OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

FOR MONTGOMERY COUNTY

APPLICATION OF ADVENTIST HEALTHCARE, INC., and CABIN BRANCH COMMONS, INC.	:	**Case No. DPA 13-02**

A hearing in the above-entitled matter was held on October 15, 2013, commencing at 9:33 a.m., at the Office of Zoning and Administrative Hearings, 100 Maryland Avenue, Second Floor, Rita Davidson Memorial Hearing Room, Rockville, Maryland 20850 before:

Lynn A. Robeson

Hearing Examiner

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E X H I B I T S

Exhibit No.		Marked/Received
130	William Chen's list of case citations	35
131	Robert Harris's list of case citations	59

P R O C E E D I N G S

MS. ROBESON: This is a continuation of the public hearing in the application of Adventist Healthcare, Inc., and Cabin Branch Commons, Inc., requesting an amendment to the development plan approved by the District Council on September 9th, 2003, in LMA G-806, on property consisting of 283.5 acres east of Clarksburg Road, west of I-270, and north of West Old Baltimore Road in Clarksburg, Maryland.

Before -- we had scheduled today for closing arguments. Before we get into that, I wanted to make sure that the parties, I think you were all cc'd on an e-mail from Rick Brush that came in yesterday. I have added it to the record as Exhibit 129. Has everyone seen, okay --

MR. HARRIS: Yes.

MS. ROBESON: -- that e-mail?

MR. KLINE: Yes, ma'am.

MS. ROBESON: Mr. Chen?

MR. CHEN: Yes, ma'am.

MS. ROBESON: Okay. So that is Exhibit 129 in the record. Are there any preliminary matters --

MR. HARRIS: No, ma'am.

MS. ROBESON: -- before we begin? All right. Mr. Harris.

MR. HARRIS: Okay. Good morning. First of all, I want to thank the Hearing Examiner for her patience during

this somewhat testy case that's gone on longer than I ever thought it would be, but we are finally at the closing argument point. My closing argument, I have three main areas I want to talk about: first of all, the general introduction; secondly, I want to address the facts and the evidence in support of the application; and then, thirdly, I want to address the opposition case and our response to that, particularly the issue of substantial compliance with the master plan.

In terms of introduction, this is a development plan amendment. The property is already zoned MXPD, and all of the findings for the zone have been made, and many of them remain intact today -- virtually all of them, in fact. Among the key conclusions is the approval for two point four million square feet of unspecified commercial uses in that rezoning and development plan.

There is extensive public support. That was amplified by the unanimous support of the planning staff and the Planning Board. And I'd note that while a hospital, a nursing home, and medical facilities were in fact contemplated in Area A of the development plan, neither the development plan nor the preliminary plan, for that matter, mandated those uses or precluded others in that area. To the contrary, the MXPD zone allows 20 percent of the total commercial density to be retail, and it deems that amount to

establish what it calls a, quote, dominant employment character for a mixed-use project.

With the unfortunate turn of events of Adventist Healthcare's loss to Holy Cross Hospital of the rights to an upcounty hospital, this DPA merely seeks to take advantage of that allowance in the MXPD zone for 20 percent to be retail so that they can include a use that will spur and support other employment uses on the property and which will serve Clarksburg and the county.

So let me turn to, secondly, to the facts and, I think, the evidence and strong support for this case. First in that respect, the addition of specialty retail in the form of an outlet center will unequivocally have a positive impact on Cabin Branch. Mr. Kaplan spoke about that, Mr. Bogorad did, and Mr. Unterberg did, and they indicated how this use would jump-start the demand for other employment uses by putting Cabin Branch and Clarksburg on the map. And they underscored, as well, how it would provide a symbiotic retail use, common to mixed-use employment centers of the 21st century and how that would make both Cabin Branch and Clarksburg more competitive in the region. But it wasn't just Messrs. Kaplan, Bogorad, and Unterberg who addressed that issue. Both the Planning Board and the planning staff repeated it in great detail how they found it to be a positive effect, but again, don't take

their word alone. Even the Peterson Company recognizes this. While they testified to the contrary in this case, as reflected in Exhibit 110, quote, the developer asserts that the shops, restaurants, and personal service uses proposed for development will create an amenity base that will help drive a higher-quality employment center that grows more quickly than would be possible under the current zoning. They clearly recognized the benefit, although they argue the contrary here.

Second, in addition to the benefit that it will have on Cabin Branch, it will have a positive impact on Clarksburg as a whole, and I think this is reflected by the huge community support for this. There was a flood of more than 200 letters and e-mails in support of this application, indicating in each person's own personal words why this is important to the Clarksburg area. These weren't form letters. They were personal communications from each of these people. Most of those are contained in Exhibits 38 and 43, but there are a number of other individual letters throughout the record as well. I can unequivocally say that this is by far the largest support I've ever had for a zoning case that I've ever handled, and I think it's, you know, impressive.

The -- in addition to the letters, there was personal testimony from those who are and have been

political and civic leaders in the Clarksburg community. Former council member Mike Knapp, who spent years working to implement the Clarksburg Master Plan, testified, and his letter is in the record and unequivocally supporting this. The former head of the Clarksburg Civic Association, Kathy Hulley, her letter is at 38Q and she also testified. And Melane Hoffman, the head of Liveable Clarksburg Coalition, came and testified. And while her letter was not submitted, she did read it, and it says, among other things: I'm here today in very strong support of the proposal for a retail center from Streetscape Partners, Simon Property Outlets, New England Development on the Cabin Branch parcel. I and many of my neighbors unwaveringly support the development plan amendment that would allow this partnership to build an outlet mall and mixed retail on the site. She goes on to explain why it would be positive.

In addition, there is a letter in the record, Exhibit 37, from Mr. Flanagan, the developer of the Clarksburg Town Center retail. In that letter, he says, and I quote: Based on our extensive development experience throughout the Washington metropolitan area, we are confident that development of specialty outlet retail on either side of I-270 will have an equally positive impact on Clarksburg and the town center. Goes on to say: It will generate additional economic activity and bring new people

and shoppers to Clarksburg and the town center. In addition, specialty outlet retail will have a catalytic effect on bringing jobs to Clarksburg and will add to residential property values. Mr. Flanagan knows what he's talking about. He's been a developer in the county for many years, and his words mean a lot in terms of support.

In addition, there were letters of support from each of the other Cabin Branch property owners. These are the properties that are most affected by what does or doesn't happen at, on this property, and they testified or indicated in their letter their belief that this would have a very positive effect.

Third and certainly not least, the planning staff and the Planning Board, as I mentioned, fully support the application and find it to be consistent with the intent of the master plan. The Park and Planning staff members on this include John Carter, who was one of the authors of the 1994 master plan and is now the chief planner for the Clarksburg area, and his comments are reflected in Exhibits 50 and 51 as well as elsewhere in documents. And, as I also mentioned, the project has, not qualified, but unequivocal unanimous support of the Planning Board. That includes Commissioner Presley, who, as we all know, hails from the Clarksburg area and who made the motion to, quote, enthusiastically support this proposal. It also included

the chair, herself a former zoning hearing examiner who understands this process. That is very strong support for this application. And while other witnesses, both pro and con in this case, admittedly have some personal interest in the outcome of this, the planning staff and the Planning Board offer their support from a purely professional and impartial stance, and for that reason it's entitled to great weight.

Now, contrast that huge community support and the full Planning Board and planning staff support with the nature and the interest of the opposition. It's clear the Peterson Company is the primary opponent and is driving the other opposition because of its desire to build a competing outlet center across I-270. Ironically, the record reflects that Peterson even thought the Cabin Branch site was such a good site for this use that they sought to buy it before they were beat out by the Simon team. That confirms that their true interest here is not that this site is improper for this use but, rather, that they want to stop competition with respect to their proposed use on the other side of 270.

The only other opposition at the hearing came from two small property owners in the historic district who have collaborated with Peterson in their opposition. They're driven by the hope that Peterson will build a sewer line to which they can connect their properties and thereby perhaps

develop them for more intense uses. Interestingly, Mr. Unterberg testified that any development of the Miles-Coppola property, doesn't have to be an outlet mall, would require sewer to that property, providing the community with the same capacity to hook up. So they don't need the outlet center on that side of the, on that side of 270.

There was one resident neighboring the Cabin Branch property, Tatiana Franklin, who opposed -- testified in opposition, but she clarified that her opposition was not with respect to development at Cabin Branch. She moved in, she knew there was going to be major development there, and she alleged no individual property impact to her property. Rather, her opposition was due, in my mind, inexplicably, because of a fear that somehow or other the weekly farmers' market in which she's involved would suffer from this. I still don't understand that, and I note that none of the purveyors at that market and none of the community groups opposed this development plan amendment with that fear. It's only hers alone.

I listened carefully to the opposition testimony, looking to see what interests they had in the outcome of this case that (a) were different than that of the general public or (b) were not based on competition. And the reason I did that is because I'm aware of Maryland law having to do

with what makes an aggrieved party, and if your aggrievement is simply the same as that of the general public or if it's based on competitive interests, those are not aggrievement issues. And I refer you to the case, the Ray case, the Superior Outdoor Signs case, and the Kreatchman case, and I'll provide citations to them for you, but those hold that those kind of aggrievements that we've heard in this case are not justification for opposition.

So I would like to formally request that the opposition be dismissed as opposing parties in this case. Now, I say that somewhat tongue in cheek because I don't expect the Hearing Examiner to stop the case now and rule in our favor, saying that they don't belong here, but I do maintain that objection. And if their testimony is accepted and considered, as I expect you will, it has to be considered for what it is worth, which I think is relatively little, if anything.

Now, without waiving my objection to the status of aggrieved parties and -- I want to focus on their primary objections. Their first argument is that it will not help energize other employment at Cabin Branch and along I-270. Contrary to the testimony, the expert testimony that Mr. Bogorad gave and Mr. Kaplan's experience, having done a lot of retail, and, as well, the planning staff and the Planning Board and Dave Flanagan, all of whom say that it

will help energize, they say it won't, but as I noted, that's completely undercut by their own testimony in the Crosstrail case in Leesburg, reflected in Exhibit 110 and 127, that they do believe this kind of thing is very beneficial for employment centers. So that argument is quite weak.

The second argument is that it'll somehow harm the town center retail. Now, they don't own the town center retail. So, you know, it's kind of interesting that they're doing somebody else's bidding for them, but in any respect, their testimony to support that is what I believe is unsubstantiated speculation by Mr. Noonan, who, admittedly, has no expertise in retail operations, retail demand, or the trends of retail, and I contrast that with Mr. Kaplan's vast experience in operating and building retail and Mr. Bogorad's expert credentials in this respect. They do have considerable experience in these things, and they indicate not only that it will not hurt the town center but it will help, that these are different forms of retail and with a different customer base and a different draw. They explained, through examples and real-world experience, how, like Leesburg, how this will not have that negative effect. Again, that was reinforced by Mr. Flanagan's letter. He should know better than anybody, and he indicates it will not have a negative impact, it will have a positive impact.

It was echoed by the support from hundreds of Clarksburg residents, and finally, of course, it was confirmed by the Planning Board and the planning staff that it will not have an adverse impact. So that second argument I don't think goes anywhere either.

The third and clearly the primary argument that the opponents offer is their contention that this proposal is not in substantial compliance with the 1994 master plan. There are at least five reasons why the development plan amendment meets any requirement for compliance with the 1994 master plan. Any one of them would be adequate to justify this application. Clearly, the combination of them makes it a very strong case in support of master plan compliance. Let me examine that issue a little bit more.

First, we have to examine the MXPD zone itself because that is a critical component here. The -- some zones require uses and densities to be, quote, consistent with the recommendations in a master plan and allow commercial or retail uses only where they are expressly recommended in a master plan. The RMX zone is one of those zones, and we cited that in Mr. Unterberg's testimony. That was the zone that was in effect at the time the master plan got adopted, and it was through the sectional map amendment and covered a big part of the property. There are other zones like that as well, but to the contrary, the MXPD zone

allows retail uses up to 20 percent without a specific master plan recommendation. Instead, the MXPD zone talks about the requirements for -- instead of consistency with the master plan, as in those other zones, the MXPD zone requires that the proposed development be, quote, compatible with the total gross floor area recommended in the master plan and compatible with the uses, both existing and proposed, in the vicinity. Compatible with is very different than consistency with a master plan, and there was ample testimony that these uses will be compatible with. Mr. Bogorad and Mr. Unterberg, among others, offered expert testimony to that effect, and both the planning staff and the Planning Board, as well, confirmed that the uses would be compatible with the rest of the Cabin Branch project, and I don't think there is any evidence to the contrary that they would be compatible.

The second component of this analysis of master plan consistency has to do with the development plan requirements. Even though the zone itself doesn't require consistency with the master plan, again, in conflict or in contrast with other zones, I recognize that the rules of 59-D, having to do with development plans, do include a broad indication that a development plan should be substantially consistent with the master plan. So I think it's an indirect issue of this, but it's not as compelling

as if the zone itself required that, but in any respect, let's look at the master plan and see what it recommends.

Clearly, the overarching vision of the master plan for the MXPD area of Cabin Branch is for a comprehensively designed mixed-use employment center. As the expert testimony in this case indicates, Mr. Bogorad and Mr. Unterberg, this development plan amendment will help to achieve that vision. It will help to make this area the 21st century mixed-use employment center that so many people want. The planning staff and the Planning Board, again, reached that same conclusion, that it would be consistent with that overarching goal. In fact, the Planning Board further commented that the development plan would not be a significant change from the 2003 development plan. That's at page 1 of Exhibit 52, their letter of support, letter of recommendation.

So, in addition to being consistent with that overarching vision of the master plan, Mr. Unterberg testified extensively about how it would be substantially consistent with the general recommendations of the master plan. He walked through them one by one in his testimony on August 14; the staff report, as well, says the same thing at pages 13 and 14. And he further went on to say how the use would be substantially consistent with the multiple specific recommendations in the master plan -- again, addressed one

by one in his testimony on August 14, Mr. Unterberg's testimony on August 14, and addressed one by one in the staff report, pages 14 to 17.

So out of all of the master plan recommendations for the Cabin Branch neighborhood, the one where the opposition argues it's not substantially consistent and where it spends most of its time concerns the master plan recommendation for 120,000 square feet of neighborhood retail at Cabin Branch. Mr. Unterberg did testify -- and this was explained in the Park and Planning staff report -- that the recommendation for 120,000 square feet only concerned neighborhood retail; it did not address specialty or comparison retail, such as an outlet center that might be built in the MXPD employment portion of the property. Instead, the master plan left that open, as it did for really all of the properties that are recommended for MXPD zoning in the Clarksburg area -- more than 10 million or about 10 million square feet of unspecified commercial uses. Clearly, retail can go into those because the zone allows that.

There was a lot of testimony about the technical appendix -- page 12, in particular -- and how that technical appendix reflects the distinction between neighborhood retail and comparison retail. It specifically says that they are different, and the calculations in that technical

appendix are recommendations for neighborhood retail based on their calculations at the time as far as the demand, but there were no calculations as far as how much comparison retail could be there because that's an entirely different calculation and they weren't going into that speculation.

The distinction in the technical appendix is then depicted on the master plan diagrams themselves, page 66 of the master plan and the foldout map of the master plan that were introduced. They mention, quote, neighborhood retail and show, quote, neighborhood retail on the Cabin Branch project without addressing the issue of comparison retail. Again, though, the master plan does acknowledge that there could be demand for comparison retail, principally in the technical appendix but, again, no calculations as to what that amount would be and no indication as to where it would go. It was left open.

It's -- on this issue of master plan consistency, it's also important to understand the split zoning of the Cabin Branch property, and I know Mr. Unterberg tried to address this and it may be a little tough to follow, but I think it's pretty compelling, as did the planning staff and the Planning Board, because I think it clarifies the reason for the master plan designation for neighborhood retail in the RMX area while leaving retail open in the MXPD area.

Again, the property was split-zoned RMX and I-3,

with RMX principally being on the western half and the I-3 zone being on the eastern half. That was shown in Exhibit 63 in the record. And because the RMX zone is one of those zones that can only have retail if it is specifically recommended in a master plan, this master plan had to recommend neighborhood retail in that zone or there wouldn't have been an opportunity for it. Again, the I-3 zone didn't allow it; so it had to be in the RMX, if at all, because, again, no one knew at the time whether anybody would apply for the MXPD zone for the eastern half of the property, which did ultimately happen. But, again, both page 66 and the foldout plan show the neighborhood retail within the area that then became RMX and is still today RMX zoning, but it, again, left open what went on in the MXPD area. Nothing in the master plan or the MXPD zone precludes comparison retail as part of the undefined employment uses in any of the three MXPD areas in the master plan, and again, the MXPD zone allows up to 20 percent of those uses, concluding that that amount retains a dominant employment area.

Mr. Unterberg, who has worked extensively in Clarksburg on master plan issues for many years, concluded in his expert opinion that the master plan does not preclude specialty retail in the MXPD area up to the 20 percent, and again, planning staff/Planning Board came to the very same conclusion. We testified about the Washingtonian Center

property, a guiding light, if you will, in terms of the MXPD zone, as the first MXPD case, a case where retail absolutely was not recommended in the MXPD area. It was called for to be a corporate office area, but again, this county approved 20 percent of that, up to 20 percent to be retail, recognizing that the zone allows it, and it didn't need a master plan recommendation. So to the extent substantial compliance with the master plan is required indirectly through 59-D, we maintain that it has been, that it is substantially compliant, and the Planning Board came to that same conclusion.

Third, in terms of the master plan guidance under 59-D, we have to look at the overall flexibility of the master plan recommendation, particularly when it's 20 years old. We -- I have put together a series of cases that I'll also provide you that talk about how flexible master plans are. I know you're generally aware, perhaps even well aware. It's the Schultz v. Pritts case, the Terrapin Run case. It's Land Use Article of Maryland Annotated Code, Section 1-304. It's DPA 07-03, G-881, DPA 05-1, G-861, DPA 13-01, DPA 6-02, DPA 6-01, DPA 12-02, DPA 08-02 or 08-2. Those are just the recent ones that I could find on your website. There are many others before that, but those show the flexibility of a master plan when you're, when considering a development plan.

