. ROBESON: Okay. I will --
 23 MR. CHEN: About the 10th and the 12th.
 24 MR. HARRIS: Let's do this.
 25 MR. ROBINS: Can I just say the 12th? I know that

1 Mr. Unterberg and I both are out but more importantly, he's
 2 out on the 12th for several cases before the Planning Board.
 3 MR. HARRIS: On the 12th or the 10th?
 4 MR. ROBINS: The 12th.
 5 MS. ROBESON: I'm sorry. Mr. Chen, which dates
 6 did you have?
 7 MR. HARRIS: He said maybe the 10th.
 8 MR. CHEN: I've sent out, about an hour ago, an e-
 9 mail to see if I could be available on the, because I was
 10 anticipating going on the 12th. That's not --
 11 MR. ROBINS: The 12th could still possibly work
 12 because he may, he may be done.
 13 MS. ROBESON: Well, that's what I was hoping
 14 because we're going to finish him on matter what on Friday,
 15 or he'll be finished, one of the two.
 16 MR. CHEN: And if the 12th works out, we're going
 17 to finish my expert on the 6th also because he just told me
 18 he's not here on, he's not available on the 12th so I'll --
 19 MS. ROBESON: Okay.
 20 MR. CHEN: I'll know within 24 hours. I'll know
 21 tomorrow.
 22 MS. ROBESON: Okay. Let's do this --
 23 MR. CHEN: But I can also, I'm also trying to find
 24 out about, looks like somebody had a problem. We had
 25 something for Tuesday but that may shake loose too so.

1 MS. ROBESON: Okay. Then what we'll do, let's
2 reconvene at 8:30 on Friday.
3 MR. HARRIS: Right.
4 MS. ROBESON: I have to give myself some time to
5 get here from Columbia because I never know, and if, I'll
6 set it for 8:30 and it will be as soon as I can get here
7 through Norbeck Road. Now, it's 10 until 5:00. Mr. Chen,
8 do you want to spend 20 minutes in cross-examination?
9 MR. CHEN: Not really.
10 MS. ROBESON: Okay. I think at this point, we
11 will just, I think we're going to need another day just
12 because of the juggling. If -- I can do it two ways. If we
13 -- I'll try, if we can't, if you can confirm the possibility
14 of the 12th or the 10th. If not, Kathy, if you can come
15 prepared, we'll try to go as late as we can stand it on the
16 6th. I don't, I don't want to put Mr. Harris off until
17 October 4th.
18 MR. KLINE: That I don't disagree with.
19 MR. HARRIS: I'm cautiously optimistic. If we
20 start early and commit to staying late if necessary, that we
21 will finish on the 6th. I think --
22 MS. ROBESON: Well, I'm not that optimistic but we
23 will --
24 MR. CHEN: Hey, look. This is a nice interruption
25 from what I've been going through. She'll confirm that so.

1 MS. ROBESON: No. I don't doubt that your
2 schedule is, is difficult at the moment so because it's 7
3 until 5:00, what I'm going to do is continue this case until
4 Friday, September 6th at 8:30 in this room.
5 MR. HARRIS: Okay. 74.
6 MS. ROBESON: I better make it 8:45 because I
7 can't even get the files up, I can't even get the files up
8 here until 8:45.
9 MR. HARRIS: Oh, because staff doesn't come until
10 8:30.
11 MS. ROBESON: Okay?
12 MR. CHEN: 8:45.
13 MS. ROBESON: Yes.
14 MR. KLINE: Can I get a note from you to my wife
15 explaining why I'm not going to be home to take her to
16 Columbia for dinner that night? I don't -- I'd start at
17 7:00 in the morning. I just don't -- beyond 5:00 on Friday
18 just for what I --
19 MS. ROBESON: It's hard for you?
20 MR. KLINE: That Friday.
21 MS. ROBESON: I just, I can't guarantee. If I
22 could describe the traffic to you, I would but I can't -- I
23 have started an hour-and-a-half early and I get here the
24 same time.
25 MR. KLINE: Mr. Harris would want to cross-examine