Clearly, they indicate that master plans are only guidelines and over time they become less definitive. This master plan, as well, particularly notes that, even calling it out in the introduction to the master plan, saying that specifics will become less relevant over time. Well, this plan is now 20 years old, and it's really at the end of its life, and the testimony that both Mr. Bogorad and Mr. Kaplan gave shows that it's important for these employment centers to evolve, to be competitive in the real world, not the past of 1994, and that calls for a maximum flexibility to enable this 21st century employment center. Again, turning to Case G-881, the Butz property that we've talked about, very recently the zoning hearing examiner found that this very same master plan had to have that flexibility because of its age and the overall flexibility of master plans allowed a use there that was not specifically recommended in the master plan -- and, to some extent, was contrary to it -- to be approved.

When there are many changes in land use and market circumstances over the past 20 years that both Mr. Bogorad and Mr. Kaplan spoke of and the, in fact, are echoed in the pending update of the Clarksburg Master Plan for the Ten Mile Creek area, they show the flexibility that needs to be addressed now, 20 years after that master plan. Among other things, the typical grocery-anchored center is no longer

appropriate at Cabin Branch because of the Wegmans and other changes in the grocery market and the strong desire to have that final grocery in Clarksburg at the town center. At the same time, the market for comparison retail has grown and evolved, and we have found how the mix of uses and the amenities that these centers provide, the restaurants that they bring in, the people that they bring in, all serve a very valuable purpose for the employment centers that surround them.

The last point I would make on master plan compliance and perhaps the most important, if the other four aren't convincing enough, and I believe they are, the fourth is that the Park and Planning staff and the Planning Board have found the development plan amendment to meet all of the master plan compliance requirements. The Planning Board states: The Planning Board found that the proposed -- this is Exhibit 52 -- the Planning Board found that the proposed development is consistent with the vision of the Clarksburg Master Plan. The development plan amendment will foster the creation of a mixed-use employment community along the west side of I-270. The DPA establishes a comprehensively planned and designed center that includes a variety of employment opportunities, additional retail, hotel, entertainment, public uses, and a variety of housing types. With that and other language that they included there, they

offer unanimous support for this project after their staff study and their own studies.

Maryland law, again, and consistent zoning hearing examiner practice is that the Planning Board's recommendation is entitled to great weight. And among the cases that cite that are the Watkins case, the Archers Glen case and, again, G-881, the Butz property, which cites those cases, and again, I'll provide the detailed citations of these cases for you. That alone, I believe, compels approval of this DPA.

Briefly, in conclusion, I think the evidence is clear that the DPA meets the purposes and standards and the regulations of the MXPD zone. It is a very flexible zone, intended to accommodate evolving development as it emerges, whether it be at the Washingtonian Center or today at Cabin Branch.

To the extent required, substantial compliance with the recommendations of the master plan has been met. It provided for two point four million square feet of undesignated employment uses. We're consistent with that. I don't think there's any testimony that we're inconsistent with the Adequate Public Facilities Ordinance or the CIP or any other county policies, and the Planning Board addressed each of those, as did the staff, confirming them. So we'll just rely on their testimony. Mr. Turnbull did testify

about traffic. There was no contrary testimony to my recollection.

With respect to preventing erosion and preserving the natural vegetation and natural features, that really was all addressed in the original rezoning and in the original development plan. As you heard, this development remains fully within the approved forest conservation plan area.

We will meet all of the stormwater management requirements. They will be addressed at the time they have to be addressed -- at the final water quality plan, at which time the actual development and its precision is known and the facilities can be engineered. There's actually another step in the process, as you saw in Rick Brush's e-mail, the third step, and that is, at building permit time, or sediment control permit, those issues are examined yet again. So they will be addressed and Mr. Bossong said they will be accommodated, and I'm aware of no testimony or evidence in the record showing the contrary.

We've addressed the documents respecting perpetual maintenance of any common areas. There really aren't areas that are being affected by this, and all that has been addressed, again, in the original development plan.

So, again, the Planning Board, in their, and the staff, in Exhibits 50, 51, and 52, concluded affirmatively in all of those regards, as they did on the master plan

consistency issue. And I think it is a very compelling case, sadly opposed by somebody who wants to do the same thing in Clarksburg but at a different site. Thank you.

MS. ROBESON: Thank you. Who would like to go next?

MR. CHEN: If the Examiner please, I'll go next.

MS. ROBESON: Okay, Mr. Chen.

MR. CHEN: Thank you. I hope to be short, and in fact -- and I'm sure many people are happy to hear that -- but what I've done is spoken to Mr. Kline, and he's going to pick up on some of the issues, and rather than be duplicative, I'm going to be short, focusing on a couple of issues and cede the rest of my time to Mr. Kline.

MS. ROBESON: Thank you.

MR. CHEN: Madam Examiner, we really do appreciate your patience. This has been, at moments, contentious, people trying to assert -- fairly, I think -- different positions, and I think you have responded to that. And I mean sincerely, I think you've tried very hard to be fair to everybody and you have been very, very patient, and on behalf of my client, I sincerely appreciate it.

Mr. Cobb, by the way, has got a business appointment today that is literally out of town and that's why he's not here. And, you know, he -- there was a comment about his interest about getting sewer service. Frankly, I

don't recall that being a major point. He is concerned -- and it may be self-interest -- about the future viability of the town center, and I think that's where his focus has been.

A couple of points. I think that you have to probably look at the transcript very carefully, at the words that are being used on behalf of the applicant and the applicant's witnesses, particularly -- one example that sticks out in my mind is the last hearing where Mr. Unterberg testified on examination about the significance of the 2011 update on the master plan and he said, and I -- one of his words was it was narrow, and if you recall, on my cross-examination I referred the gentleman to the provision in the update that said that they were, the Board and the District Council, were reaffirming the land use plans and policies that are in the base master plan.

So, please -- and I'm going to deal with this in a moment -- I think you have to be very careful about some of the words that are being used, and that brings me to -- by the way, the other issue Mr. Harris spent a great deal of time with was on the support and how he had never seen so much support. The law in Maryland is very clear that plebiscites are not recognized, and I think the undercurrent that you have heard from all the support, some of it more candid than the others, and the undercurrent -- and this

goes to the staff of the Park and Planning Commission and the Planning Board, and my characterization of their support may not be as generous as it is for the residents who support it -- but the issue is, they want something to happen in Clarksburg. They want something so badly to happen in Clarksburg that they are willing -- and this is what is so unfortunate about the professionals -- they're willing to turn a blind eye to the master plan and its requirements in order to have something happen in Clarksburg. The candor that you heard with that was from the citizens. The staff and the Planning Board dress it up because they've been through the process enough, and so they don't say that quite as candidly as the citizens do, but really, that support -- which, again, I don't think is legally significant -- is basically because they want something to happen.

Now, that does take me to the master plan. If you listened carefully to Mr. Harris, he gave you his five arguments and he went to the statute. Now, as you have pointed out, there are really two statutes that, or ordinances, applicable to this case and the master plan. One is the provision in the MXPD zone, and one is in the development plan provision. Now -- and I'm talking about, specifically, 59-C-7.50, which is the MXPD zone, which says that, it uses the word compatible, but in the development

plan provision, which is Section 59-D-1.61 small a in parentheses -- and I don't think I'm going to tell you anything new -- that ordinance provision says substantially complies with the use and density.

Throughout -- and I listened very carefully to Mr. Harris's closing argument, and I wrote down every time -- he uses the word substantially consistent. He used it several times. He used it in reference to Mr. Unterberg's testimony, that Mr. Unterberg said it was consistent with. He said the staff report, referring to some pages, said it was consistent with. He sums it with the words master plan consistency. At another point, at the end, he said substantially compliance, and a moment ago he just said substantial compliance. That is not the language used in 59-D-1.61(a), and unless I'm mistaken -- and maybe I don't have the most current version of the code, but I think I do -- but it uses the words that it must be, substantially complies with, and that's important. That's real important. It's not being consistent with. They got to show compliance with.

Now, let me talk about -- by the way, as an aside, I think -- and I'm not going to get too much into this other than this comment -- I think Mr. Noonan's testimony was very credible. I think he went through a very accurate analysis of the master plan. Mr. Unterberg obviously does not agree

with him, but I think Mr. Noonan's testimony was very logical, and I think it was accurate as to what the master plan calls for in this case. And I suggest to the Examiner that on balance, as far as the master plan is concerned, I think he has the better of it when he talks about what is required by compliance with the master plan. And I'll leave it at that, but I also will say that it talks about neighborhood retail and this ain't neighborhood retail, and I'll leave it at that just for a moment.

When you talk about compliance with, in this case there are at least two, aside from neighborhood retail, a couple of things that pop out: one, a grocery store is recommended in this neighborhood. It's explicit in the ordinance. I think it's page 64. I know you know the page, but a grocery store is required. The other more obvious one is the 120,000 square feet of retail. That is a numeric cap in this area, or a standard. It is -- and I use that word intentionally -- it is a numeric requirement of this master plan.

By the way, just on that, they -- and this is, again, one of Mr. Harris's comments -- they talk about the 20-year life of the master plan, and he used two words. They say, gee, this is a 20-year-old master plan and therefore it has to evolve. That was his word, it has to evolve, and he transitions that to be flexible and that's

his word. So that what he is saying is, gee, this is an old master plan, it ain't working, it has to evolve, and the way we're going to do it is by making it flexible to allow this use, because this use is really what is appropriate today, the master plan is not appropriate because it's 20 years old, so you ignore the master plan requirements under the rubric of evolve and flexibility. Quite frankly, I don't think that's the law of Maryland. This master plan is the master plan. It has been reinforced in 2011 by the District Council and the Planning Board; so that its standards, its requirements, when it talks about 120,000 square feet of retail, they have been reinforced, reaffirmed as recently as 2011.

Now, if I may, there's a case -- and I'm surprised that Mr. Harris hasn't given it to the Examiner -- and I want to talk about it. Mr. Harris is going to give you some case citations afterwards, and I respect that and I'm sure he will. I will say, by the way, just as an aside, his reference to Schultz versus Pritts and to Terrapin Run were special exception cases, as I recall, and they were not zoning cases, but -- so that when he's talking about overall flexibility, that was part of his flexibility argument. And Terrapin Run, by the way, as you may recall -- and it's in the cite I'm going to give you -- has been legislatively overturned because it did not reflect, as far as the General

Assembly was concerned, the proper standard for master plan compliance and the road that the court went down in that case. But aside from that, Park and Planning versus Greater Baden, 412 Md. 73 -- it's a Court of Appeals decision. It's also at 985 A.2d 1160. It's a 2009 decision. This is a case, a zoning case, not special exception, that comes out of Prince George's County, and it talks about compliance with the master plan and it talks about, in this case, numeric limits and that's important. By the way, it also refers to the decision of the Court of Special Appeals in Archers Glen Partners versus Garner. That decision is 176 Md. App. 292, 933 A.2d 405 (2007), which was affirmed by the Court of Appeals in 405 Md. 43 in 2008.

What's significant is that in Park and Planning versus Greater Baden it refers to the decision of the Court of Special Appeals in Archers Glen, because Archers Glen also dealt with a numeric limit in the master plan. And in Greater Baden, the Court of Appeals talks about master plan compliance, and at page 98 of 412, it says: In the context of zoning actions, master plans have been viewed generally as non-binding advisory recommendations unless a governing statute or ordinance clearly elevates them to the status of a regulatory device. So when Mr. Unterberg talks about it's a guide, he's neatly not paying attention to at least two ordinance provisions.

And it goes on in this decision, the Court of Appeals -- this is a Harrell decision -- and explains that where the local -- I apologize. This is at page 101, at the top of 101 of 412 of Maryland: where the local government has enacted a statute, ordinance, or regulation that links planning and zoning, they serve to elevate the status of comprehensive plans to the level of true regulatory device, and those are quoting from Rylyns, Mayor/Council of Rockville. Where such a statute or ordinance exists, its effect is usually that of requiring that zoning or other land use decisions be consistent with a plan's recommendations regarding land use. Again, that's going back, citing a case in the language used in the regulation of that case.

It further says -- again, this is still at page 101 -- Noting that the weight to be accorded a master or comprehensive plan recommendation recommends upon the language of the statute, ordinance, or regulation establishing the standards pursuant to which the decision is to be made. Same page and quoting -- that was Boyds versus Montgomery County, an old 1987 decision that I'm intimately aware with because I represented the community that took it up in the Court of, had to take the Court of Appeals decision -- same page: In such cases, we look first to the words of the applicable statute, ordinance, or regulation to

divine what the enabler intended the weight to be accorded by the ultimate decision-maker to a recommendation of the plan, citing Richmarr.

What's important about this decision and the Court of Special Appeals decision in Archers Glen is that it recognizes that when a master plan has a numeric standard, you have to go to it, okay? And, admittedly, there's language in the decision -- it has to be addressed, is the bottom line. And what we are saying in this case is that the 120,000 square feet of retail, as well as the grocery store, they are explicit requirements in the master plan and they must be complied with. That is the language of the ordinance.

Now, I've heard this explanation by Mr. Unterberg and Mr. Harris about, involving the base zone, previous base zone, about how they get to this 20 percent permissible in the MXPD zone. I defer to you. I've read it in -- I don't get it, okay, but to me, it doesn't matter because 20 percent in the MXPD zone still must comply with the master plan. So this convoluted argument, legal argument, not only do I think it's not accurate, it ignores the fact that you still must comply with the master plan.

Let me look at my notes just real quick because there's another point I want to get to. By the way, again, in this argument about evolving master plans, Mr. Harris

said that -- and I apologize, but I think I got this right -- but after he referenced Schultz versus Pritts, Terrapin Run, and some other cases that were not court decisions, he says they dealt with development plans. Maybe the cases, the zoning cases that were not court decisions did, but Terrapin Run and Schultz versus Pritts were not development plan cases at all.

Stormwater management, I have to go to the language that we cite. Mr. Harris's position is that they will meet that when they have, when it has to be addressed at another step in the process. Well, I look at the language in the ordinance -- and I know we've talked about this many times -- I'm sorry. That's subsection (i). I had it right here.

MS. ROBESON: I think it's 59-D 1.3(i).

MR. CHEN: Yes. Wait a minute. I got my pages -- yes, it's small i: If a property proposed for development lies within a special protection area, which is our case, the applicant must submit water quality inventories and plans and secure required approvals in accordance with Article V of Chapter 19. The development plan should demonstrate how any water quality protection facilities proposed in the preliminary water quality plan can be accommodated on the property as part of the project. This is ordinance language. Now, I do understand in

administrative practice, and they say we'll deal with it at site plan, that's an overall, but I don't think, and I submit to the Examiner, that is not what the ordinance requires.

I have case cites too.

MR. HARRIS: Oh, thank you.

MR. CHEN: I'm going to give you a list of case cites. I have, I have not put Bil Chen's characterization of any case. I've just given you a list of cases and quotations from the cases. That's all you're getting. So this is not a legal memo as such. It just gives the Examiner a series of cases that deal with what I think is a concern about the status, the requirements of the zoning ordinance language and an administrative interpretation of it.

MS. ROBESON: Okay. Well, I am going to give it, we don't usually take -- I'm thinking of housekeeping. Normally we give anything an exhibit number simply so we can refer to it. So I am going to give it Exhibit 130.

(Exhibit No. 130 was marked for identification.)

MR. CHEN: Okay. And as I say, there is no editorial comments. It is literally a string cite, if you will, of Maryland court decisions that pertain to the interpretation of an administrative agency of an ordinance

that it operates under. I will --

MS. ROBESON: And just to clarify -- I'm sorry to interrupt -- when you submit your citations, that will have an exhibit number.

MR. HARRIS: Thank you.

MS. ROBESON: Okay. I'm sorry, Mr. Chen. Go ahead.

MR. CHEN: It's okay. Look, I'm not going to spend more time on it, but what we've heard is apparently an administrative interpretation of this subsection that defers compliance with it until site plan stage or -- well, as to use Mr. Harris's words, at another step in the process. I don't think so. On behalf of my client, they had to comply now. And I appreciate the fact that maybe the Planning Board and the Planning Board staff and DPS may do something else and there may be a logical reason why they do it, but if there is, they should go to the legislative body and have the legislative body change the law, and among the case cites that I've given you are situations in which even District Councils have been reversed by the appellate courts for failing to comply with the requirements of their ordinances.

So that, again, respectfully, as far as the argument is concerned and these agencies, they have to comply today. The record has to show compliance with

subsection (i). The record does not show compliance with subsection (i), and this application therefore cannot be granted by the District Council as a matter of law. And that's all I've got.

MS. ROBESON: Thank you Mr. Chen. Mr. Kline.

MR. KLINE: Good morning. Bear with me for a second here with my throat. Mr. Harris has apparently just worn me out after all these hearings.

MS. ROBESON: Never.

MR. KLINE: I'll try and speak up. I'd like to reiterate the same, the same compliment that was mentioned by both the other attorneys, to co-counsel at the table for the manner in which they all conducted themselves, particularly Mr. Harris, who showed very great professionalism and even courage at a time in his life when I probably wouldn't have even had enough strength to get out of bed myself. It's very impressive.

Having said that, though, the thrust of our --

MS. ROBESON: That was short-lived.

MR. KLINE: The thrust of my argument is the converse of that old phrase damned by faint praise, and in this case, DPA 13-02 should be damned for any excessive praise of the application. Everything about it is just too much. It's over the top. It's too much square footage, it's too much activity, and it's too exaggerated in

everything that it intends, says is its purposes to accomplish.

You start with the obvious issue that Mr. Chen already mentioned; that's the 120,000 square feet. And how much are we getting? Four hundred and eighty-four thousand. And how many times did you hear people say, how can you say 484,000 is consistent with the master plan recommendation of 120,000 square feet? Mr. Chen basically kind of gave you the legal significance of the master plan recommendations. I'll try and put it into master planning context.

The only way that you could justify the leap from 120 to 484 was to essentially create a zoning fiction of something called, which was originally called employment retail use which morphed into specialty retail use -- something that has no significance, well, no designation or definition or zoning ordinance and, based on my experience, doesn't have any practical application in the zoning practice itself, at all. And, of course, the argument from the applicant has been that the 120,000 relates to the neighborhood convenience retail and that other retail was not prohibited or precluded, but remember how the regional outlet center essentially reaches its desired size. It does so at the expense of the neighborhood-oriented convenience retail that was specifically mentioned in the plan of 120,000 square feet.

If you look at the applicant's justification statement, Exhibit 20 -- and I encourage you, please reread it again. It's, in my opinion, the most telling description of how this regional outlet center will function and, I think, is a better window into what it's going to be in the field than the testimony that you've heard here today. But do you remember the math? The math was -- the application requests 484,000. If you take a look at the justification statement, Exhibit 20, the opening paragraph on the first page basically says it'll be, I'm sorry, the regional outlet center will be 450,000 square feet of employment-based retail, including 14,000 square feet of restaurants and a substantial marketplace food court.

So if you remember the questions between Mr. Unterberg and myself, you take that 450, you add the Gosnell property of another 8600, and as Mr. Unterberg conceded, that would leave you the potential of 25,400 square feet of neighborhood convenience retail in the Cabin Branch neighborhood -- clearly not enough to have an adequate critical mass to create a neighborhood shopping district, which is what the plan was contemplating at the time, and to boot, as Mr. Chen stressed very much, no grocery store, the one thing where there's a specific bullet that says this is a use that's essential to being able to create that neighborhood retail component.

So, it's interesting. When you've got the ratio of 450,000 square feet of regional retail facilities against 25,4, soon to go up to 50,000 square feet, I find it fascinating that if you live in Cabin Branch, you're going to find it easier to buy a ball gown than it will be to buy a jug of milk or to get your laundry picked up in terms of how that -- basically, the neighborhood convenience retail that was contemplated in the plan has been cannibalized in order to increase the size of the regional outlet center.

Now, you highlighted this as an issue, and the applicant says it's going to -- that is, the development plan -- to go up to 50,000 square feet of convenience retail, but when that application comes in, we're going to scrutinize that because we believe that's got to be exclusive of the 8600 square feet attributable to the Gosnell property, which is a car wash, a gas station, and a convenience store, and that's not the kind of retail that we were -- that everybody was thinking about, nor is it in the location where the retail was supposed to be, it being on the north side of 121.

So for the same reasons that Mr. Chen said you got arithmetic numbers in the master plan, you've got a plan that talked about retail always in the context of convenience retail and never any reference to any other kind of retail. Office was the only reference I've ever been

able to find anywhere in the record to what that other 2,300,000 square feet was supposed to be. Therefore, this development plan does not substantially comply with the amount and the type of the retail uses recommended for in the Cabin Branch neighborhood.

The location of the convenience retail is also a way in which the development plan, excuse me, deviates from the plan's recommendation, and that is, by that, I mean, the location of the, what's left of the -- where that 50,000 is going to go. If you take a look at the text of the plan, pages 68 and 70, it says retail should be located at neighborhood core. That core should be a clustered, high-density residential, retail services, office uses, and civic uses; it should have a grocery store; and most importantly, it should have a strong neighborhood orientation. The header for that whole section in the plan on page 70 says: Create a strong neighborhood focal point by concentrating public and retail uses in the same general area. And a sub-bullet to that is: This plan supports the concentration of those uses in one central area to strengthen the neighborhood center concept. That's all found on page 70.

If you contrast that with the applicant's justification statement, it starts off by saying: As a retail employment destination, these facilities, meaning the

outlet center, will operate at the scale of the region. And then a following quotation: The central square at the food court will serve as the neighborhood square and will be easily accessible by area residents.

So, what's happened is they've taken what the plan contemplated to be sort of a town square and they've buried it inside the regional outlet center, where essentially the functions will be overwhelmed by the activity of all the people who are coming in from however far they're going to be coming to shop here. And the idea of the master plan of having the town square is actually morphed into what I will call Times Square because of the activity level that the justification statement says is going to be occurring within the regional outlet center. So you don't get that neighborhood-oriented, community-based neighborhood retail center.

Furthermore, the way the plan is currently set up now, the neighborhood retail is dispersed. Whereas before it said you got to concentrate it in one place, it's now, it's now dispersed. You've got the Gosnell property, which we would concede is convenience retail, but it's 8600 square feet. It's up on the north side of 121. It isn't pedestrian-oriented, and it isn't really part of Cabin Branch per se, as you think about it. You have some convenience retail that's going to be buried inside the

regional outlet center in locations not, not defined yet but somewhere in the core near the food court, and then you got that central node down in Part C that's going to get something also.

So if we've got 50,000 square feet, we're going to essentially split it up into three places, and you're just never going to be able to create that critical mass that the plan had contemplated and that's why I go back to my somewhat, my -- trying to think of that lovely term from English -- but something that basically you go, onomatopoetic of town square slash Times Square. It's just, it's been perverted into that being Times Square.

So, because of those locational features -- both in terms of where they're going to put the retail, not in a place where it's basically the focal point; and, two, because it's not centralized by being dispersed -- for that reason it also doesn't comply with the master plan, not in substantial compliance with the master plan. And furthermore -- and I know you asked, you alluded to Policy 7 a number of times -- it does not comply with Policy 7, found on page 28 of the plan, which says: Establish a mix of uses to encourage pedestrian travel and reduce dependency on the automobile -- and that's certainly not what happens when you take your convenience retail, which was intended to be pedestrian-oriented, and drop it in the middle of a regional

outlet facility -- or proposes retail and employment uses at a pedestrian scale and oriented to the needs of the residents, and that's probably my biggest concern, as I view this, is that you cannot mix the community neighborhood-oriented retail within the regional facility and still have any kind of a character, a neighborhood character for that use at all.

I said that the Cabin Branch Development Plan wasn't in accordance with the plan because of the activity level that the regional outlet center will generate, and again, I encourage you to reread the applicant's justification statement because it tells you, it gives you a sense of the energy that's going to be created and that's why I complimented Mr. Kaplan, because from an exercise of place-making, it's a fascinating application; as a means of implementing the master plan, the Clarksburg Master Plan, it's just, it's an absolute failure.

The outlet center, according to the justification statement, Exhibit 20, says it will create a sense of place, and I don't disagree that that's, that's true, but it's not the type of place that the master plan was thinking about that was going to occur in Cabin Branch that was going to be community-oriented, and it's not the, excuse me, and it's not the location of place, as I said before.

I think all the parties agree that the plan did

basically -- the structure of the plan was a hierarchy. There was a town center, a town center district that according, as stated on page 26 of the master plan, was to be the center of community life. And then you had the two subordinate neighborhoods, and the plan on page 28 says those are the basic building blocks in establishing the sense of community. The introduction of a regionally-oriented use into a neighborhood-oriented community, Cabin Branch, basically damages the Cabin Branch community for the reasons I just explained, both in terms of its intensity and its location of the different facilities, but it hurts the town center as well.

There seems to be disagreement between the experts whether or not the leasing program at the premium outlet center will actually in any way inhibit the leasing program in the town center. So I probably won't go that far at all, but it's certainly clear after reading the applicant's justification statement that the energy and the activity at the regional outlet center will draw the focus away from the town center and to this more dynamic use. So the justification statement says it may create a sense of place, but I would argue that it does not create a sense of community because it is not basically revolving around the communities, or the neighborhood communities that were contemplated in the plan.

And without getting too metaphorical in this, you've heard, you've heard the applicant's description of the facilities it would have basically on the fringe of the regional outlet center. The amphitheater has been mentioned. Take a look at page, Figure 20 on page 45 of the master plan. That's the illustrative image of the town center. That's where the amphitheater was supposed to be. That's one of those features that was supposed to activate the town center, make it that center of community life. And I hope I'm not carrying the point too far, but appropriating that use and moving it over to the west side of I-270 is basically a symbolic expression of how this plan is basically going to undermine the town center because of its level of energy, its level of activity, and the fact that it's appropriating uses that were contemplated to be in the center of the community and moving it over to the west side.

Therefore, the Cabin Branch Development Plan Amendment is not in substantial conformance with the plan recommendations that the development create a town scale -- that's your Policy No. 1 on page 16 -- and that the town center district be the strong central focus for the whole study area. And, frankly, from day one that's the thing that's bothered us the most, is that it just, by putting this facility on the west side, it essentially overwhelms the plan and knocks the whole plan out of balance.

One of the witnesses, Mr. Chen's client, Whit Cobb, who's an owner of property in the historic district, stated the situation very succinctly, and I'm going to quote this from, I think, his testimony or his letter: For all that the regional outlet center does for the town center, the regional outlet center could be located anywhere on the I-270 corridor, and we'll get the same benefit from it whether it's in Gaithersburg or Urbana, meaning that people will drive there, they'll drive to the retail center, they'll shop there, they'll eat there, and then they'll get in their car and they'll go home because there'll be nothing that they haven't been satisfied with in that stop and there will be no reason to go to the town center, and that's why this facility, at least as it's designed today, is contrary to the ultimate success of the town center.

You know, I said in the beginning that what bothered me was the application, which is so much over the top. It was just so exaggerated in what it said it was going to accomplish. And if you remember in the opening statement, it was said that, you know, we don't really even need a development plan amendment; what we're doing is we're basically adding another use that wasn't mentioned in the plan, but it's not precluded and therefore we just didn't need a plan amendment at all. Well, that belies the fact that we've been here however many days we've been here

arguing kind of about all of that. So I think that's kind of an expression or an example of the overstatement of what this application can do.

Another one, the application -- the applicant's justification statement: The fashion retail center employment -- I'm sorry. The fashion retail center employment retail proposed as part of the filed DPA will be a catalyst for the remainder of the employment center; there is a proven track record to substantiate this statement. Well, I would argue there is nothing in the record to substantiate this statement.

Mr. Bogorad basically testified three times -- originally, then a day of follow-up, and then he came back again on rebuttal -- and he basically demonstrated or tried to explain there were situations where there had been some effect, but I'm going to suggest to you that his initial comment, which I believe was very candid, as Mr. Kaplan was, is that it's an untested proposition that the regional outlet center will basically stimulate and be a catalyst for high-tech development in the surrounding area. I mean, we would not disagree that anything helps, but it's not accurate to say that there is a linkage that one is going to automatically create the other.

Mr. Chen made a reference to the split zoning, or actually, Mr. Harris mentioned the split zoning and Mr. Chen

kind of alluded to that. I don't even feel qualified to talk about it because I just quite didn't get it at all. What I knew, though, was we adopted the plan first, then we put the RMX zoning and the I-3 zoning on it, and then we put the MXPD zoning on it. And the one thing I would add to -- well, let's put it this way: If the suggestion was that the additional retail was not precluded, my argument was, well, why didn't, when we adopted the plan, why didn't the plan say, look, it's 120,000 square feet if you stuck with the RMX zoning but, if you do get MXPD zoning, you could add more retail; but that -- the absence of that language in the master plan, in my opinion, says we were always committed to, I'm sorry, the plan was always committed to 120,000 square feet of retail, and there was no suggestion or allusion that there could be more retail. It is legally possible, yes, but the plan language doesn't suggest that. And I go back to the number of times, when you look at the tables, when you look at the references, when you look at the record of G-809, we always talked about retail -- admittedly, convenience retail -- and the only other use we ever heard about employment was office. You never heard any other suggestion, other than office use, at all. Even the hospital wasn't even mentioned in terms of an alternative use.

And, finally, I guess I'd say it's certainly

exaggeration, the claim we heard last week, that the Council resolution on the original rezoning suggested that you could go up to 240,000 square feet, and we basically had a dialogue about that at the time. And the resolution on page 14 actually reads: Retail uses would occupy roughly 10 percent of the commercial floor area, well below the 20 percent limit. And I'm going to say that's nothing more than a simple description of a fact, albeit with an arithmetic error, because 120,000 square feet is not 10 percent of 2,420,000. It's only five percent, give or take.

When I sit back and kind of think where we are, we're actually, I don't think the parties are actually all that far apart -- we're kind of quibbling about things in the master plan -- because, in fact, my client doesn't disagree that the plan is out of date. The plan date basically needs to be looked at in that regard, but we don't agree that the answer is that you can be more flexible in how you interpret the master plan due to the recommendations of its age. And as Mr. Chen emphatically stated, if age of the master plan was the determining factor, we have not had this conversation at all because the 2011 limited master plan amendment, which specifically reconfirmed all of the assumptions and policies in the original 1994 plan, didn't give any suggestion that there should be any variation at all on that.

And, as an aside, I will add into my kind of prepared script, if you want to take a look at the record of G-881, the Council did not say we need to be more flexible, more open-minded. If you look at the hearing examiner's report and recommendation, you will find a quotation of Mr. Unterberg, testifying that in fact the master plan recommends density of two to four dwelling units per acre, which is what the application was requesting, as compared to staff position that the master plan suggested it should be RE-2 zoning. It was not a flexible, reading the plan. It was basically the, an argument about what was the proper language and what should control, graphics or text, and it didn't have anything to do with looking at the plan in a more flexible manner in the future.

Through the evolution of this case, I've come to the conclusion that I need to give the staff the benefit of the doubt -- the staff and the Planning Board, for that matter -- the benefit of the doubt because this, their recommendations, surprising to me, surprising to my client, was their attempt to salvage the Clarksburg Master Plan, a plan that admittedly has got a lot of inconsistencies and a lot of warts on it because of its age. But it's beyond us how they could have concluded that the proposal is in substantial conformance with the plan, in terms of the specific numbers and the specific uses that are recommended

in the plan, because of its deleterious effect on the town center and the structure of the entire plan that Mr. Noonan and Mr. Ferguson both talked about in terms of the balance and how you're supposed to have the district, town center district, and the subordinate neighborhoods basically all kind of working together, one subordinate to the town center; and, finally, for its effect on the whole town scale intent of the master plan, because you cannot introduce 450,000 square feet of regional retail outlet center and maintain a town scale, either with -- particularly in Cabin Branch and because of the effect it has on the town center as well.

As I said a minute ago and as I said to Mr. Kaplan when I first started my questioning of him, it's a well-conceived, beautiful plan, it's a great example of place-making, but it's not in accordance with the recommendation of the plan and, in fact, if it's adopted the way it is today, it'll basically be the death now of the Clarksburg plan ever having any likelihood of fruition the way its envisioned today.

I would like to spend a little bit more time on the procedural issue dealing with the stormwater management, a little bit more than Mr. Chen did. I actually thought Mr. Brush's letter made it all pretty simple how to address the procedural issues in this case, you know. I think his

last line said, we'll do, we'll review the water quality plan when it's submitted to us, whenever that is supposed to be done. Yes, actually, the quote was: DPS will review the plan, if it is submitted, at whatever point in the process it is determined to be required.

So I guess the question you got to wrestle with is when is that point in time in the plan, and I agree with Mr. Chen -- it seems to me that Chapter 19 and the regulations really nail it down and make it very clear. COMCOR 19.67.01.01 and 19.67.01.03 says that you amend the development plan, I'm sorry, that when you amend a development plan, you must submit a water quality plan for review, and that's essentially what 59-D-1.3(i) says as well, that you've got to have those things going on.

When do you submit that water quality plan? Under 19-65(a)(1), it is coordinated with the project review. That's a quote from 19-65(a)(1). Water quality review must be done in conjunction with the review process for a development plan. They are supposed to go in tandem together, at the same time.

What's the scope of that review? 19-65(a)(3)(A) basically says that you do, must undergo a review as described in subsection (b), which is a complete submission of all of the materials that are listed in the ordinance, and we talked about those the other day, the inventory, the

stormwater management, and the sediment control plan. All that stuff is supposed to come in at that point in time.

And whether -- well, no. Who gets to review it is determined by whether it's minor or significant. 19.67.01.01, if you remember my quotation, was if it -- all amendments are significant unless they're minor, and it lists the minor, and you may recall my questioning of Mr. Bossong and you know what the facts are of this case. What is going on at Cabin Branch does not meet any of the three criteria for what is a minor amendment. So that means DPS has to review it, Park and Planning can't do it, and it has to be done in accordance with the whole shooting match of materials that have to be submitted, excuse me; and, when that's done and under 59-D-1.3(1)(i), and approval secured, meaning you have to submit it and you have to get DPS's approvals as well.

So the answer to the question that you asked Mr. Etheridge was -- can the Council make a finding here that current stormwater management requirements can be met for the maximum amount of development shown on the development plan amendment based on the water quality plan, showing outdated ponds? The answer in my opinion is unequivocally no because they don't have the information today to be able to make that decision. They basically have an outdated plan. That's what Mr. Brush's letter says to

you. And that process all makes sense under the new policy and the new emphasis in the 2007 Stormwater Management Act.

Mr. Chen alluded to the administrative practice that's occurred in the past, and you said, mentioned it in some of your memos. I can understand how the water quality plans that have been approved today -- I'll rephrase that. The site plans that have been approved today and the water quality plans that have been amended today all occurred without having to go through the process of 59-D-1.3(i) because those were all dealing with parts of the property that had been grandfathered, and this is an area of the property that hasn't been grandfathered at all. And the whole philosophy and change in 2007 basically shifted that burden.

You know, the applicant's position today is, we're not making it any worse, so we should be allowed to go forward. The mantra of ESD to the maximum extent practical shifts that burden and puts on the applicant an affirmative obligation to demonstrate that it can't make it any better. It has to come in and it has to say this is what we're going to do before but take our word for it that that's to the maximum extent practical, and that's not the way this system is set up. Now you have to basically just, basically demonstrate that it is to the maximum extent practical.

So the what happened before is essentially not the

process that we can follow today, and under the change, the philosophy where the burden shifts, they basically have to come in and demonstrate that, hey, there isn't anything else we can do to make it any better. It just isn't -- this rule of we're not making it any worse just doesn't sit any longer.

So the full review of the Chapter 19 procedures is required before the amended development plan is approved. That's why you do the two things in conjunction with each other, and the post-2007 law says that no project approval until water quality plan approval has been, has been achieved.

Now, what do you do with that? I mean, I, you know, we've never really been trying to kill this thing. We've just always been saying you got to play by the rules. So I believe you got two choices, and I guess your e-mail to, yesterday, to the, about your conversation with Mr. Carter, we can either sort of suspend everything and have the applicant go and basically do that water quality plan review and then put it in the record -- and I don't probably doubt that it'll probably do pretty well, but they still have to go through that exercise -- but we shouldn't be going forward with Council because how can the Council be basically making a decision based on plans that show features that no longer are going to be approvable by DPS,

and that's what Mr. Brush's letter said to you yesterday.

That deals with the procedural issue. With -- this is sort of the point in time in my presentation I'm supposed to look at you very intently and say, and we -- you must recommend denial of this application, and in fact, that's not our position. We've never been trying to kill this application. We just thought they should have to go through a master plan amendment the same way we've have to go through a master plan amendment on that east side of I-270, the Ten Mile Creek plan.