1 me on it anyway.
2 MR. HARRIS: Final bid. We're here. Let's go a
3 half an hour.
4 MS. ROBESON: Today?
5 MR. HARRIS: Today.
6 MS. ROBESON: Yes. We'll go -- Mr. Chen --
7 MR. CHEN: I'll do it.
8 MS. ROBESON: Okay.
9 MR. HARRIS: Thank you.
10 MS. ROBESON: Let's go. Okay. So I take it back.
11 We're not adjourning. Do I get take-backs?
12 MR. HARRIS: Do you get, no. I just want to point
13 out a number of people from the Gosnell SMTM people were
14 here today, Adventist Healthcare, Winchester and Toll
15 Brothers. All of the other property owners have been here
16 to show their support. They're leaving now. I gave them
17 dispensation.
18 MS. ROBESON: Okay. I don't blame you but --
19 MR. CHEN: I think that's very inappropriate.
20 MS. ROBESON: Okay. You know what? Judge Cathell
21 (phonetic sp.) once said to me don't ever try to argue that
22 standing up, you know, doing a show of hands was fault in
23 the decision so I'm going to accept it and I'll note your
24 objection. Okay. Because Judge Cathell yells at you. All
25 right, Mr. Chen. Thank you. 5:30 we'll go to. And then I

1 really do have to ask you to clear this room as soon as
2 possible. All right. Let's not interrupt him. He's
3 getting a date.
4 MR. CHEN: Let me try. Okay. Are we ready to
5 start?
6 MS. ROBESON: I'm sorry?
7 MR. CHEN: I just want to know if we're ready to
8 start.
9 MS. ROBESON: Yes.
10 MR. CHEN: Okay.
11 CROSS-EXAMINATION BY MR. CHEN
12 BY MR. CHEN:
13 Q Mr. Unterberg, just for clarification, you went
14 through a series of other applications and DPAs that you're
15 familiar with and you researched and you participated in.
16 Are you aware of any other development plan amendment, and
17 at this point, I'll take for any zone for this question,
18 where the master plan set a numeric level for retail that
19 the DPA sought four times the master plan's numeric retail?
20 A The -- besides the one we have researched?
21 Q I just want you to give me, at this point, any DPA
22 where the master plan calls for one level and in the master
23 plan it said a numerical level for retail, retail, and the
24 DPA sought and was approved for four times the retail that
25 was provided for in the master plan. And I'm using the word

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1 retail.
2 A The one, the one we already talked about, the
3 Washingtonian, it had zero in the master plan and it was
4 approved for 400,000 square feet of retail.
5 Q That was commercial, wasn't it, sir? I'm talking
6 about retail.
7 A I believe it was approved for retail.
8 Q No. That's not the question. I want where the
9 master plan called for retail. Those words. R-E-T-A-I-L.
10 A Well, in that case, the master plan did not call
11 for retail but offhand, other cases, no.
12 Q Okay. So that at least we do know one thing, that
13 this is the first time that there's a DPA that recommends
14 four times the retail provided for in the master plan.
15 MR. HARRIS: Objection.
16 MR. CHEN: He just went through a whole series of
17 applications.
18 MR. HARRIS: You asked him whether he was aware of
19 any, and then you jumped to the fact that we now know that
20 there --
21 MS. ROBESON: Where's the question?
22 MR. HARRIS: -- never have been any.
23 MS. ROBESON: Where's the question, Mr. Chen?
24 MR. CHEN: Well, he's answered the question. I
25 was about to go to another question and Mr. Harris jumped

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1 in.
2 MS. ROBESON: Okay. Why don't you go to the next
3 question.
4 MR. CHEN: Okay.
5 BY MR. CHEN:
6 Q So that now we know, sir, that through your
7 research and your experience, we do not, the Examiner does
8 not have before her any other case in this county, and I
9 didn't care about the base zone, any other case where the
10 retail called for a numeric level, excuse me, the master
11 plan called for a numeric level of retail where what was
12 approved was four times the amount, the numeric amount in
13 the master plan. Isn't that correct?
14 A Other than the cases we spoke to already, I'm not
15 aware of any. Not that there aren't any others out there.
16 Q But none of those cases, sir, and this was the
17 question, none of those cases had a master plan that used
18 the word retail, isn't that right?
19 A Again, the Washingtonian did not use the word
20 retail.
21 Q That's right. The master plan used a different
22 word. It used the word commercial, isn't that right?
23 A There was no, there was no number for retail in
24 the master plan for the Washingtonian.
25 Q Okay. But the question is the word retail.

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1 MS. ROBESON: I think he's already answered --
2 MR. CHEN: Okay.
3 MS. ROBESON: -- that it didn't mention retail.
4 MR. CHEN: I know he didn't want to answer, yes,
5 you're right. I understand that.
6 BY MR. CHEN:
7 Q Mr. Unterberg, is that your master plan there?
8 Go, if you would, sir, we've heard so much talk about what
9 is recommended in the RMX-1 Zone. First of all, as I
10 understand it, if you go to page 96, figure 37. Do you have
11 it?
12 A Okay. I'm on page 96.
13 Q Okay. What's the title of that figure?
14 A Existing zoning (as of 1993).
15 Q And do you see the subject property in that
16 figure?
17 A Yes.
18 Q Now, what is the existing zoning on this, on the
19 property in 1993?
20 A R-200.
21 Q Okay. So that, am I correct in understanding from
22 this figure that at the time the master plan for Clarksburg
23 Master Plan and Hyattsville Special Study Area was approved
24 and adopted, that the then existing zoning on the subject
25 property was R-200?

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1 A As of 1993, yes.
2 Q Okay. And as of the time of the adoption of the
3 Clarksburg Master Plan. That was in June of 1994.
4 A I believe so. And then there is the sectional map
5 amendment that updated the zone.
6 Q I'm, I'll come to that, sir, but I just wanted to
7 establish some baseline information. As of the date of or
8 the time of the approval and the adoption of the Clarksburg
9 Master Plan in June of 1994, the existing zoning on this
10 property was R-200.
11 MR. HARRIS: I think he answered that yes.
12 BY MR. CHEN:
13 Q Okay. Now, the master plan does recommend zoning
14 changes on the property, is that right, sir?
15 A Yes.
16 Q Okay. If we go to page 105, do you see at the top
17 under the section number 4, Cabin Branch neighborhood? Do
18 you see that, sir?
19 A Yes, I do.
20 Q Okay. And that section of the master plan
21 provides for the land, the key land use recommendations and
22 the key zoning recommendations, is that correct, sir?
23 A Yes, it does.
24 Q Okay. Could you read to the Examiner the key land
25 use recommendations for the Cabin Branch neighborhood?

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1 A There's three bullets under the key land use
2 recommendations. Encourage a variety of housing types; to
3 create mixed-use neighborhood center; to encourage an
4 employment pattern which is supportive of I-270 as a high-
5 technology corridor.
6 Q Okay. By the way, just as an aside, there's no
7 recommendation for specialty retail, is that right?
8 A That's correct.
9 Q Okay. Now, could you please identify the key
10 zoning recommendations?
11 A There's two bullets. Designate areas recommended
12 for residential and retail uses as RMX-1 in mixed-use zone.
13 And the second bullet is recommends the MXPDP Zone if areas
14 planned and designed in a comprehensive fashion.
15 Q As I understand it then, the master plan
16 recommended that property be rezoned to RMX-1, is that
17 correct?
18 A That's what it says.
19 Q And that zoning classification was not on the
20 subject property prior to the adoption and approval of the
21 master plan, isn't that right?
22 A That I think is also correct.
23 Q Okay. And as I understand, I think your
24 testimony, what you're about to say, there came a time when
25 the property was reclassified to the RMX-1 Zone, is that

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1 right?
2 A There was a time and whether or not it was RMX or
3 RMX-1, I would need to check the, what's written here versus
4 what I recall that's on the zoning map which is, was
5 previously stated.
6 Q You have not offered any evidence as to what was
7 the zoning classification for this property at the time it
8 was rezoned to the MXPDP Zone.
9 A Can, can you restate that?
10 Q Yes. What was the zoning classification for the
11 subject property prior to the time that it was rezoned to
12 the MXPDP Zone?
13 A I believe it is two zones. One was the RMX/TDR
14 and the other was I-3. Actually, I believe there's a third
15 which part of it was RD-1.
16 Q Okay. And how did those zoning reclassifications
17 come about and when did they come about?
18 A Offhand, I don't know.
19 Q But there came a time when the property was
20 rezoned to the MXPDP Zone.
21 A It was rezoned MXPDP in 2003.
22 Q Okay. And indeed, there was an attempt to develop
23 the property under that zone, isn't that correct?
24 A Correct. And development is proceeding under that
25 zone.