So our recommendation is, is that you recommend deferral of the application or remand back to the hearing examiner until such time as the County Council has amended the work program from the Planning Board to do a master plan, and then whether its minor or major -- I would think it would have to be major because, as we've talked about, if there was to be, if there is to be a regional outlet center on the west side of I-270, it does have some effect on the town center the way the plan is structured today. So it seems to me that's got to be bigger than just a minor master plan amendment, but maybe it could be done that way. But that's the complaint we've raised through the whole thing, is that the plan -- the way the plan is set up today, the regional outlet center is basically inconsistent with that plan and this application shouldn't be approved until that

plan is -- yes, it shouldn't be approved until the plan has met it. I'm not saying you withdraw it and re-file it, just saying you got to amend the plan before you can basically do anything with this application. Thank you.

MS. ROBESON: Thank you. Before you rebut, as to Mr. Chen's and Mr. Kline's arguments on stormwater management, would you agree that it's arguable that you do have to amend the plan? That's one. And, two, when I read Mr. Brush's e-mail, I, perhaps naively, was under the assumption that DPS had seen this amendment, and as I read the statute, DPS is the lead agency on -- they each have different, different functions, but DPS, you know, performs a separate function than technical, or the Planning Board.

So, in light, can you address your position on those aspects raised by Mr. Kline and Mr. Chen, and perhaps you were already prepared to do that, but I just wanted to make sure you did it.

MR. HARRIS: Okay. Do you want me to address that first, or how --

MS. ROBESON: You can go in whatever order you wish.

MR. HARRIS: Okay. First of all, before I start, I should have done this before, but the cases --

MR. CHEN: Thank you.

MR. HARRIS: -- that I referenced.

MS. ROBESON: Thank you, and I will make this Exhibit 131.

(Exhibit No. 131 was marked for identification.)

MR. HARRIS: Okay. First of all, I guess I'd start by saying I'm truly touched that a competitor is so concerned about the, a literal interpretation of the master plan regarding a completely different property, not even next to or neighboring their property, that they're so concerned about good quality design for Cabin Branch, that they are extremely concerned about the survivability of town center retail when they want to do the same thing that would have the same impact there, and that they now are the conscience of the County with respect to how stormwater management regulations should be applied. This is just truly profound for a developer to be so concerned, and it's great. Our experts disagree with 100 percent of what they said, and the planning staff, the Planning Board, and the DPS disagree with them. So while it's touching, it's of passing interest.

MS. ROBESON: Wait. DPS disagrees --

MR. HARRIS: Correct.

MS. ROBESON: -- because I don't read that.

MR. HARRIS: Okay. Well, I'll address that in a minute --

MS. ROBESON: Okay. And the other --

MR. HARRIS: -- I'm talking, overall.

MS. ROBESON: Okay. I'm sorry. I have one more question --

MR. HARRIS: Oh, yes.

MS. ROBESON: -- I'd like you to address. I'm sorry to interrupt, but why not just amend the preliminary water quality plan? So if you could do that too.

MR. HARRIS: Okay. I will come to that. Thank you.

MS. ROBESON: Okay.

MR. HARRIS: In any respect, I'm talking about both master plan issues, the zoning issues --

MS. ROBESON: I see.

MR. HARRIS: -- and everything else. They've become the conscience, they're wrong, but it's a nice, noble gesture.

With respect to the 2011 master plan, they maintain that that completely reaffirmed the master plan. Clearly, it was a very narrow, very quickly done master plan amendment, focusing on one issue only. And if it were such a complete rewrite of the ordinance, of the master plan, why are we doing another master plan amendment for the Ten Mile Creek area now, two years later? Clearly, it was not a reaffirmation of everything in the master plan.

The -- Mr. Chen just chooses to ignore the flexibility in the MXPD zone and the master plan and particularly the Washingtonian case that demonstrates that clearly. So I respectfully disagree with him on that respect.

He indicates that a grocery is required at Cabin Branch. That is certainly not the case. There was a recommendation to allow it, but circumstances have changed now, and you heard exhaustive testimony as to why it's not appropriate.

He mentions that the 120,000 is a cap. I know a cap when I see it. It says a cap, and this master plan does have a cap for retail in the town center. It does have a cap for retail in Clarksburg Village. It uses those words: maximum. It does not use that word in Cabin Branch. So that is a different circumstance.

We're not saying to ignore the master plan. We're saying that it should be applied flexibly, as is required by Maryland law, and that we do substantially comply. Maybe I used the word conform; maybe I used the word substantially consistent. To me, those are synonyms. Compatible with is not a synonym. That's what's in the MXPD zone, but we do substantially comply. There is no numeric standard in this master plan for the MXPD zoning area. So we are substantially consistent with the absence of that.

With respect to Terrapin Run, Terrapin Run was not overruled where properties are within a priority funding area, such as this. Section 1-304 of the Land Use Article that Mr. Unterberg testified to specifically says that in priority funding areas where there are requirements in a statute for consistency with or compliance with or conformity with a master plan, that those do not require consistency, compliance, or whatever, with the use and density in a master plan; other requirements, yes. And, in outside of a priority funding area, yes, you have to comply with the use and density, but in a priority funding area, you do not. The reason simply is, in light of Terrapin Run, they wanted to clamp down on development outside of priority funding areas but to give priority funding areas flexibility so that they could develop and meet the needs of an evolving community. That is exactly what is going on here.

In terms of the Greater Baden case that he cited, that case did affirm the general principles of deference to the Planning Board. Ultimately, the court there did recommend remanding to the Planning Board because the Planning Board had not examined the issues with respect to the master plan. They examined the issues here exhaustively, both they and the staff, and they looked at the numbers in the master plan, and they did find that this substantially complies. So that case is not dispositive of

our situation at all.

The -- Mr. Chen made a big point about the, where a statute requires consistency or compliance that then it elevates it, and I don't disagree with that, but the cases that I cited, the DPA cases, those are all DPAs under 59-D-1.6. I think there were nine of them that I cited, and in those cases, despite 59-D-1.6, the Zoning Hearing Examiner's Office found that the master plan in those cases was flexible and that it was appropriate to interpret it that way and allow, allow the development to proceed.

In terms of Mr. Kline calling it a fiction to call retail employment, I'm touched that he's gotten religion now when he called it employment when it was Wegmans and it was his client, but when it's my client, it's not employment.

There is, or there will be neighborhood-serving retail in this project. I consider a gas station serving a neighborhood. I consider a convenience store serving a neighborhood, among others. Those are already approved and will go forward, but in addition to that, there will be other retail in terms of the restaurants, in terms of the other retail that we're reserving in Area C. We are and have proposed a binding element that will obligate us to do neighborhood retail in that area and that will be on the final development plan when we submit that.

As far as a grocery, I can't make it more clearer:

the community does not want a full-size grocery at Cabin Branch. It would be the death knell to the town center, the very town center that they're so concerned about protecting. So that will not be there but that does not mean there won't be neighborhood retail. As far as the prom dress or the jug of milk, you can get both. The convenience store will certainly sell milk, and I suspect there'll be a place to get a prom dress if Mr. Kline or someone wants one. Again, I'm touched that Peterson Company is so worried about, you know, what the residents of Cabin Branch will be able to buy.

The entire project is highly pedestrian-oriented. You heard Mr. Unterberg go into that exhaustively. It really is, you know, ideal in that respect. Yes, people will drive to the, to the outlet center, just as they would to Peterson's outlet center or other uses, but guess what? Two point four million square feet of employment, hmm, I think they'd have driven there too. I don't think they were all walking from Cabin Branch.

So the, if anything, the retail will be more neighborhood-oriented than would be two point four million square feet or two point three million square feet of pure office use, drawing from a much bigger area. As far as the town center impact, again, Elm Street, planning staff, Planning Board, the community all disagree, with all due

respect, with the opposition. They don't see that adverse impact.

With respect to the town center being the center of the universe here, the town center is supposed to be a small village, a main street feel, never intended to be the major component of Clarksburg. It couldn't be with 10 million square feet of employment at Cabin Branch and COMSAT and elsewhere. Clearly, it is just the village center but not the center of Clarksburg overall. That town center will be there and it will survive, in fact, be amplified by this, as Mr. Flanagan has indicated.

As far as the amphitheater, Mr. Flanagan does plan a public-use space at the town center area and that will go forward. Building assumption --

MR. KLINE: Objection. That's not in the record at all.

MR. HARRIS: I believe it is. Mr. Unterberg testified to that.

MS. ROBESON: Well, I allowed some latitude. The record speaks for itself. So --

MR. KLINE: Sure.

MS. ROBESON: -- I will -- and I have carefully reviewed the transcripts, and I will review the final transcript when I receive it.

MR. HARRIS: And I believe it's also in the record

that the Peterson Companies plans to have activity space like that at the retail center they would do.

MS. ROBESON: Well, well, okay, I know that's not in the record. So --

MR. HARRIS: Okay. I thought it was, but it may not be.

MS. ROBESON: No, I don't think so.

MR. HARRIS: In terms of stormwater management, again, I appreciate the position taken by Mr. Chen and Mr. Kline, but both Park and Planning and DPS have indicated they disagree with that position. After being, you know, you know, I'm -- well, never mind, I won't even say that. We do have a preliminary water quality plan. That remains valid.

MS. ROBESON: He's not saying that, though.

MR. HARRIS: Mr. Bossong --

MS. ROBESON: He's saying --

MR. HARRIS: Mr. Bossong did say that. Mr. Bossong is an expert on the regulations. Nothing in his, Mr. Brush's e-mail says that it's not valid. All he says is that, as with all cases, as the project proceeds through subsequent levels of approval, where more definition is given to the water quality features, that water quality plan will become more refined. It's a general preliminary water quality plan. It's general in nature. It was never

capable of being -- it was never intended to be built in that regard. It didn't specify exactly where water quality features would be, such as ESD devices. There are numerous places throughout the concept plan, in the preliminary water quality plan, which says, you know, just talks generally about there will be such things as bioswales, et cetera, without locating them. That was always going to be done at the final water quality plan stage.

Again, remember Chapter 19 of the County Code. It says you do a preliminary water quality plan that says what are the -- the primary thing of the preliminary water quality plan is to identify water quality features and drainage areas so you have a base-conditions circumstance. It does contain a concept of how stormwater will be addressed but recognizing that it's a concept that will not be built in that capacity but, rather, will have to be approved through subsequent approvals. So that preliminary water quality plan stays in effect.

As this project goes to, again, under Chapter 19, the final phase of development approval, prior to building permit, the site plan phase, a final water quality plan has to be done and that final water quality plan will do specific engineering as far as the amount of water that each building and each parking will generate and how that will be done. You could not do that today because you don't know

the footprint of those buildings, you don't know the exact size of the parking lot, you don't know the exact location of the roads. So it is always an evolving plan, as Mr. Brush indicates in his e-mail and as Mr. Bossong testified.

The, they didn't -- contrary to the other argument, they didn't say the preliminary water quality plan is outdated, at least not as I read it. They simply said that it will be finalized, I don't remember their exact words, through the subsequent approval processes. Chapter 19 clearly calls for a preliminary water quality plan at the first phase of development, and it calls out a development plan. We did one and it is there. It doesn't say that you have to amend that preliminary water quality plan at the time of a development plan amendment. Rather, it contemplates that that would be done through the final water quality plan phase that's done at the time of site plan. And the DPS notes, in fact, a further stage. There are three stages to the water quality process. After final water quality plan and site plan, you actually have to go through a sediment control plan -- permits, that is -- and at that time, they will still address things beyond that.

So it is a fluid process that does not require a new preliminary water quality plan now. We do not have to amend that. There would be no purpose in amending a

preliminary water quality plan when the final water quality plan will have to contain everything that the regulations require. In fact, as Mr. Bossong testified, theoretically the regulations could still change further before we get to a final water quality plan and that final water quality plan would have to incorporate those things. No one would suggest that if the regulations change again, we would have to go do another preliminary water quality plan. In fact, if we weren't amending this development plan and we were going straight to a site plan for a hospital, let's say, we wouldn't go back and amend the preliminary water quality plan; we would do a final water quality plan with that site plan, which is what Chapter 19 calls for. It would be different than some of the contemplated features in the preliminary water quality plan because the regulations have changed. It would have ESD beyond the ESD that was contemplated in the preliminary water quality plan, but it would not be an amendment to the preliminary water quality plan; it'd be a final water quality plan. Well, by the same token, those regulations have changed; that's true. The fact that we're going through a development plan rather than amendment, rather than a site plan, doesn't change the process set out in Chapter 19 for preliminary at the first stage and the final once you know more about what you're going to do on the property. That's the process that we're

doing. And, you know, again, the --
MS. ROBESON: How about the question why not do one and just eliminate the issue?
MR. HARRIS: It would be pointless to do that --
MS. ROBESON: Well, I, I took the --
MR. HARRIS: -- because we wouldn't, we couldn't --
MS. ROBESON: Okay, just a second.
MR. HARRIS: Okay.
MS. ROBESON: I took the opportunity to read Chapter 5 of the state --
MR. KLINE: Design manual.
MS. ROBESON: -- design manual, and it says you, they suggest laying out -- and I'm not trying to argue. I'm trying to, to feel good about this.
MR. HARRIS: I want you to feel good about this.
MS. ROBESON: It says that one of the things they look at is whether the design of the facilities flows, you know, doesn't interact at the preliminary conceptual phase. One of the things they look at is, is it going to change the flow from the natural flow, and they stress the importance of designing in advance, from day one, to incorporate ESD. So how does that play into it?
MR. HARRIS: Sure. The objective of the manual and the regulations in the county is to ensure that ESD gets

done to the MEP, okay? And the principle is that you should be planning your stormwater as you're designing your project. You don't want it to come afterwards: We've got this building. Oh, where are we going to put stormwater? Oh, too bad, we don't have a spot. That's what they want to avoid. And so in the design manual and in the regulations, that's why you do the final water quality plan with the site plan. You're doing detailed work on what you're going to build there at the same time that you're doing the detailed water quality work so you know that they will fill, you know that they'll stay out of forest areas and out of streams, et cetera.
Now, in this case, we're actually better off in that because we have a preliminary water quality plan that defines where the stream buffers are; we've got a forest conservation plan that defines where the forest is, and as you've heard the testimony, we are not affecting either of those conditions. The preliminary water quality plan also shows the drainage areas. We're not changing the drainage areas. The final water quality plan that will be reviewed in conjunction with the site plan for this will 100 percent conform with the preliminary water quality plan drainage areas.
So the only thing that is left to be done is the specific design and individual location of the probably

dozens, if not, hundreds of ESD devices that will be sprinkled throughout this project, but they, those can only be done when you're doing the detailed design of the buildings, et cetera. So when we come in with a final water quality plan for the northern pod, A and B, let's say, and if we're not doing Pod C at that time, we won't have a final water quality plan for Area C because we won't have the specific development there. That would then -- that final water quality plan would be done then at that later stage.
So there is no point to amend and, in fact, no real process to amend the preliminary water quality plan. It is out there and it provides a benchmark from which to operate as we design the ESD devices in conjunction with the development. And I think Park and Planning's letter was, you know, perfectly clear on that, and Park and Planning -- there is split lead agency role, as you correctly note. DPS basically is the lead agency for defining where the environmental features are and stuff, and Park and Planning has more of a role in connecting or making sure that the built development coincides with the water quality features. That is exactly what we're doing. Their memo, Park and Planning's memo, was crystal clear that we are completely compliant with the regulations and that we are following the process that the regulations specify. I will say that the successive e-mails from DPS have been less than clear in

that regard, but in my reading, they only affirm and do not conflict with Park and Planning. They had an opportunity to disagree with Park and Planning's memo in their latest memo, because it came well after Park and Planning's memo, but they did not disagree with that. They were consulted when Park and Planning did its memo, as you saw it in the cover letter, and so we are completely following the process. There is, again -- I sound like a broken record, I guess --
MS. ROBESON: Yes.
MR. HARRIS: -- no point in amending the preliminary water quality plan.
Lastly, you know, again, I think the bottom line in this, let's, let's look at the parties. We've got a competitor arguing a, b, c, and d. We've got the planning staff and the Planning Board saying e, f, and g. I think between those two the Planning Board and the planning staff, you know, deserve the benefit of any doubt, and I don't think there is any doubt.
MS. ROBESON: Okay. Well, I -- did you have anything else to add in your closing?
MR. HARRIS: I think I'm worn out.
MS. ROBESON: Well, I don't usually ask questions like that during closing. Mr. Kline, do you want to comment on what Mr. Harris said or --
MR. KLINE: Very simple answer -- the law says

what the law says.
MS. ROBESON: Okay. I understand that point. Well, Mr. Harris -- well, let me say that all the attorneys here have done a truly, an excellent job representing their various clients and interests. I did want to say that. Mr. Harris, are you going to submit a revised development plan?
MR. HARRIS: Yes. Yes, ma'am, we are. It will include the binding elements that we discussed in a final form. I think I can submit that by tomorrow.
MS. ROBESON: Okay. And -- tomorrow. Okay. Then I am going to give -- well, let me do this: Let me hold the record open for 10 days from today, if that's -- hold on one second. So that would be the, Friday the 25th. That will give you time to submit that, the revised development plan with the additional binding elements. And then -- if you could do that no later than Monday, 10/21 -- then I'm going to leave the record open solely for Mr. Kline and Mr. Chen to comment, aside from the general comments you've already made, just on the specifics of the language in the development plan. So that would be due 10/25. Well, I, you know, I don't want to -- let me put it this way: I don't want to, I don't want a second chance at closing arguments.
MR. KLINE: No.
MR. CHEN: We understand.

MR. KLINE: We understand.
MS. ROBESON: If there's anything specific you have to say --
MR. CHEN: We're as burned out as you are. It's okay.
MS. ROBESON: Because I have to wait 10 days until I get the transcript anyway, all right? So this public hearing, thank you very much --
MR. CHEN: Madam Examiner, just one --
MS. ROBESON: Yes.
MR. CHEN: I think I misrepresented Greater Baden. It was not a zoning case. It dealt with zoning, but the actual --
MS. ROBESON: Which one? Baden?
MR. CHEN: Baden, yes, was a preliminary plan. I think I said it was a zoning case. It talks about zoning and master plans.
MS. ROBESON: Yes, I'm familiar with that case.
MR. CHEN: Okay. I didn't want you to think -- I think in my --
MS. ROBESON: That has a footnote that raises the -- well, anyway, I won't go into it.
MR. CHEN: Yes.
MR. KLINE: Yes, please.
MS. ROBESON: All right. Thank you very much.