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1 Q No, no. I apologize. Wasn't there a application,
2 a development plan to develop this property under the MXPDP
3 Zone --
4 A Correct.
5 Q -- prior to this application?
6 A There's an approved development plan from 2003.
7 Q Okay. Did you hear the testimony of the prior
8 witness, sir?
9 MR. HARRIS: Which witness?
10 MR. CHEN: The prior witness.
11 MR. HARRIS: The immediately previous witness?
12 MR. CHEN: Yes. Yes. Mr. Soltesz.
13 BY MR. CHEN:
14 Q Did you hear --
15 A Yes. Mr. Soltesz, yes. I was here.
16 Q Okay. During the course of his testimony, he
17 described a project that he was involved with for the Cabin
18 Branch area including the retail area. Do you recall that
19 testimony?
20 A Yes.
21 Q And as I recollect his testimony, he explained
22 that that project failed, is that right?
23 A There are several parts. Which specifically are
24 you speaking to?
25 Q Okay. You recall his testimony that he spoke

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1 about a gentleman, I believe his name was Collins, who had
2 owned the property and had filed an application to develop
3 it with a retail center.
4 A Yes.
5 Q How much was the amount of retail that he said was
6 being proposed by that project?
7 A I was not taking notes so I believe it was a
8 little over 100,000 from what he said.
9 Q I think he said 110,000 square feet.
10 A I don't know for sure.
11 Q Okay. And but that, we also know that that, for
12 some reasons, apparently, the gentleman lost the property
13 and that project did not come to fruition, is that correct?
14 A That, I believe is correct.
15 Q We're going back to the master plan. If you
16 would, sir, would you please go to page 101. Are you there?
17 A Yes. I'm there.
18 Q Thank you. Would you please read the top of the
19 paragraph on that?
20 MR. CHEN: Madam Examiner, do you have that?
21 MS. ROBESON: Yes.
22 MR. CHEN: Thank you.
23 BY MR. CHEN:
24 Q Sir, could you please read the top paragraph.
25 A The most significant area of new employment is

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1 located in the Cabin Branch neighborhood where up to 2.3
 2 million square feet of office type uses could occur. This
 3 plan recommends the development occur as part of, as part of
 4 a mixed-use concept to allow the opportunity for housing.
 5 Our mixed zoning will be the base zoning for the northern
 6 portion of the site and I-3 Zone for the southern portion
 7 with an MXPDP option over the entire area to allow for
 8 comprehensive planning of these mixed uses.
 9 Q Do you see the last, the last five letters in that
 10 paragraph? Can you read them?
 11 A The --
 12 MR. HARRIS: Last five letters?
 13 MR. CHEN: I apologize.
 14 THE WITNESS: The word uses?
 15 BY MR. CHEN:
 16 Q It's getting late. The last five words.
 17 A Let me count here.
 18 Q Yes. I know. I did the same thing.
 19 MS. ROBESON: I think it begins with
 20 comprehensive.
 21 THE WITNESS: Comprehensive planning of these
 22 mixed uses.
 23 BY MR. CHEN:
 24 Q You see the words these mixed uses?
 25 A Yes.

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1 Q What are those words referring to?
 2 A Well, prior to that, it talks about the MXPDP
 3 option and under MXPDP, there are multiple options and mixes
 4 that are allowed for that zone.
 5 Q Do you see there, the first sentence in that
 6 paragraph where it talks about office type uses?
 7 A Yes. Where it says office type uses.
 8 Q And do you see in the second paragraph where it
 9 says mixed use concept to allow the opportunity for housing?
 10 Do you see that, sir?
 11 A Yes.
 12 Q Do you see any other reference to any other types
 13 of uses in the paragraph other than office and housing?
 14 A Specifically, no.
 15 Q Okay.
 16 MR. CHEN: Now, Madam Examiner, Mr. Kline took a
 17 lot of my area so if this gets choppy it's because I don't
 18 think you want to hear me repeat questions.
 19 MS. ROBESON: No.
 20 MR. CHEN: So just bear with me.
 21 MS. ROBESON: I'll bear with you.
 22 MR. CHEN: Thank you.
 23 BY MR. CHEN:
 24 Q Sticking with the master plan, would you please go
 25 to page 70?

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1 A Okay. I'm at page 70.
 2 Q Thank you, sir. Do you see the, I guess it's the
 3 first bullet on that page.
 4 A Yes.
 5 Q Could you read the bullet and the paragraph below
 6 it?
 7 MR. CHEN: Madam Examiner, do you have that page?
 8 MS. ROBESON: Yes. Thank you.
 9 THE WITNESS: Create a strong neighborhood focal
 10 point by concentrating public and retail uses in the same
 11 general area. This area should have a strong neighborhood
 12 orientation. The scale of the development is large enough
 13 to support a variety of nonresidential uses, so important to
 14 creating a central place. These uses should not be only
 15 retail but civic and public places as well. This plan
 16 supports the concentration of these uses and one central
 17 area to strengthen the neighborhood center concept.
 18 BY MR. CHEN:
 19 Q Now, do you see that the bullet there provides
 20 that the plan supports for a concentration of these uses in
 21 one central area to strengthen the neighborhood center
 22 concept? Do you see that, sir?
 23 A Yes.
 24 Q And I take it it's your opinion that the DPA
 25 pending before the District Council that is proceeding does

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1 strengthen the neighborhood center concept.
 2 A The -- can you rephrase that?
 3 Q Sure. Does the pending DPA support strengthening
 4 the neighborhood center concept provided for in the master
 5 plan for the Cabin Branch community?
 6 A I believe it does.
 7 Q How?
 8 A Let's walk through the one exhibit.
 9 Q Okay. What exhibit is that, sir?
 10 MS. ROBESON: That is a slide from Exhibit 45 with
 11 the word Cabin Branch at the top.
 12 MR. CHEN: Is there an exhibit number on it?
 13 MS. ROBESON: It did not have a separate exhibit
 14 number because it's part of 45.
 15 THE WITNESS: It's included in 45.
 16 MS. ROBESON: Now, we can add it as a separate
 17 exhibit. Were you going to mark on it or anything?
 18 MR. CHEN: No. I just want -- I think it should
 19 be an exhibit though.
 20 MS. ROBESON: I agree with that. If he's going to
 21 testify to it, it should be a separate exhibit and then we
 22 know. Ninety-two will be there, what is it, large --
 23 MR. HARRIS: Blow-up of what's it say, Cabin
 24 Branch?
 25 THE WITNESS: It says Cabin Branch. It's a slide,

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1 slide from the Power Point for the --
2 MS. ROBESON: Okay. A blow-up of Cabin Branch
3 slide from Exhibit 45.
4 (Exhibit No. 92 was marked for
5 identification.)
6 MS. ROBESON: Okay. Do you have 92 marked on
7 there, Mr. Unterberg?
8 THE WITNESS: I do not.
9 MS. ROBESON: Do you mind crossing that out and
10 putting 92 on?
11 MR. HARRIS: Good eyes.
12 MS. ROBESON: They're aging fast.
13 THE WITNESS: I wrote 45 on there before.
14 MS. ROBESON: Okay.
15 THE WITNESS: Where are we?
16 BY MR. CHEN:
17 Q You were going to explain, sir, how, and utilizing
18 Exhibit 92, the basis for your opinion that the DPA
19 strengthens the neighborhood center concept for the master,
20 for the Cabin Branch community.
21 A We talked previously how with our northern
22 district, which is this northern area, how the majority of
23 the retail is concentrated in that location, includes the
24 majority of the neighborhood retail. And within the mixed
25 uses, particularly within the parameters of the MXPDP in the

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1 mixed uses which not only includes retail, office, the
2 public spaces, a wide variety of mixes, that concentration
3 would be along the Wellspring Greenway and concentrated in
4 the first block between the Golden Eye, Cabin Branch and
5 then also, it would be concentrated, overlapping into the
6 second block which includes the outlets and specialty
7 retail.
8 Q Okay. And how many square feet of retail will be
9 in that area?
10 A It will vary. And again, we talked about the
11 path.
12 Q What's the minimum, what's the maximum?
13 A A range that could change would be --
14 Q What would change, the range or within the range?
15 A I think a little bit of both.
16 Q Could you --
17 A This is what --
18 MS. ROBESON: Well, the maximum -- well, I won't
19 interrupt. Keep going.
20 THE WITNESS: The maximum is the 484 which is 20
21 percent of the, which is allowed under MXPDP.
22 BY MR. CHEN:
23 Q What is the minimum?
24 A Frankly, as noted on the development plan, there
25 is no minimum. What's shown on this graphic is one scenario