MR. HARRIS: Thank you very much.
MR. KLINE: Thank you.
MS. ROBESON: This hearing is adjourned. The record will be open until 10/25 solely to receive the revised -- the development plan with the revised binding elements and any responses thereto until 10/25. Thank you.
(Whereupon, at 11:28 a.m., the hearing was adjourned.)

C E R T I F I C A T E

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

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

Case No. DPA 13-02

By:

Wendy Campos, Transcriber

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OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

FOR MONTGOMERY COUNTY

APPLICATION OF ADVENTIST HEALTHCARE, INC., and CABIN BRANCH COMMONS, INC.	**Case No. DPA 13-02**

A hearing in the above-entitled matter was held on October 10, 2013, commencing at 9:40 a.m., at the Office of Zoning and Administrative Hearings, 100 Maryland Avenue, Second Floor, Rockville, Maryland 20850 before:

Lynn A. Robeson

Hearing Examiner

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C O N T E N T S

Rebuttal Witnesses:	Direct	Cross	Redirect	Recross
Frank G. Bossong, IV				
By Mr. Harris:	8			100
By Mr. Kline:			39	
By Mr. Chen:			84	
Leonard Bogorad				
By Mr. Harris:	107			165
By Mr. Kline:			140,164	
By Mr. Chen:			153,164	
Gary Unterberg				
By Mr. Harris:	167			
By Mr. Kline:			215	
By Mr. Chen:			226	

E X H I B I T S

Exhibit No.		Marked/Received
122B	Letter from Mr. Carter on the water quality issues	93
123	Statement of qualifications of Mr. Bossong 7	8
124	Chapter 5.0, Environmental Site Design	84
125	E-mail from Ehsan Motazedi	106
126	E-mail from Elsabett Tesfaye	106
127	Statement of justification that the Peterson Companies submitted to Loudoun County	111
128	August 20, 2013, letter from David Flanagan	190

P R O C E E D I N G S

MS. ROBESON: We're on the record. This is a continuation of the public hearing in the application of Adventist Healthcare, Inc., and Cabin Branch Commons, Inc., requesting an amendment to the development plan approved by the District Council on September 9th, 2003, in LMA G-806, for property consisting of 283.5 acres east of Clarksburg Road, west of I-270, and north of Old Baltimore Road in Clarksburg, Maryland.

All right. I hesitate to ask this, but are there any preliminary matters?

MR. HARRIS: I don't believe so from the applicant's standpoint.

MS. ROBESON: Okay. Opposition?

MR. CHEN: Yes, Madam Examiner. My client, Whit Cobb, is not present today. You may recall there's been some discussion about the east side of Clarksburg and what's been going on on that side, and today there's a hearing or a proceeding for the Planning Board that deals with his property and that's -- he called and that matter is probably much more important to him than being present today. I don't plan to call him as a witness.

MS. ROBESON: Okay.

MR. CHEN: So, to explain his absence, that's why he's not here.

MS. ROBESON: Okay, that's fine. Yes, Mr. Kline.
MR. KLINE: I thought Mr. Chen was going to give us his calendar for the rest of the month. I knew that would take a while, but I guess I would --
MS. ROBESON: We may need another hearing date for that. So go ahead.
MR. KLINE: Yes. Well, I was going to ask about another hearing date because there was e-mail correspondence yesterday. Did we finally settle on a date and --
MS. ROBESON: I did get a note that says 10:15 work for everyone but only until 12:00 p.m. So my thought is let's see how far we get today -- we're on the rebuttal case -- let's see how far we get today and perhaps 10:15 can be just the closing arguments.
MR. KLINE: Closing argument, okay.
MR. CHEN: That's what it originally was supposed to be.
MS. ROBESON: That's right. So with that, Mr. Harris, this is your rebuttal case.
MR. HARRIS: Yes. Thank you, Ms. Robeson. I believe that we had agreed to call Mr. Bossong, Frank Bossong, as a witness to address stormwater management issues. So I would like to call Bossong as a witness.
MS. ROBESON: Okay. Please raise your right hand.
(Witness sworn.)

MS. ROBESON: Okay. Go ahead, Mr. Harris.
MR. HARRIS: I'm going to present as an exhibit a statement of qualifications of Mr. Bossong.
MS. ROBESON: All right. And this would be --
MR. CHEN: What's the exhibit number?
MS. ROBESON: I'm getting there.
MR. HARRIS: 123, I believe.
MS. ROBESON: He is correct.
(Exhibit No. 123 was marked for identification.)
MR. CHEN: I have no problem giving this exhibit a number 123, but I don't think this exhibit list -- I could be mistaken. I could be mistaken, but I don't believe that this exhibit list reflects all the e-mail traffic that has occurred probably at least in the last week. I know there were two separate letters from Park and Planning, dated, I think, October 8th, that I read, and there's some e-mail with -- I think Mr. Etheridge had more than one e-mail. I just think that at some point that e-mail traffic probably should be included as --
MS. ROBESON: Okay. I know that she has been, some of these -- I will check that. I don't want to take the time now, but I do know that some of the e-mail chains are in one exhibit because it picked up the whole chain, but I will double-check that, okay? All right. So this is

admitted as Exhibit 123, which is Mr. Bossong's statement of qualifications.
(Exhibit No. 123 was admitted into evidence.)
MR. HARRIS: And we might be able to cut to the chase here. I think Mr. Bossong has been admitted as an expert, including very recently here, and --
MS. ROBESON: Yes.
MR. HARRIS: -- I don't, I know Mr. Kline just informed me that he had no problem admitting him as an expert.
MS. ROBESON: Mr. Chen, do --
MR. CHEN: Same.
MS. ROBESON: Okay. You're admitted, well, as in a -- as a civil engineer.
MR. HARRIS: Civil engineer, including stormwater management and water quality protection.
MS. ROBESON: Okay. A civil engineer, I think, is fine. Go ahead.
MR. HARRIS: Okay, that's fine.

REBUTTAL DIRECT EXAMINATION

BY MR. HARRIS:

Q Mr. Bossong, can you explain to us, generally, the methodology for water quality review in special protection areas?

A Okay. In Montgomery County there are certain areas within the county that are designated as special protection areas that the Council years and years ago had identified and approved. If a project in Montgomery County, a proposed project, lies within a special protection area within the county in those areas and per Chapter 19-65 of the County Code, basically, they have a two-step process, that if the project has to go through more than one development approval process, such as the project that's in front of you today -- we've got to go through a development plan and eventually a site plan -- you need to go through a two-step process through the water quality approval. What that encompasses is first a preliminary water quality plan, which would be done at the first submittal or the initial submittal of an application, and then the -- there's a second step, called the final water quality plan, which is reviewed and approved at the last stage of the approval process, which in this case would be at the site plan stage.
Q Did this project have a preliminary water quality plan?
A Yes. In, it still does, but in 2002 an application was filed for a preliminary water quality plan which was eventually approved in 2003 for the preliminary water quality plan for the project at, you know, for the Cabin Branch project.

Q And can you describe what a preliminary water quality plan is in terms of its overall function?
A Okay. The preliminary water quality plan basically sets a conceptual foundation of how stormwater management can be accomplished on the site. It's very conceptual. There's no specific details of the actual design of the facilities, the shape of the facilities, and in fact, the location of the facilities also is not necessarily set at the preliminary water quality plan. The plan is, again, very general in nature, saying that these are areas that can accommodate stormwater management, with water quality features, to meet the current regulations at that time. So, again, it's more of a -- it's a very concept plan which, in turn, is refined at the last stage, which would be the site plan stage, where you get into exactly more details at that time.
Q And identified as Exhibit 119 in the record here are a preliminary water quality plan dated December 2002, revised March 2003, and another preliminary water quality plan referred to as being conditionally approved by DPS on March 13, 2004. Are those the preliminary water quality plan submissions for the Cabin Branch property?
A Yes, they were.
Q And was the first of those, the 2003 one, used as the basis for approval of the initial development plan in

this project?
A Yeah, that would have been, as far as 19-65 goes, you know, Section 19-65, Chapter 19, that would have been the first submittal of applications. So, yes, the preliminary water quality plan approved in 2003 would have been, again, consistent with the first submission --
Q And did --
A -- of the application.
Q And did the zoning hearing examiner and the County Council in their approval of that development plan rely on that preliminary water quality plan?
A Yes, they did.
Q Can you briefly take us through the list of items that are submitted with a preliminary water quality plan?
A Okay. Basically, a water quality plan is -- and you have to be, look at from a broader standpoint. When it says plan, it doesn't mean necessarily a specific plan; it's the plan of the water quality concept going in. So the requirements of a preliminary water quality plan basically include a water quality inventory; a description of proposed project -- basically, the zoning type of development that's going to take place; overall imperviousness; disturbance of environmentally sensitive areas, that's all taken into consideration; also, application to state and federal for any federal permits, such as wetland permits; designation,

or description of mitigation techniques -- basically, what that is, is how are BMPs, best management practices, going to be used, so you go through that as, more in a narrative aspect; stabilization requirements; grading, if you have phased grading for the project; road features, what type of road: open section, closed section, or modification to the roads. Stream valley buffers are incorporated in that, opportunities of how you're going to do groundwater recharge, documentation of performance if it's a nonstandard measure that the county has already approved, because in today's world stormwater management changes rapidly and there are new techniques that come in; so the county may have something that they haven't seen before. You may have to demonstrate how the performance of those facilities meet what the county is looking for, and then a monitoring plan as well.
Q And were those items submitted as part of this preliminary water quality plan?
A Yes, uh-huh.
Q And do those items remain the same today with respect to this development plan amendment?
A Yes, they do, uh-huh.
Q Can you describe, generally, how that preliminary water quality plan relates to the final water quality plans that have been and will be approved at Cabin Branch?

A Okay. So, generally, the preliminary water quality plan was very general in nature and it basically broke down the project into, let's say, subwatersheds and showed how, when the development would take place, how the water would basically be treated in the sense of a very concept stage.
The way the process works through Chapter 19 is, as I said, there's a -- the final stage is the final water quality, the final water quality plan approval, which is done at site plan. At that stage, detailed design, not actual construction plan design, but very detailed design of the shape, size, location, type of facility is established at that time and approved by DPS, Park and Planning, and --
Q Are those specific features of building -- shape, size, and design and parking -- known at the time when a preliminary water quality plan is submitted?
A No, because at the time of the preliminary water quality plan, basically -- you have a development plan which kind of gives you a general idea of what's going to take place on the project, but the actual size and locations, and so forth, of the buildings are not set at that stage; it's set at the site plan stage.
Q And does the preliminary water quality plan provide enough flexibility for the design of those built features, if you will, the buildings, the parking,

et cetera --
A Right.
Q -- to be reviewed and approved as part of the final water quality plan?
A Yes, and that's what, that's what the reviewers are looking for: is there enough flexibility that they see on the preliminary water quality plan that it can sustain, you know, modifications as it goes through the site plan stage.
Q All right. Now, the preliminary water quality plan, was that deemed appropriate -- under Section 59-D-1.3 of the zoning ordinance that calls for submission of a water quality inventory and preliminary water quality plan, was that deemed appropriate for approval of the original development plan?
MR. KLINE: Objection.
MR. CHEN: Objection.
MS. ROBESON: Basis?
MR. CHEN: Approval by who?
MS. ROBESON: Well, it's a factual question.
MR. CHEN: No. Excuse me, I apologize. As I recollect the question as asked, it was not -- and I appreciate, if it was purely factual, I would agree -- but as I recollect the question that was posited, was it deemed to be in satisfaction of the requirements, which is --

MS. ROBESON: Okay.
MR. CHEN: -- respectfully, that's not being factual.
MS. ROBESON: I understand. Mr. Harris, can you ask, you know, whether it was approved as part of the original water quality, was it accepted, was it -- just ask it without appropriate.
MR. HARRIS: Okay.
BY MR. HARRIS:
Q Was it accepted by the District Council in their approval of the original development plan?
A Yes, it was, and I think that's shown by their approval, I think it's Exhibit 50. Park and Planning staff report basically designates that the examiner's report recommended approval and then the District Council ultimately recommended approval of development plan.
Q And I believe the Council's resolution approving the development plan is an attachment to the staff report that is Exhibit --
A I think it's 50.
Q 15?
A 50 --
Q 50.
A -- five oh, I think.
Q You are correct, Exhibit 50, and are you referring

to the discussion of this at page 16, I guess it is, of the, of the Council's resolution?
MR. CHEN: Objection. Why don't you just ask him where it is rather than telling him where it is.
MR. HARRIS: Okay.
BY MR. HARRIS:
Q Can you find in the resolution --
MS. ROBESON: Well, wait.
MR. HARRIS: Okay.
MS. ROBESON: Wait. Wait. I noticed this in the transcript. Don't talk amongst yourself. You can object and I'll rule on it, okay, because it gets out of control, all right? So -- and, Mr. Harris, I mean, we've, I read the staff report like three times. So if you feel the need, if you want to have him point something out, you may, but I am clear -- well, I don't want to negate your examination, but I have read it three times and I have parsed through the language very carefully. So if there's something he can add to that, why don't we go with that.
BY MR. HARRIS:
Q Is there approval reflected in the Council resolution?
A Yes.
MS. ROBESON: Wait. The Council resolution of the original DPA?

MR. HARRIS: Yes.
THE WITNESS: Of the original development plan.
MS. ROBESON: Okay. And that's what is mentioned in the staff report. Is that what you're saying?
THE WITNESS: That's correct.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q And, in your opinion, did the approval by DPS and acceptance by the Council in that resolution reflect compliance with the requirements of Section 19-65 of the County Code?
A Yes, it did, because 19-65 requires approval of a preliminary water quality plan with the first submission of it through the development process, this being the development plan at that time, 2003.
Q Did the preliminary water quality plan anticipate more particular submissions with respect to water quality features and calculations as part of the final water quality plan approval?
A Yeah. I think, as I mentioned a little earlier in the testimony, the preliminary water quality plan is a concept plan. The review agencies know there's going to be modifications as the project moves through the other development stage processes, and specifically, if -- in the last stage, which is the site plan for this particular

project, at that stage, very detailed engineering is done regarding the location, type, size, performance of the stormwater management water quality features. So it's at that stage that you really get into nuts and bolts of the stormwater management, not necessarily, as I mentioned earlier, construction drawings, but very detailed information in which that the DPS and the Park and Planning and whoever the other bodies that have to approve the plan are comfortable enough that this is what's really going to be implemented as the project moves forward, once it gets site plan approval.

Q Has the development of the various phases of Cabin Branch followed that procedure of essentially converting the preliminary water quality plan into a final water quality plan approval at site plan?

A Yes. In fact, there's -- oh, there's an exhibit that was presented earlier in this case, but there've been numerous site plan submissions for the Cabin Branch project. At each submission stage of the site plan, an updated or detailed stormwater management is done at that stage, incorporated into the final water quality plan.

So in order to get approval of that site plan, you have to have approval of the final water quality plan and all the detailed engineering and, as I said, location, size, type, efficiency, and so forth like that, at that stage. So

there have been, you know, quite a few on the project. And so, terminology standpoint, there's been the Gosnell Site Plan; there's been the Winchester Phase I Site Plan; the Winchester Phase II Site Plan; Winchester Phase III Site Plan; the Toll Phase I Site Plan; and the Toll Phase II Site Plan -- all went through site plan approval through the process, all have, are required to go through and have the approved final water quality plan for those sections.

Q And did any of those submit a new preliminary water quality plan, or did they go to a final water quality plan approval process?

A No, the process is to go straight to the final water quality plan. They already had an approved, you know, today, have an approved preliminary water quality plan.

Q Does that preliminary water quality plan remain in effect today?

A Yeah. In my opinion, it does, yes.

Q Does the approved -- well, turning to the approved development plan that I think is on the easel there, and I think it says Duplicate of 21F maybe --

A Yes.

MR. ROBINS: Yes, that's what it says.

MR. HARRIS: Is that what it says?

MR. ROBINS: Yes.

MR. HARRIS: Okay.

BY MR. HARRIS:

Q Looking at Exhibit 21F, does that development plan specify any particular stormwater management features on it?

A No, it does not. Typically the projects that I've been involved in in SP areas -- and once you go in there, you have to follow the, you know, the preliminary water quality plan/final water quality plan process -- on the development plan, it is, in all the experiences I have, the actual facilities or proposed facilities or concept facilities are not shown on the development plan, such as, you know, what was approved in 2003.

I've also been involved or was the designer of the, when Clarksburg Village went through, and they're in an SP area. Same thing with that development plan, it did not show the stormwater management facilities on there. The property just north of the Clarksburg Village, which was, at that time, when I was working on the Mayo (phonetic sp.) property, I think it's called Arora Hills or something like that now, same situation there, they were for PD zonings, development plan, no stormwater management on those. And just recently, a project I just worked with Mr. Kline, he was the attorney for the applicant, which is the Butz property, that development plan also did not show the stormwater management facilities or proposed concept stormwater management facilities on the development plan.

So in my history or career, it has not been the norm to show the actual concept stormwater management facilities on the development plan.

Q In each of those cases, did the decision makers conclude that stormwater management can be accommodated on the property?

A Yes.

Q As part of the final water quality plan for each of the Cabin Branch phases that has proceeded to site plan, has the location of and design of the water quality measures been identified and approved, again, at the site plan stage?

A Yeah. That's the requirement. You have to have a very detailed stormwater management plan at the site plan level, which basically turns into your final water quality plan, to show that you can meet the current regulations at that time per Chapter 19, on the plans, in order for the project to proceed forward.

Q Some of the plans and exhibits that have been used in this proceeding have identified ponds --

A Okay.

Q -- at various areas.

A Yeah.

Q Can you describe what that reference means?

A Okay, yeah. I think it's, I think it's semantics with the word ponds. First of all, the facilities that were

shown on exhibits previously shown in this hearing, probably in past, going through the preliminary plans of what are said ponds, they're not ponds as I say a typical layperson would know. They weren't facilities that continuously hold water, you know, which you, you know, it's not a, it's not a pond that -- it's not a facility that holds water continuously.

Basically, the pond -- and I really don't like to use the word pond; they're really stormwater management facilities -- and those facilities that were labeled as ponds were basically dry stormwater management facilities where, at a rain event, they would, you know, take some of the water that was directed towards it, they would hold the water for, and since we're at an SP area, no more than 12 hours, they would release the water at a lower rate so the streams can accept it from environmental standpoint.

So they weren't really, I would say, as -- I'd say a layperson may look at it as a pond. They were stormwater management facilities, and they're only one element of the stormwater management treatment training that was proposed, whether at the preliminary water quality plan stage or even at the final water quality plan stage.

Q One of those areas was identified as Pond 12. Are you familiar with that area?

A Yes, I am.

Q And will that area continue to serve as a stormwater management facility in part?

A I guess for, just so everybody knows where we're talking about, Pond 12 -- I'll use the exhibit Duplicate 21F. On the right side of Redgrave, along the, along I-270, there's a labeling that says dedicated to public use. Just to the right of that, there's an area that's labeled OS. Okay. That was an area that was designated for a stormwater management facility per previous documentations. With going forward, this area, the OS area, whether it's, you know, from the original development plan or the DPA, there will still be stormwater management facilities located in that area. So as far as concept-wise, there was stormwater management designated as a concept to go there before; there'll be stormwater management facilities going there as the project proceeds.

Q And do you anticipate that area being used for sediment control during construction?

A Yes. Yes.

Q Is there any need -- well, strike that.

Looking forward, have you thought about how you would design and obtain final approval for water quality protection measures for the area that's the subject of this DPA?

A Absolutely. You know, as the project moves

forward, you still, although it's at a concept level, you still look at it to make sure that the, what's being proposed can accommodate stormwater management. And in -- I'll go ahead and use, I believe this is Exhibit 59, which is the DPA that's in the subject of discussion. I'll just stay with what's labeled as Area A. I'll just concentrate on Area A. When we look at this, as I mentioned, the OS area that I just mentioned previous, there'll be some stormwater management facilities located down here. I think this is also the amphitheater area. So they'll be incorporated with the amphitheater. Intermingled within all of A will be stormwater management facilities meeting what's today's regulations as ESD to MEP, environmental site design to maximum extent practicable. They will be infiltrated all throughout Area A.

Now, specifically, to get into the details of what we looked at or I looked at as far as stormwater management, which is very similar to what was shown on the approved preliminary water quality plan, is, in the islands themselves of the parking, you can have ESD measures, such as micro-bios and bio-facilities. Of course, pavement can also be used in here. In between the buildings, again, you can go with micro-bio ESD facilities; you can go with bioswales along the outside, adjacent to the edge of the roadways.

So infiltrated throughout will be facilities that, again, were contemplated at the preliminary plan, preliminary water quality stage, so really no difference. Because the buildings may have shifted around a little bit, the concept remains the same, whether, you know, this building shifted this way or there's a different building over here.

The other thing regarding this is there has been no change as far as imperviousness. Let's say -- let's just stay with A right now. In fact, it's gone down a fraction, and stormwater management in today's regulations, the key point of the design of stormwater management is imperviousness. So in this case, whether it's the A area on the original development plan or the A area on the DPA, the imperviousness area is, I'll say, essentially identical. So, therefore, the facilities and the concept that we were proposing on the original development plan is the same as, again, meeting today's regulations, which, I agree, have evolved, and they continue to evolve, you know, through either state regulations or county regulations.

MS. ROBESON: May I ask a question? When you have the limits of disturbance, say, A and A, do they calculate, is that -- is that area considered impervious, the whole area --

THE WITNESS: No. No.

MS. ROBESON: -- when they calculate treating the volume?
THE WITNESS: What you'll do is -- let's take Area A. You'll take Area A and calculate the imperviousness of that area for your calculations.
MS. ROBESON: Based on the building location or just the limits of disturbance?
THE WITNESS: Well, the limit of disturbance defines your buildable envelope.
MS. ROBESON: Area, okay.
THE WITNESS: Envelope, basically, and that's another thing, which is, there has been a -- you know, we're holding the same limit of disturbance; the forest conservation is the same. So there's no change there. So we have our buildable envelope. Then within that buildable envelope, you'll have, especially when you go to the final water quality plan, you'll really define the specific drainage sheds based on current county requirements and design the respective ESD measures for those drainages based on the imperviousness of each of those sub-drainage areas.
MS. ROBESON: Okay, but I just want to make sure I understand that -- staff said in their response that the limits of disturbance don't change. So does -- when they do a preliminary water quality plan, do they calculate an overall volume that you have to treat based on the limits of

disturbance or is that just to show that you can protect all the environmental features --
THE WITNESS: Right. I mean --
MS. ROBESON: -- on the site?
THE WITNESS: I mean, in my opinion, the preliminary water quality plan is more a defining your buildable development area and then, from a conceptual standpoint, how are you going to take care of the stormwater management within that developable area. So at the very first stages --
MS. ROBESON: I see.
THE WITNESS: -- the stream valley buffers were set, the --
MS. ROBESON: Right.
THE WITNESS: -- the steep grades were taken into consideration. Once all the environmental features were taken into consideration, which basically established, I'll say, your limit, your ultimate limit of disturbance, as you progress forward to the site plan, those areas, development areas, could actually shrink down a little bit, offering more environmental protection, more forest conservation, trees, and so forth like that. But at the final, at the final site plan is when you get to the actual design of the facilities for each of -- you know, let's say you take a half of parking lot here. That half of parking lot is going

to have a certain imperviousness to it, and then you'll design the ESD measure accordingly to that drainage area and its imperviousness.
MS. ROBESON: Okay. I have one more question.
THE WITNESS: Sure.
MS. ROBESON: I know, or for now, I know that you have been before us with preliminary stormwater management concept plans --
THE WITNESS: Yes, uh-huh.
MS. ROBESON: -- under the current ESD.
THE WITNESS: Uh-huh.
MS. ROBESON: What do you show on them for facilities?
THE WITNESS: The stormwater management concept plan, it's very similar in the sense of showing locations of proposed --
MS. ROBESON: I think it's one of the criteria. So I guess --
THE WITNESS: There's a stormwater management concept plan as part of the water inventory --
MS. ROBESON: Yes. So, I guess -- and I didn't pull one to check -- but when you have ESD --
THE WITNESS: Uh-huh.
MS. ROBESON: -- and you do a preliminary stormwater management concept plan for proposed mitigation,

what do you show?
THE WITNESS: We show, we show general locations of where proposed stormwater management facilities can go and, also, possibly the type of facilities that we're recommending, such as bioretention facilities or micro-bios.
MS. ROBESON: So are they examples of, or they're not -- are they actual locations? Are they just examples of the type of facility?
THE WITNESS: To some degree, it is locations because you say that in this area there will be a stormwater management facility. That type of facility most likely, we're proposing at this time, on today's regulations, would be this type of facility in that general location because, again, you can't set the exact location, you know, the concept --
MS. ROBESON: Until you have --
THE WITNESS: Until you have a site plan. It just wouldn't make sense. It would be, you know, you'd just be redoing everything all the time.
MS. ROBESON: Right. So you're saying the general locations are the same --
THE WITNESS: Correct.
MS. ROBESON: -- it's just that the types of facilities in the general locations may change?
THE WITNESS: That's correct --

MS. ROBESON: Okay.
THE WITNESS: -- depending on the regulations at that time, because the, again, the regulations --
MS. ROBESON: But how do you know -- I'm sorry.
THE WITNESS: No, no, no. That's -- no, no.
MS. ROBESON: I'm trying to work this, sir.
THE WITNESS: No, I understand.
MS. ROBESON: How do you know that you have enough space to mitigate -- how do you know you have sufficient space on the plan?
THE WITNESS: You could do preliminary calculations to make sure. So, in other words, today's regulations, stormwater management facilities per the new state laws, and so forth, is basically a half acre; maximum drainage area to an ESD measure is basically a half acre. So what I would do is, I'll take the actual DPA, is --
MS. ROBESON: That's 59.
THE WITNESS: That's, yeah, it's in 59. In the area of, it's designated on here as E -- well I guess, I'm sorry -- we'll say the most northeast portion of Area A, which has a selection of buildings, we'll look at, okay, I'll subdivide several of the buildings into, let's say, into half-acre areas --
MS. ROBESON: Yes.
THE WITNESS: -- and verify that there are

locations within that subdivided area, that half acre, that can accommodate an ESD measure, and in this case, there's plenty of area between the buildings for either bioswales or micro-bioretention facilities or other ESD measures.
So I can basically look at -- and what I'm looking at is making sure there is enough room, open space available to implement the ESD measures per the new regulations. That's basically, almost the same thing that -- well, it is the same thing that was done back in 2002/2003, same methodology, basically different implementation today because the regulations have evolved, whether -- the stormwater management techniques have evolved. I'm not sure I answered your question. I --
MS. ROBESON: No, I'm working on it.
THE WITNESS: Okay.
MS. ROBESON: Well, have you done that calculation for the current development plan amendment, looking at ESDs?
THE WITNESS: What I looked at was make sure that, looking at, looking at, you know, Exhibit 59, is there opportunities for ESD development, which is today's regulations, within a development pod, okay, and going through this, there's plenty of areas to implement ESD measures for, for the entire, you know, DPA areas that are being proposed here. So I have looked at that, looking at areas, you know, basically cut down on half-acre maximum

subwatersheds.
I mean, there is plenty of areas -- it's hard to see at this scale, but again, on the parking itself, all the parking islands, the areas, the open-space areas between the buildings, there's a significant space in between there. There's area along the access drive road to put, again, bioswales in, micro-bio facilities there. So, in my opinion, my professional opinion, there is plenty of room here or the original one. So, to me, it's exactly the same because basically the methodology of imperviousness and the calculations that would be more detailed in site plan is the same. I just have to make sure that there's adequate area to accommodate ESD, whether it was in 2003 or 2013. Again, the basic difference between 2003 --
MS. ROBESON: That's what I'm --
THE WITNESS: -- and 2013 is the type of facilities.
MS. ROBESON: Right.
THE WITNESS: The general methodology of stormwater management is still the same.
MS. ROBESON: And that is?
THE WITNESS: Basically, capture the water, clean the water, and try to infiltrate the water back into the ground. That's, that's sort of, from the 2000 changes -- Maryland, MDE changed the regulations in basically 2000 --

MS. ROBESON: Right.
THE WITNESS: -- and that's where the true change of stormwater management took place, where it went into more of let's get the water back into the ground instead of holding the water and just releasing it. So --
MS. ROBESON: Did you say 2000 or 2007?
THE WITNESS: It changed twice.
MS. ROBESON: Oh.
THE WITNESS: There was a 2000 change, and then there was a 2007/2008 change, okay, where you were using -- actually, you were, in the 2000 regulations, you were implementing, I'm going to say, BMPs or type of ESD structures. They were still calling out of biofiltration facilities, and so forth like that. All facilities that you can use today for ESD were still in, let's say, the booklet or the toolbox in the 2000, okay? What they changed in 2000 was they wanted, they wanted everything to be controlled utilizing --
MS. ROBESON: 2007.
THE WITNESS: 2007. They wanted everything to be utilized using ESD to the MEP. So even in --
MS. ROBESON: Yes.
THE WITNESS: -- the original 2003 preliminary water quality plan, if you go to the specific detailed sheets, it shows, it labels bioretention facility and other,

infiltration facility, and so forth like that, scattered throughout the buildable areas, doing the same thing today in 2013, utilizing basically only ESD structures and then taking it to maximum extent practicable.

MS. ROBESON: Okay. I'm sorry to interrupt.

MR. HARRIS: No, that's fine.

BY MR. HARRIS:

Q So taking a step backwards or away from the project a little bit, will the development plan amendment affect the area, I'll call it, preserved for stream buffers, forest conservation, steep slopes, and identified in the preliminary water quality plan?

A It's exactly the same.

Q Exactly the same. Does the change in use proposed in the DPA affect, first of all, the approval process for the final water quality plan?

A Approval process remains identical. You have your first submission at your first application, which is the preliminary water quality plan, and then your last submission, which is the site plan, you do your final water quality plan. That has stayed exactly the same.

Q Does the change in use reflected in the development plan affect the substance of the final water quality plan requirements, i.e., for ESD?

A No, because, again, the basic premise of the

stormwater management calculations is based on imperviousness. The imperviousness, whether it's the original development plan or the approved development plan or the DPA in front of us today, the imperviousness is the same. So, basically, the calculations are exactly the same; it's just the type of devices that you'll be using. Even though we would be using those devices based on the 2003, we're going to continue using them, but there are other devices that you will no longer be used because they're not considered ESD-type facilities.

Q And would that same procedure and would those same substantive requirements for ESD apply if this project proceeded under the approved development plan?

A Again, it'll be the same.

Q Do you have an opinion as to whether all of the applicable provisions for water quality protection under County Code Chapter 19 and COMCOR --

A Uh-huh.

Q -- Chapter 19, which is really the executive regulations, can be satisfied with development of this property contemplated under this DPA?

A Yeah. I think, as I stated, all the regulations can be accommodated with the DPA in front of us and will be accommodated and must be accommodated. That's the law. That's the regulations. So the design will accommodate the

current requirements. So I'm not sure if -- okay. I mean --

Q That's fine.

A Okay.

Q Looking at this, the area that's the subject of this DPA, which I think is 283 acres --

A Uh-huh.

Q -- do you have -- what is your level of confidence about the ability to achieve the stormwater management requirements there and does it relate at all to the status of approvals already for that area?

A Okay. I guess I'll point out that the Cabin Branch project as a whole has approval of -- 81 percent of it has been approved for final site plan and final water quality plan, which leaves, you know, 19 or -- actually, let me go back.

Looking at Exhibit 59, Area A and a portion of -- I'll use another exhibit to be exact. I'm going to use Exhibit 109. I think this was used previously by Mr. Hughes and others. In looking at Exhibit 109, the area that's represented by a dash line and has encompassed within that dash line the number 12 --

MS. ROBESON: In green?

THE WITNESS: In green.

MS. ROBESON: Yes.

THE WITNESS: For argument sake, let's say that's part of Area A that is shown on Exhibit 59. Going down on Exhibit 109 where it says future development and there's a circle by a dashed line that incorporates the green area labeled 15, I'm going to, I want to reflect that as a portion of Area C, okay? These two portions of the project represent only 10 percent of the entire project. They also --

MS. ROBESON: When you say entire project --

THE WITNESS: Entire Cabin --

MS. ROBESON: -- 535-acre project?

THE WITNESS: Right. See, these two pods, I'll call them, represent about 55 acres. They also represent, as far as the DPA goes, an area of the DPA, it represents about 19 percent of the total area, also represents that only 19 percent of the current DPA area has not reached final site plan approval or final water quality approval for the other areas.

So, in general, up to today, to answer your question, Mr. Harris, the project originally had the preliminary water quality plan approved in 2003. It followed that progression through the site plan for the final water quality plan, using that final water quality plan as a guide, and everything has been approved based on that cornerstone of the preliminary water quality plan.

So I am, you know, since I have essentially 90 percent of the drainage area on the entire Cabin Branch project approved from a final water quality standpoint, I'm very confident, through my experience and the hundreds of facilities I've designed, that the two areas I just designated -- one with the green area, 12; one with the green area, 15 -- will be able to accomplish and go through the final water quality plan approval and acceptance --

BY MR. HARRIS:

Q In a --

A -- at the site plan stage.

Q In a normal development plan, would any of the area that's the subject of the development plan have final water quality plan approval?

A Very rare. I don't know of any other plan that's ever gone through a DPA that already had a significant portion of it or 81 percent of it already having final water quality plan approval. I think it's very rare.

Q In those cases where there is no final water quality plan approval at the time of the development plan, has, have you offered an opinion that the water quality requirements can be accommodated based on your knowledge and experience with these things or matters?

A I mean, I've testified, you know, on numerous plans that, you know, final water quality plans can be done,

you know, and approved based on the DPA, the development plan or DPA that's in front of them at that time.

Q And would your confidence be higher, even higher than that where, if 81 percent or 83 percent of the project already had final approvals?

A Well, it does give you a sense of that this is achievable, it's accomplished when 81 percent of, or I'm going to say, 90 percent of the project or 81, or when 81 percent of just the DPA in front of us has already been approved. So, yeah, I'm very confident that it can be approved based on the approvals that have already been granted.

MR. HARRIS: I have no further questions.

MS. ROBESON: Okay. Cross-examination. Who, do you have a preference as to who will go first?

MR. KLINE: Well, let me try and go first, yes.

MS. ROBESON: Okay. Mr. Kline.

REBUTTAL CROSS-EXAMINATION

BY MR. KLINE:

Q Mr. Bossong, we're kind of working off, or what triggered all of this debate was our sort of stumbling around, trying to understand what was the meaning of Section 59-D-1.3(1)(i), and in that it uses a term that the applicant has to submit water quality inventories. I haven't heard you use that term at all. So can you tell us

what a water quality inventory is in the, in context of the other things you've been talking about?

A Okay. I believe I did mention -- that was one of the first questions I was asked, about what's entailed in a water quality submission, and one of them is a water quality inventory. And, basically, a water quality inventory has, is part of the overall water quality plan, and it essentially has three specific areas. One is stormwater management concept, one is sediment control, and one has to do with impervious, evaluation of impervious areas.

Q You know, as I look at the structure of 19 in the regulations, isn't the water quality plan actually a subordinate of a water quality inventory, which is the reverse of what you just said?

A Well, if you -- second. The water quality plan, I'm reading from, this is COMAR 19.67.01.09, Water Quality Plan --

MS. ROBESON: Wait. COMAR or COMCOR?

THE WITNESS: I'm sorry. COMCOR, I'm sorry. COMCOR, sorry.

BY MR. KLINE:

Q Okay. Could you repeat that for us?

A Okay. It's 19.67.01.09. It says water quality plan submissions, and here it has No. 1. It says elements of a preliminary water quality plan, preliminary must

include, and then it says water quality inventory, and then it goes down through the other nine or 10 items that I mentioned earlier.

Q Well, can I draw your attention to 19.67.01.08?

A Yes.

Q Which basically is entitled Water Quality Inventory and tells us what would be involved in that, and I believe this is what you had mentioned earlier.

A Correct.