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1 within this block and this block. It ranges from 400 to
2 450,000 square feet and that would be for retail,
3 neighborhood retail and specialty retail.
4 Q So am I correct in understanding that the minimum
5 would be 400 square feet of retail?
6 A One scenario is 400,000 square, thousand square
7 feet.
8 Q I apologize. It's getting late. But I just, I
9 want to get to what is the minimum that would be in this
10 area and as I understand your testimony, the minimum would
11 be 400,000 square feet.
12 A That, that is one scenario.
13 Q Could you tell me what will be the minimum retail
14 square feet under this DPA? Do you know?
15 A Under this DPA, there is no minimum. The maximum
16 is at 480,000 square feet of retail.
17 Q Okay. So we don't know the minimum but we do know
18 the maximum.
19 A Correct.
20 Q Okay. And you're saying that this concentration
21 of specialty retail satisfies what would be known as a
22 neighborhood center under the master plan.
23 A Part of that would satisfy that, the uses that
24 fall into that neighborhood retail category. We definitely
25 are trying to mix, to blend the uses, and those are the uses

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1 in addition to those neighborhood retail uses, adding in the
2 other uses that are allowed in the MXPDP and that are
3 particularly encouraged to mix different uses within this
4 area.
5 Q Okay. So and I apologize. I probably missed you,
6 but you're telling us that the overall retail area that
7 you've identified at Wellspring and Golden Rod, in that
8 general area. I probably don't have all the correct street
9 references but in that area --
10 A Wellspring and Golden Eye.
11 Q You're saying that that area will really consist
12 of two, two types of areas. One will be a neighborhood
13 center area and one will be a specialty retail area.
14 A It gets more complicated then from there because
15 there are also the other mix, mix of uses that are allowed.
16 Q I understand but see, my problem is the master
17 plan says there's got to be a neighborhood center in the
18 Cabin Branch community and I'm just trying to -- I think
19 it's a fair question, sir.
20 A And that does --
21 Q I --
22 A -- blend in.
23 Q Let me just finish my question. Under this DPA,
24 where will the neighborhood center be located?
25 A Within these two blocks that we just, that I just

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1 spoke about. Between Cabin Branch, Wellspring, Golden Eye
2 to the --
3 Q Cabin Branch -- I apologize. Between Cabin
4 Branch.
5 A Wellspring, Golden Eye, 121 to the north.
6 Wellspring continues to the east, and that will also overlap
7 and mix with uses from the neighborhood and blend with the
8 specialty retail.
9 Q And approximately how many square feet of retail
10 will be in the neighborhood center?
11 A In this specific location?
12 Q I understand that's where the neighborhood center
13 is going to be.
14 A We've talked previously in the staff report, the
15 staff report talks about 50 to 120,000 square feet of
16 neighborhood retail. The majority of that will be within
17 these two areas that I have just described.
18 Q Yes. Cabin Branch, Wellspring, Golden Eye and 121
19 to the north.
20 A Uh-huh.
21 Q And so that area will not be a, a retail outlet
22 area.
23 A The majority of that retail will not, although, it
24 does mix and overlap into the specialty retail. It also
25 mixes and overlaps with the employment and the office.

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1 Q Okay. And it's your opinion that that area that
2 you've just defined for us satisfies the requirement under
3 the master plan for a neighborhood center.
4 A Yes, it does.
5 Q But there will be no grocery store in that area.
6 A There will be no grocery or large scale full
7 grocery store as previously testified.
8 Q Okay. And I think you answered this question
9 under, question for Mr. Kline but I didn't write the number
10 down. The area further to the south, I think there's
11 another retail area in the --
12 A In the middle of area C on the development plan?
13 Q Yes. What is the range of square footage there
14 for retail?
15 A That I believe -- it's been a little while. See
16 if I say the same range. Again, these are ranges and
17 they're going to vary as the plan goes forward. This is 25
18 to 50,000 square feet but that also overlaps with the range
19 of office, neighborhood office and services.
20 Q As I understand your testimony, again, I don't
21 want to put words in your mouth, that area, that retail
22 component in Area C of, ranging from 25 to 50,000 square
23 feet, that would not be considered a neighborhood center, is
24 that right, sir?
25 A It would not be a center but it would include

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1 neighborhood retail.
2 Q Yes. Yes. I understand that.
3 MR. CHEN: We've got about five minutes.
4 MS. ROBESON: I know. I'm letting you get -- do
5 you have one?
6 MR. CHEN: One.
7 MS. ROBESON: Well, if you don't, we can, we can
8 end now.
9 MR. CHEN: Well, maybe this will give Mr. Harris
10 and Mr. Robins, we probably can't get an answer to it today
11 but I'll telegraph where I'm going to be fair.
12 MS. ROBESON: Yes.
13 MR. CHEN: Because this witness has been allowed
14 to testify about compliance with the Zoning Ordinance,
15 including the development plan provisions of the Zoning
16 Ordinance --
17 MS. ROBESON: Yes.
18 MR. CHEN: -- as well as the master plan --
19 MS. ROBESON: Yes.
20 MR. CHEN: -- I will be asking him how the DPA
21 complies with Section 59-D-1.3(c)(7) and how the DPA
22 complies with 59-D-1.3(h)(2)(3). That may just save some
23 argument the next time around but it gives Counsel --
24 MS. ROBESON: What are those provisions dealing
25 with?