Q And then when you go over to 19.67.01.09, when it talks about a water quality submission --

A Uh-huh.

Q -- it talks about the water quality inventory.

A As part of the water quality plan submission.

Q Is there any difference? Tell us what the -- in essence, I'm trying to just understand the difference between the two.

A Between a water quality plan? Okay. The water quality plan, again, is not a piece of, simple piece of paper --

Q Yes. No, I understand.

A -- it has a whole bunch of components. In the water quality plan -- this is how I'm reading the regulations -- in the water quality plan, you have to, as part of that, you have to submit these elements. One is a

water quality inventory, as you just pointed out. A water quality inventory then has a subset of certain aspects that has to be, that comprise the water quality inventory, and then you go down, you keep going down the list.

Q Okay.

MS. ROBESON: And what's in the water quality inventory?

THE WITNESS: Water quality inventory, if you turn back -- I mentioned this earlier -- it's basically three specific areas. It has a stormwater management concept plan, it has a sediment control concept plan, and it has, as it says here, documentation of impervious areas. It's basically looking at the impervious areas --

MS. ROBESON: Right.

THE WITNESS: -- and the reason that is so see, as I mentioned, stormwater management calculations are so geared toward imperviousness.

MS. ROBESON: Right.

THE WITNESS: Yeah.

BY MR. KLINE:

Q There was a series of questions asked you by Mr. Harris, and I guess I'll go into that. Did we conclude or did we ever find that there was a water quality plan submitted as part of the original rezoning application?

MR. KLINE: And, actually, I'll even ask

Mr. Harris that, because I know it was referenced in the --

MS. ROBESON: Well, don't ask Mr. Harris.

MR. KLINE: Sure. Thank you. I stand corrected.

BY MR. KLINE:

Q Mr. Bossong, were you the civil engineer, testifying as part of the original zoning application?

A Yes, I was.

Q Okay. Was there a water quality plan submitted as part of the original application?

A Yes, there was.

Q Okay, thanks. You talked about 19-65 and the language of 19-65. Did it read the same in 2003, when that water quality plan was reviewed, the preliminary water quality plan was reviewed, as it reads today, if you recall?

A Well, as I recall, it does. I mean, 19-65 -- Chapter 19 has evolved, also, based on 2007 change in regulations, you know. The county had to make the changes to match or to meet the requirements of the state. So, yes, items within Chapter 19 have changed. My understanding is the requirements for 19-65 are pretty much, if not identical, to what they were back in 2002/2003.

Q So would the only changes be the additional ESD language being stressed more?

A It's the involvement of how stormwater management is handled in today's regulations, yeah.

Q Our understanding is -- and it goes back, I guess it goes back to your 81 percent and whatever is left after that -- is that 81 percent was all grandfathered. Well, let me rephrase that. Some of it, I guess, was approved, site plan is approved before 2007?

A The infrastructure site plan, I believe, was approved in 2007. That would have been the first site plan that would have been approved for the Cabin Branch project as a whole, and then subsequent to there was, as I mentioned earlier, the Gosnells, the different Winchesters, the different Tolls.

Q Explain to the Hearing Examiner the grandfathering concept. What did you have to do by what date in order to be able to be grandfathered and not have to comply with the Stormwater Act of 2007?

MR. HARRIS: Objection.

MS. ROBESON: Basis?

MR. HARRIS: Mr. Bossong did not testify at all about grandfathering. That's really beyond the scope of his testimony, and it's not really relevant here.

MS. ROBESON: Well, he did testify as to the process. He purported to testify, and I think I asked him questions about 2000 versus 2007. So I'm going to give him some latitude and see where you're going with it.

THE WITNESS: All right. Could you ask the

question again, please?

MR. KLINE: Sure. Sure.

BY MR. KLINE:

Q The state adopted the Stormwater Management Act of 2007 --

A Uh-huh.

Q -- it basically affected how, what is the test for stormwater management. What did you have to have accomplished and by what date in order to be able to not have to comply with Chapter 19 and COMCOR as it exists post, or as exists today?

A Okay. In order to design stormwater management facilities based on the MDE, the state regulations of 2000 -- again, it changed in 2000 -- you had to have, basically for Montgomery County you had to have approved construction drawings for the stormwater management prior to May 4th, 2013. Therefore, you could utilize stormwater management techniques that would have been under the 2000 regulations versus the change in the 2007 state regulations. There are other things that go with it --

Q Right.

A -- but that's essentially the last, the last date.

Q And by way of example, since the area that we're primarily interested in, where the regional retail outlet center would go, that's an area that, according to the staff

report, is not grandfathered. So those steps had not been accomplished by May 4th, 2013, correct?
A That's correct.
Q Okay. And the water quality plan that does show measures that would be used in that area are no longer allowed post, or are no longer allowed?
A No, they are allowed. It --
Q Okay.
A -- depends on the case, depends on the type of design. Again, going -- the preliminary water quality plan, approved preliminary water quality plan back in 2003, identified ESD measures on the plan for the area that you're, for the --
Q I understand.
A -- the subject area we're talking about or the portion of the subject area we're talking about of the DPA. So those facilities that were shown on that plan are still allowed to be designed and implemented, constructed today. The type of measures that changed in 2007 did somewhat restrict the ability to use previously approved type of facilities, that they were not eliminated, though. Again, the change in 2007 strictly enforced, they wanted ESD to the MEP.
MS. ROBESON: Maximum extent practicable.
THE WITNESS: Extent practicable.

MS. ROBESON: I just am thinking of the Council --
THE WITNESS: Okay, I'm sorry.
MS. ROBESON: Yes.
THE WITNESS: Yeah. Environmental site design to maximum extent practicable --
MS. ROBESON: Right.
THE WITNESS: -- that's the big change in 2007, and in that change the state wanted you to try to attempt maximum extent practicable of using solely ESD facilities and not a combination of ESD facilities and, I'll say, somewhat traditional or past type of stormwater management facilities. So I can't say that in today's world you cannot utilize previously different types of stormwater management facilities. The emphasis today is on ESD facilities.
BY MR. KLINE:
Q When you prepare the final --
A When you prepare the -- at site plan.
Q Okay. This is the question.
A I'm sorry.
Q When you prepare the final water quality plan for the area of interest to us --
A Uh-huh.
Q -- you will not use some of the facilities that are shown on the current approved preliminary water quality plan, am I correct?

A That is correct.
Q Okay. So you are amending the water quality plan then.
A No, I'm not. I had an approved preliminary water quality plan, which has concept stormwater management facilities of which a significant portion of those stormwater management facilities will be utilized on, as DPA, as the DPA goes forward. As far as -- let's say, looking at Exhibit 109, I think where you're going, Mr. Kline, is, on Exhibit 109 it shows those two green areas I mentioned earlier, Area No. 12 and Area No. 15. Those are designated as stormwater management facility areas. The type of facility in those areas may change, but stormwater management facilities will still be in those areas.
Q Mr. Hughes, I think, provided us a forest conservation plan, which I marked as Exhibit 95, and I believe that on this exhibit there are stormwater management facilities that we would all typically call stormwater management ponds. That probably makes sense to you.
A I have to see the exhibit, please.
Q Yes, sure.
A Are you saying in this document or on this cover sheet?
Q No, in this document.
A Okay.

MS. ROBESON: I believe it's 95.
MR. KLINE: That's what I'm working on --
MR. HARRIS: Yes.
MR. KLINE: -- on my copy.
THE WITNESS: Are you, Mr. Kline, are you specifically interested in --
BY MR. KLINE:
Q I'm specifically interested only in the area of where we're replacing the hospital with the regional --
A Okay.
Q -- regional facility.
A To expedite, do you know exactly? There's 63 pages here. I'm not sure. Do you know which exact --
MS. ROBESON: Do you know the sheet?
THE WITNESS: The sheet numbers.
MR. KLINE: Sorry, no.
MS. ROBESON: What are you looking for?
MR. KLINE: I'm looking for a sheet in there that says stormwater management pond or stormwater management.
MS. ROBESON: Well, didn't Mr. Hughes testify as to particular sheets as to Pond 11? For some reason, I remember -- well, rather than have him look --
MR. KLINE: Sure.
MS. ROBESON: -- repeat your question for me so I know where --

MR. KLINE: Yes. Well --
MR. ROBESON: -- you're going, because I don't know where you're going.
MR. KLINE: Then let me try this another way.
BY MR. KLINE:
Q Mr. Bossong, is the answer to your question, Mr. Kline, we're not amending the water, preliminary water requirement, it's evolving to address a different set of features?
A Different set of features? That doesn't --
Q All right. If that doesn't make sense, let me try it this way then.
A No.
MS. ROBESON: Now, I have Sheet 15 as Pond 12. Is that what you're asking about?
MR. KLINE: Yes, that's probably a good example.
THE WITNESS: Okay. That's a good -- okay. All right. So you have to refresh your question, please.
BY MR. KLINE:
Q All right. So we're looking at Sheet --
A 15 of --
Q -- 15. So we have something on here called Pond 12 --
A Correct.
Q -- that's got some contour lines --

A Uh-huh.
Q -- associated with it, and would you be building a pond as shown on this sheet?
A No.
Q Rephrase that. Would you be showing in the final water quality plan a pond as shown on this sheet?
A As shown here, exactly as this? No, but --
Q But you're saying that you would have other measures that would go in that same general area?
A That is correct, because, again --
Q Okay. So my question is, why is that not an amendment of the preliminary water quality plan?
A Because I'm still providing stormwater management for the site based on the approved preliminary water quality plan. Again, the, the --
Q Just a minute. Just a minute. Just --
A Okay.
Q -- answer my questions. So you're just saying, Mr. Kline, if I'm not going beyond the limits of disturbance, I essentially have carte blanche to come up with features that satisfy Chapter 19 but I'm not bound by what I've got in --
A Okay.
Q -- the preliminary water quality plan?
A I guess what I'm saying is, I'm staying within the

restrictions that were set by the preliminary water quality plan, and the internal, make it simple, the internal imperviousness, which is a key component of stormwater management, has not changed. So my restricted area has not changed. My imperviousness has not changed. I'm still going to implement stormwater management techniques that are per Chapter 19, which include, which includes items that were shown on the preliminary water quality plan.
The other thing is, when you asked about that specific facility, when I build that specific facility, it's going to change because the site plan -- when you go to the site plan, there may be some modifications that change the shape, size, possible location, to some degree, and that's why it's all done at, when you know more details, at the site plan stage and then your final water quality plan.
Q You used the term restrictions, and is it fair to say that's limited disturbance, those are equivalents?
A Restrictions is, this is my developable envelope.
Q The envelope, right, fine.
A Yeah.
Q And you talked about imperviousness. So that means you either have or -- well, yes, you obviously have done some kind of a calculation to determine that the regional retail outlet center would have an imperviousness equivalent to what would be a real hospital pad.

A Yes.
Q Okay. And you shared that with what public agency for any kind of confirmation that those are reasonable calculations?
A I think the confirmation, whether I shared them or not, was both DPS in, I guess it's what you talked about earlier, the e-mails and the letters coming from, the letters coming from -- or the letter that come from John Carter from Park and Planning confirmed that they believe everything is in, is good regarding the preliminary water quality plan, who's one of the technical review agencies. DPS, both Mark Etheridge and Rick Brush, responded, who are technical reviewers regarding -- from DPS's standpoint, from the executive branch, also confirmed that the preliminary water quality plan is acceptable and the details will be worked out at site plan. So both of those agencies, I would say, were also comfortable that ESD to the MEP can be accommodated at the time of site plan review and final water quality plan review and approval.
Q And that's based on what submission you have made to those two agencies?
A The DPA.
Q That's all, right?
A Uh-huh.
Q And is there --

A They already have it.
Q Is there anything on there that tells us what the imperviousness levels are or anything that tells us what the measures are going to be? I mean, isn't, aren't you telling us they've made a leap of faith and accepted what you just told us, that you're confident you can fit everything on the property?
A I would say they are confident that we can fit the stormwater management on the property based on the DPA, yes.
Q But don't have any factual or empirical information from which they can come to that conclusion yet?
A I don't know -- I don't know if they did their own computations. They may have, but again, just from a general standpoint, I want to -- going back to Exhibit Duplicate 21F, which is the approved development plan, and comparing it to Exhibit 59, even from a, I can say, a layman's term, without doing technical calculations, impurity calculations, when you look at this layout and look at the building coverage, just generally -- building coverage, road coverage, parking lots -- and then you look at this from a layman's standpoint, not doing a total, it looks pretty much the same from, to me, from an impervious standpoint or coverage, building coverage, parking lot coverage, again, going back to impervious coverage.
Q Mr. Bossong, let me just see again, forgot

something. Actually, let me go back. You were talking about the Butz application, which I'll actually ask Mr. Unterberg to remind me what the case number was.
MS. ROBESON: 881.
MR. KLINE: Thank you. Thank you my memory is very short. Yes.
BY MR. KLINE:
Q I'll defer to your recollection that there's no stormwater management ponds on the development plan; yet you did testify. You must have had the exhibit at the hearing because you were testifying about actual locations of stormwater management ponds on the property, whether they were shown on the development plan or not. Did we never do that?
A We had a stormwater management concept plan, yes.
Q Yes, okay. And, in fact, the hearing examiner made a recommendation in his report and recommendation that we basically preserve the ability to relocate some of those facilities, didn't he, if you recall?
A Define relocate.
Q He was interested in trying to preserve vegetation and protect the view of properties from the west and suggested that we try and put stormwater management facilities in locations where they would not remove --
A Well --

Q -- existing vegetation, and so you had to have an exhibit that showed that.
A Well, there's a difference there. The two -- there were two facilities on that, on that project which were on the west side of the project, adjacent to existing neighborhood. Those facilities were for, basically, flood control for, if you want to call it, stormwater management. They were not for water quality and stormwater management. The stormwater management on the Butz property was -- we showed through the concept, and was approved, that we could provide ESD to the MEP through all ESD measures.
The two facilities, I think, that you're mentioning that the hearing examiner said, you know, give some flexibility to adjust, and so forth, one for vegetation and one for the adjacentness of the facilities to adjacent properties, they were flood control measures. They were not your typical ESD to the MEP. They were -- in the past, stormwater management, going back to when stormwater management first started, back in, basically, the late '70s/early '80s in Montgomery County, stormwater management was really hold the water and then let it release at a slower release rate, and depending on where you were located, you sized it for different storm events, 210 and 100 when it first started back there.
So back then it had very little, if no water

quality features to them. I mean, there was a little bit intrinsic to the facilities themselves because you would have possibly some infiltration, if you held the water long enough, that you'd get some uptake and stuff like that, but they weren't really water quality control facilities; then, as I keep on saying, stormwater management has evolved.
But going back to your specific question, on the courts of the Butz property, the two facilities adjacent on the west side, they were more for flood control issues because of possible concerns of neighbors of that. It had nothing to do with providing today's stormwater management ESD to the MEP because that was done throughout the entire project to -- per the regulations.
Q And you're saying they're outside of Chapter 19 and they didn't have to be shown on anything?
A What's interesting on those two facilities, they're not -- and we're talking about a different case -- but on that case, DPS even had hesitation on saying why do you need these. We were doing this in response to neighbor concerns and trying to be friendly, and so forth like that. So if they are built -- and that was correct, those are not guaranteed to be constructed -- but if they are built, they would have to abide by the regulations of Chapter 19 and also state regulations, also, since they would be an embankment; so you have to meet the embankment requirements.

Q Mr. Harris asked you a question about would the uses affect how the, basically, the stormwater management areas -- rephrase that. Would the change in use have any effect on how you would satisfy the stormwater management requirements?
A In this particular case, no, because I'm dealing with more building pervious coverage. Let's put it that way.
Q But there is a change in the configuration of the layout of the buildings and that could affect how you would basically address water quality measures?
A I'm going to provide water quality measures for the layout at the time of site plan, yes.
Q Sure, but there are going to be different, there are going to be different types, there are going to be different locations of what would have been conceived of in the preliminary water quality plan because of the change in the configuration of the buildings?
A I mean, yeah. That's why you do it at site plan. There is going to be, there -- that site plan, there could be shifts of the stormwater management facilities as shown on the preliminary water quality plan due to the final layout and other elements, utilities, you know, all sorts of other elements.
Q So the change in how we're going to lay it all out

does cause you, trigger -- you'd have to take a look at how you're going to satisfy Chapter 19?
A I'm going to have to satisfy Chapter 19 no matter what the layout is, whether it stays identical to the approved development plan or as is shown on the DPA. I have to meet Chapter 19. That's a requirement.
Q The Hearing Examiner asked you to bring copies of Chapter 19 and COMCOR with you today. Do you have them there in front of you?
A Yes, I do.
Q Okay. Can I draw your attention to COMCOR regulation, I guess it would be, 19.67.01.01?
A Okay.
Q It's titled Authority.
A Uh-huh.
Q And it basically says Chapter 19 applies in cases, looking at the third line down --
A Uh-huh.
Q -- significant amendment to a development plan. You obviously agree that that language is, says what it says?
A I can -- yes, that's what it says.
Q All right, very good. Okay. So how about going over to 19.67.01.03?
A Under Applicability?