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1 MR. CHEN: Well, the first one, 59-D-1.3(c)(7),
2 deals with a preliminary forest conservation plan. As I
3 understand the evidence of record, you have a preliminary
4 forest conservation plan at Exhibit 13. It is my
5 understanding that under the requirements of the development
6 plan section of the Zoning Ordinance, that the application
7 must contain a preliminary forest conservation plan. What I
8 think you've got at 13, and Counsel can let me know if I'm
9 mistaken, but it is my belief that Exhibit 13 is the
10 preliminary forest conservation plan used for the original
11 base development plan and I don't think they can do that. I
12 think they've got to bring in a preliminary forest
13 conservation plan reflecting the proposed amendment to the
14 DPA.
15 The other section, 59-D-1.3(h)(2)(3), deal with
16 the requirements, again, for a diagram showing the general
17 building, it says build, and height of the principal
18 buildings and their relationship to each other and to
19 adjacent areas. That's sub 2. And sub 3 is the gross floor
20 area of buildings by type of use and the FAR. I believe
21 that any DPA amendment must include those matters and I'm
22 sure Counsel will disagree with me and I'm giving everybody
23 fair notice so that they're prepared.
24 MS. ROBESON: Okay. Thank you. I had one
25 question too. You mentioned on the general requirements for

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1 a DPA, you mentioned that the maintenance, there is a
2 provision, I don't have 59-D in front of me, but there is a
3 provision saying how common areas are going to be maintained
4 and I think you were relying on whatever was filed with the
5 original development plan.
6 But I guess my question is is it different now
7 that a specialty outlet is coming because I do think to make
8 a finding on that, it would be helpful to have something
9 like that in the record as well because I, I don't have the
10 original development plan before me and I don't know if it's
11 what you wrote or what it says or if it's still applicable
12 so I was going to mention that as a housekeeping matter.
13 All right. It being 5:30 --
14 MR. HARRIS: Ms. Robeson, one question I should
15 have asked earlier and it dawned on me now. Actually, Mr.
16 Robins reminded me. We had asked for John Carter to be
17 called as a witness and I understand he is willing to be
18 called. You declined to do that and, as I recall, your e-
19 mail had said at this time. I might renew that request
20 because I believe that much of the cross-examination went to
21 the issue of what did the master plan intend.
22 I suspect that much of the testimony that will be
23 offered by Mr. Noonan and by Mr. Ferguson will attempt to
24 address that as well and it would seem appropriate to me to
25 invite Mr. Carter in to, to discuss that, he being one of

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1 the authors of the master plan.
2 MS. ROBESON: I will consider it after I hear Mr.
3 Noonan's but I'll be honest, I have had experts come in here
4 before who worked on the master plan and tell me it really
5 means this and I haven't found their testimony -- really,
6 it's what the adopting agencies say and not someone's
7 interpretation of what the adopting agencies did. So if, if
8 you want to renew it, you know, I didn't foreclose it
9 because, you know, I was really waiting to, to hear why
10 120,000 is unclear. I've let you put in the testimony about
11 it had to say that because it might not have been zoned MXP
12 but I'm going to reserve on that until I hear how far Mr.
13 Noonan or, I'm sorry, I don't recall the name.
14 MR. CHEN: Ferguson.
15 MS. ROBESON: Until I hear what they have to say.
16 I'm not going to anticipate it.
17 MR. HARRIS: Okay. Thank you.
18 MS. ROBESON: All right. With that, Mr. Chen,
19 you're going to check on possibly another date, and we will
20 continue this case to 8:45 on Friday, September 6th. Yes,
21 sir.
22 MR. CHEN: I'm hoping to hear something tomorrow
23 and I'll call your office.
24 MS. ROBESON: That would be wonderful.
25 MR. CHEN: Yes.

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1 MS. ROBESON: And we can get an e-mail out. Mr.
2 Robins?
3 MR. ROBINS: I just wanted to ask one question
4 related to the John Carter matter and that is on September
5 6th, our goal, given that we're starting early and maybe
6 going late, is to try to finish that day.
7 MS. ROBESON: Yes.
8 MR. ROBINS: And I understand what your ruling is
9 is that you're still considering whether he would be allowed
10 to testify. It seems to me it might make sense to alert him
11 that he might be called on Friday or allow him to come?
12 MS. ROBESON: If he comes, I'm not going to call
13 him on Friday. I can't -- that's not enough notice. I have
14 to actually -- well, I guess I could request him but --
15 MR. HARRIS: He indicated he would come without a
16 subpoena.
17 MR. ROBINS: Yes.
18 MS. ROBESON: That's what I was just thinking.
19 MR. HARRIS: Yes. He is not requiring to be
20 subpoenaed. He is willing to come, and I think he was
21 willing to come on Friday so it seems to me if we're going
22 to try to finish, that might make sense.
23 MS. ROBESON: Well, I would like to hear what you
24 did today with the background documents. I find, frankly,
25 more persuasive than somebody coming and saying well, Betty

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1 Ann Kranke did this and said this and, you know, so I would
2 really, at this -- I'll send him an e-mail with copies to
3 the parties but I'm very reluctant to have him come in,
4 especially as I haven't even heard the other experts.
5 That --
6 MR. HARRIS: Maybe suggest if he wants to come in
7 the afternoon, he may or may not be called? I don't know.
8 MS. ROBESON: No. He can -- he's a half hour
9 away. He can get here.
10 MR. HARRIS: Okay. Okay. That's fine.
11 MR. CHEN: Well, if I may.
12 MS. ROBESON: Yes.
13 MR. CHEN: Two things. This is their case. I
14 mean, if Mr. Carter is going to be called, he's part of
15 their case and should be treated as an applicant's witness.
16 That's number one. Number two, I just want everybody to
17 hear, I've put them on fair notice about the subjects of the
18 ordinance I'm going to be getting into on Friday. I don't
19 want anybody squawking that, you know, this is the wrong
20 witness or anything like that, that the areas that I -- and
21 I think I've been very fair about disclosing so that people
22 are on notice. Okay.
23 MS. ROBESON: My real feeling is if at all
24 possible, I think we're going to need a full other day so I
25 am waiting. I am really hoping, Mr. Chen, that we can do,

1 do another day. I will send something to Mr. Carter but
 2 again, I've had, you won't believe the testimony I've had
 3 from staff, former staff members and --
 4 MR. HARRIS: Please.
 5 MS. ROBESON: So --
 6 MR. HARRIS: You've got my position. You've got
 7 my letter on that subject. I'm just saying --
 8 MS. ROBESON: Yes, I did. So I, again, I'll send
 9 something to him but I don't want to subpoena or I don't
 10 want to request him to be here until I feel like it's
 11 necessary and right now, I don't know what their experts are
 12 going to say.
 13 MR. HARRIS: Okay.
 14 MS. ROBESON: And I'll be honest with you. The
 15 drafts and the resolutions are more persuasive to me than
 16 having some, even as eminent a staff member as Mr. Carter
 17 come in and say this is what we really meant.
 18 MR. HARRIS: Okay. Fair enough.
 19 MS. ROBESON: All right. With that, we're going
 20 to be adjourned until 8:45 on September 6th.
 21 MR. CHEN: I've got, in anticipation of Mr.
 22 Noonan, I'm handing Mr. Harris some excerpts. It's not a
 23 report. There is some discussion about Leesburg from his
 24 witnesses and I've got an excerpt from their master plan and
 25 some photographs that I'm giving to Mr. Harris.

1 MR. HARRIS: Thank you.
 2 (Whereupon, at 5:33 p.m., the hearing was
 3 concluded.)
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C E R T I F I C A T E

1
 2 DEPOSITION SERVICES, INC., hereby certifies that
 3 the attached pages represent an accurate transcript of the
 4 electronic sound recording of the proceedings before the
 5 Office of Zoning and Administrative Hearings for Montgomery
 6 County in the matter of:

8 Adventist Healthcare, Inc. and Cabin Branch Commons, Inc.

9 DPA 13-12

11 By:

16 Josephine Hayes, Transcriber

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