Q Applicability --
A Okay.
Q -- A2 small ii.
A Uh-huh.
Q So Chapter 19 kicks in when we're seeking approval of an amendment to an approved development plan --
A Uh-huh.
Q -- correct?
A I'm reading, required by law to obtain approval of development plan, diagrammatic plan, schematic development plan, project plan, special -- okay, yeah, which we -- yes.
Q Okay. Can I draw your attention to 19.67.01.10E at the bottom?
A Okay. I'm at E.
Q Okay. Amendments and modifications.
A Yes.
Q Would you agree that this regulation says that all modifications to an approved water quality plan are considered significant amendments?
A That's what it says, but it also says except for minor modifications where the changes do not significantly affect site layout under E2 dot.
Q Well, it basically says except for minor modifications where, and turning over to the next paragraph --

A But, in my opinion, we're not doing any modifications.
Q No, I understand what -- I'm just asking you to tell us what the statute says.
A Okay.
Q Okay. So everything is deemed to be significant unless it's minor under this section?
A I'm not a lawyer; so I don't know the legality of it.
Q Okay. Okay. All right. Well, is it not correct that subsection E says everything is significant unless you fit in one of the minor modifications that are found in this regulation? Correct?
MS. ROBESON: Mr. Kline, I don't -- he isn't an attorney.
MR. KLINE: Okay, fine.
MS. ROBESON: Maybe you could just ask him --
MR. KLINE: Sure. Well, the --
MS. ROBESON: -- whether --
MR. KLINE: All right. Go ahead, sorry.
MS. ROBESON: -- whether it's minor, but --
MR. KLINE: Well --
MS. ROBESON: -- I don't want to put words in your mouth --
MR. KLINE: Not a problem. I --

MS. ROBESON: -- because I think he's already answered that.
MR. KLINE: Very good.
BY MR. KLINE:
Q Then can I draw your attention to 1, 2, and 3 within E?
A Okay.
Q Okay. So is the proposal that will change the water quality plan, the approved preliminary water quality plan, is it due to a field --
MR. HARRIS: Objection.
MS. ROBESON: Basis?
MR. HARRIS: He just testified that he was not changing the preliminary water quality plan --
MS. ROBESON: Well, I'm going to let him --
MR. HARRIS: -- that's not modification.
MS. ROBESON: Okay. Can you rephrase your question?
MR. KLINE: Yes. Well, actually, I think the question was going to be fairly precise.
BY MR. KLINE:
Q Are the modifications you're going to make to the approved preliminary water quality plan triggered by any of the three items in E1, 2, and 3?
MR. HARRIS: Same objection.

MS. ROBESON: I --
MR. HARRIS: It's assuming a fact that is not in evidence and is contrary to what Mr. Bossong just testified. The premise of the question --
MS. ROBESON: Okay. I think what you're asking is -- are you asking what modifications he's going to have to make at final development plan?
MR. KLINE: I'm asking him are the changes he's making significant or minor and are the changes, basically fit within any one of the three categories that are in that COMCOR regulation that define minor.
MS. ROBESON: Okay.
THE WITNESS: All right. I am not changing the preliminary water quality plan.
BY MR. KLINE:
Q You've said that many times.
A Okay. Okay. I'm not changing that. So I'm not making any modifications to the preliminary water quality plan. The modifications to the -- the changes on the DPA, building configurations and so forth, have no effect on the stormwater management. So, to me, there are no modifications to the stormwater management because, as I testified earlier, everything to me, I'm in with -- I'm within the buildable envelope, not going out; all the sediment controls, steep slopes, forest conservation, all

staying, is exactly the same. The imperviousness within the building areas are almost identical; in fact, it's slightly less. So, to me, there are no modifications. The change of this DPA does not generate any modifications to the preliminary water quality plan. It stayed the same.
Q Again, are we not --
MS. ROBESON: Let me just ask you something. I have, attached to Exhibit 121 -- which is Mr. Kline's letter about the regulations, but I'm not asking you about the regulations -- I'm looking at a May 13th, 2004, DPS letter approving the preliminary water quality plan, and in that there's a paragraph labeled stormwater management. Take a minute while you get that.
MR. HARRIS: What's the date of that letter?
MS. ROBESON: May 13th, 2004. It's an attachment to Exhibit 121.
MR. CHEN: Is that the October 8th letter from Mr. Kline?
MS. ROBESON: Yes. Do you have it?
THE WITNESS: I have it.
MS. ROBESON: Okay. So I see -- tell me what is the same and what is not the same anymore, because it does have, the first section under stormwater management -- and I'm not an engineer --
THE WITNESS: Uh-huh.

MS. ROBESON: -- so that's why I'm asking you -- it says channel protection measures for this site will be provided via 13 extended --
THE WITNESS: Uh-huh.
MS. ROBESON: -- detention dry ponds. Okay. So which portions of that remain the same --
THE WITNESS: Okay.
MS. ROBESON: -- and which are not the same, you know, which --
THE WITNESS: Well --
MS. ROBESON: -- are no longer the case?
THE WITNESS: Well, we're going to get in more technical aspects of the calculations of stormwater management.
MS. ROBESON: That's okay.
THE WITNESS: CPV, channel protection volume --
MS. ROBESON: Yes.
THE WITNESS: -- so forth like that, that has basically been changed with the 2007 regulations with the ESD. You're actually -- before, there was water quality facilities and there was channel protection volume facilities. With the new regulations --
MS. ROBESON: Wait. Explain the difference.
THE WITNESS: Okay.
MS. ROBESON: I'm sorry I'm belaboring this --

THE WITNESS: That's okay.
MS. ROBESON: -- but I really want to understand this.
THE WITNESS: Okay. Simplistically is that you had two areas; you had treat the water, clean the water --
MS. ROBESON: Right.
THE WITNESS: -- and the other one was control the water --
MS. ROBESON: Right.
THE WITNESS: -- from runoff --
MS. ROBESON: Controls --
THE WITNESS: Correct.
MS. ROBESON: -- whatever the cube factor, whatever it was.
THE WITNESS: Right. So when -- so you used to, previously, and again, as I keep on saying, stormwater management evolving, when the state implemented new regulations, I believe, 2008 and the county went forward, what the state wanted to do was do away with the CPV-type control features and incorporate it into the water quality control features, the ESD measures. So right now, when you design the ESD measures to the MEP, you are actually incorporating the CPV elements, if you want to say, within the design of the ESD facilities.
MS. ROBESON: Okay.

THE WITNESS: So, I mean, is that --
MS. ROBESON: So you're saying they're no longer relevant because they'll be treated in the ESDs?
THE WITNESS: Absolutely.
MS. ROBESON: Okay. So is there anything else in that paragraph that has -- that will not be the case?
THE WITNESS: I mean, most likely, surface sand filters will most likely not be utilized because right now they're not really considered ESD-type structures, but again, as I cautioned earlier, that doesn't mean they're not, they're not approvable; it's just not the preference.
MS. ROBESON: Okay. Okay.
THE WITNESS: I mean, in general, everything else stays the same. Dry swales, biofiltration structures, vegetative buffer filtering, you know --
MS. ROBESON: Okay.
THE WITNESS: -- that's all the same.
MS. ROBESON: Now, does anything else change, for instance, in performance goals or sediment control?
THE WITNESS: Sediment control, no, except that recently, as of January 1st, 2013, the state sediment control rules changed, but as far as type of devices and so forth like that, it was more stabilization and maximum disturbed areas allowed at one time. Those are really the two major changes. That really doesn't affect this, the

sediment control.
Performance goals -- protect the streams and habitat, we're still doing that; maintain the natural on-site stream channels, we're doing that; minimize storm flow runoff increases, we do that through the ESD measures; identify and protect stream banks prone to erosion, we've already done that; minimize increasing, increases to ambient water temperature; minimize sediment loading; maintain stream base flows; protect springs, minimize -- these are all the same.
MS. ROBESON: Okay. Now, if you could move to the conditions of approval.
THE WITNESS: Okay.
MS. ROBESON: Are these still applicable? Take your time.
THE WITNESS: They all remain the same. The only one I would point out, and I don't know if this really means anything, on No. 10, final water quality plan, must show the additional recharge volume has been divided similar to that shown in the preliminary water quality plan, 150 percent of MDE requirements. When this was done in 2004, obviously the 2000 regulations were not into effect, and we've raised, in a sense, the bar with the ESD structures. We're taking, we're taking the ground back to forested condition where before you weren't. So it's kind of a moot point now that

we're already doing it. So, in a sense, yes, we're still doing this.
BY MR. KLINE:
Q And I think you said the 2000 regulations. You probably meant 2007.
A No.
Q No. 2000? All right. They were not in effect in 2004?
A What?
Q The 2000 regulations were not in effect in 2004?
A No, no, no, no, no. I misunderstood your question then. What I'm saying is in -- when this letter was written in 2004, it was under the premise of the stormwater management regulations of 2000.
Q Right.
A When 2000 they -- through the type of facilities that the state wants, they've changed it around. So, in other words, I don't want to get into the technicality of this, but you don't want to dry up the streams either. So if I'm doing the maximum amount of, you know, which I have to now, and I do 150 percent of it, I possibly violate, you know, the --
MS. ROBESON: The stream flow.
THE WITNESS: -- water in the streams and the habitats, so forth like that, but I mean, that's just a

technicality. That's not a -- so, in a sense, yes, we're providing that.
MS. ROBESON: All right. Mr. Kline, why don't you continue.
BY MR. KLINE:
Q Well, I would basically say the changes that you've said on the features that you said you would not be applying or employing, are those triggered by any one of the three provisions that deal with minor changes?
MR. HARRIS: Objection.
MR. KLINE: I just lost my --
MS. ROBESON: Yes, that's calling for a legal conclusion.
MR. KLINE: Well --
MS. ROBESON: Can you paraphrase the statute and ask him --
BY MR. KLINE:
Q What I can do is ask him, on 19.67.01.10E1, do field inspections or design evaluation reveal minor changes are needed to the final water quality plan or to the approved preliminary water quality plan?
A Can you ask your question again?
Q Sure. Under that section --
A Uh-huh.
Q -- do field -- now, No. 1, just reading it, do

field inspections or design evaluation reveal that minor changes are needed to the approved preliminary water quality plan?
MR. HARRIS: Objection.
MS. ROBESON: Basis?
MR. HARRIS: Again, he has testified multiple times now that we are not seeking modifications, that we do not need modifications. If this is a hypothetical question about another project and whether that project would be subject to this, that's an irrelevant question.
MS. ROBESON: I'm going to let him answer. Go ahead.
BY MR. KLINE:
Q Mr. Bossong, do I need to repeat it?
A Yeah. Yeah.
Q Okay. If there are measures, basically, water quality measures that were shown in the approved preliminary plan that won't be used or others will be added, were they triggered by field inspections or design evaluation, revealing minor changes are needed to the plan?
A No.
Q Okay. And, number two, does No. 2 cause any of the modifications, changes you would be making?
MS. ROBESON: What do you mean does No. 2 cause?
MR. KLINE: The changes do not significantly

affect the site layout.
MS. ROBESON: Do the changes, is that your question?
MR. HARRIS: Again, what changes?
THE WITNESS: Yeah.
MR. HARRIS: This says --
MS. ROBESON: Just a second.
MR. HARRIS: -- changes to an approved water quality plan. There are none. Therefore, there is no subject. As far as what changes?
MS. ROBESON: Can you rephrase this?
MR. KLINE: Well, yes.
BY MR. KLINE:
Q Does paragraph 2 trigger the deletion of any of the features shown on the approved preliminary water quality plan?
A I guess I have to answer that that No. 2 has nothing to do with it because it has to deal with minor modifications. I'm not doing modifications to the preliminary water quality plan.
Q And in No. 3, is there emergency situation exists as determined by the director that would cause you to submit a final water quality plan that differs from the approved preliminary water quality plan?
MR. HARRIS: Same objection.

MS. ROBESON: Well, he can answer this.
THE WITNESS: Ask that again, just, I guess, just the way you asked it.
BY MR. KLINE:
Q Looking at No. 3 --
A Uh-huh.
Q -- the text of No. 3 --
A Uh-huh.
Q -- is there an emergency situation that will cause your final water quality plan to differ from your approved preliminary, approved preliminary water quality plan?
A As of right now, I know of no emergency situation.
MR. KLINE: I'll leave it at that.
MS. ROBESON: Mr. Chen.
MR. CHEN: Thank you.
MR. KLINE: Oh, no, no. I'm sorry. I wasn't going to go any further on that, yes.
MS. ROBESON: Oh, I'm sorry.
MR. KLINE: No, just a couple more, though.
BY MR. KLINE:
Q Can I draw your attention to Chapter 19, Section 65?
A Okay.
Q Are you there? Okay. It's called (a) General, and (1) reads, coordinated with project review.

A Okay.
Q The second and third line down says that water quality review will be done in conjunction with the review process for a development plan. So we're amending the development plan. So doesn't this section tell us that we should be conducting a review of the water quality plans at the same time rather than alone? 19-65(a)(1).
A Uh-huh.
Q What does coordinated with project review mean, to your understanding?
A Okay. What they're saying -- okay, water quality review, including submittal and review of the preliminary and final water quality plans, where required, must be done in conjunction with the review process for a development, then it goes, development plan, schematic development plan, blank, blank, blank, or special, in accordance with this section, and we've done that when we submitted in --
Q But earlier you said, when we're doing an amended development plan, Chapter 19 still kicks in. So that provision applies to an amended development plan, and my question is --
A I don't --
Q -- why aren't we doing the water quality review contemporaneous with the review of the project plan?
A Well, I don't see it, unless I'm missing

something, I don't see it says amendment. It says development plan, which we did in 2003.
Q No, but when I asked you the question about 67.01.01 that says it applies to an amended development plan, you said yes, that is applicable. So that automatically incorporates the applicability of this 19-65 and that's my question, is shouldn't we be doing -- doesn't this tell us these two things should be done simultaneously?
A I think you misunderstood. What I'm saying is, in our design process and review process, we have to adhere to Chapter 19 for the design for the final water quality plan --
Q Sure.
A -- which we had done at the preliminary water quality plan, so you know, as it says here, including review of the preliminary and final water quality plans. So when we submit in the future site plans and we have to do final water quality plans, it's going to have to be reviewed, and it goes down further: the planning director must coordinate review of the water quality plan with the DPS director. We have to follow that when we submit for site plan and final water quality plan on that.
Q So you're saying that 19-65, coordination with project review, is not applicable to an amended development plan?

A I guess I could answer two ways by saying no, because it doesn't say amended development plan. On the other hand, if you read further into Section 19-65, it does stipulate, you know, when possibly it could trigger a further review.
Q Let me just pass something in here.
MS. ROBESON: And that is?
BY MR. KLINE:
Q Mr. Bossong, I'm handing to you an excerpt from the design manual for Environmental Site Design.
A Uh-huh.
Q I don't see -- Figure 5.1.
MR. KLINE: And, Madam, what I guess I'd do is just put the whole -- well, I'll give you this and I can, I brought one copy of the entire design manual. I can put it in the record if you'd like.
MS. ROBESON: Well, unless I hear a necessity from the applicant, we can stick with this.
MR. HARRIS: This is from the county's -- I'm not sure what this is from, Mr. Kline.
MR. KLINE: Yes. I'm going to ask Mr. Bossong what this comes from.
MS. ROBESON: Well, let me mark it first, and then if we need to strike it, we will, but I'll make this, mark this as Exhibit 124, and it will be --

MR. ROBINS: The whole document, Madam?
MS. ROBESON: No, just the page. It'll be Exhibit 124, Figure 5.1.
BY MR. KLINE:
Q Mr. Bossong, are you familiar with this figure?
A I've seen this figure before.
Q Okay. Found within this section, Chapter 5, Environmental Site Design, which is a publication of the county or the state?
A Are you asking me, or do you know?
Q I'm asking you.
A It's a state document.
Q Okay. The site -- I'm sorry. The document is titled Design Process for New Development --
A Uh-huh.
Q -- and it describes the sequence of which things should occur in terms of site design under the new Chapter -- under Chapter 19 as it is today?
A No, because this is what the state put out. The county has to adhere generally to what the state put out, but they, they can change, they can -- they can develop their own development process as long as it's approved by MDE, which it has been, and that's the revisions of Chapter 19, to reflect the 2007/'8 changes.
Q Does the -- I'm sorry. Go ahead.

A I'm done.
Q Does the county have a similar design manual of its own?
A A stormwater management design manual? No.
Q Okay, fine. When the county basically adopted the changes in the 2007 stormwater management law, did it in any way dilute the emphasis on using ESD measures?
A No, because Chapter 19 says ESD to the MEP.
Q Right. So I look at No. 4 and the sequence --
A Uh-huh.
Q -- when you actually submit the site development plan.
MR. HARRIS: Objection.
MS. ROBESON: Basis?
MR. HARRIS: There's no indication that this document controls the process in Montgomery County. This was, as I understood Mr. Bossong's testimony, this was a state document that the county did not have to follow. So I think it's irrelevant.
MS. ROBESON: Well, do you want to ask him what this -- I heard he said it's a state document --
MR. KLINE: Right.
MS. ROBESON: -- but the county can --
MR. KLINE: Okay. I'll work with that. That's okay.

BY MR. KLINE:
Q Mr. Bossong, what I want to do is just note the sequence between 4 and the highlighted triangle beyond that, showing that ESD is considered --
A Uh-huh.
Q -- simultaneous to the site development plan.
A Right.
Q The question is whether the county's adoption in its application of Chapter 19 in any way dilutes what the state thought was the proper sequence and importance and emphasis of ESD?
MR. HARRIS: Objection. Again, site development plan is the term here. There is none such thing as a site development plan in Montgomery County. Is that a site plan or is that a development plan? So you can't answer that -- you can't ask that question and it can't be answered because this is not the process in Montgomery County. This assumes a --
MS. ROBESON: Okay. I understand.
MR. HARRIS: -- one-step process of a site development plan.
MS. ROBESON: Mr. Kline.
BY MR. KLINE:
Q This being a state document, you would not expect the State of Maryland to have been able to incorporate in

Paragraph No. 4, Submit Site Development Plan, all of the terms that we would use through all of the counties in the State of Maryland. So would it be a generic phrase -- and I would suggest that it applies to a development plan or an amended development plan with a rezoning application --
MS. ROBESON: Well, that's a lot of suggestions for cross-examination. So --
MR. KLINE: Okay.
MS. ROBESON: -- can you get to the point another way?
MR. KLINE: Yes.
BY MR. KLINE:
Q In the review of -- rephrase this. Environmental site design is a critical element in approving a water quality plan, correct?
A It's an element of the water quality plan, yes. It's an element.
Q Doesn't the 2007 Stormwater Management Act increase the importance of an environmental site design --
A Yes.
Q -- over what existed prior to that time?
A Yes, more emphasis on ESD.
Q Right. And the section I just read about 19-65 said you should be looking at water quality plan review in conjunction with the companion development plan that's

triggering the review.
MR. HARRIS: Objection. It doesn't say that.
MR. KLINE: Well, this document doesn't, but 19-65 does.
MR. HARRIS: Mr. Bossong testified earlier.
MS. ROBESON: Okay. Where are you going with this, Mr. Kline?
MR. KLINE: Sure. Sure. It all has to do with the fact that these regulations and the state's sort of concept of how you were supposed to do stormwater management was you had the ESD being evaluated simultaneously with the development plan. They're saying basically we can do it at site plan. I'm saying that the structure of the county law plus the state's philosophy as expressed in the design manual says you do the two together, and 19-65 clearly says that. And they're saying no, we don't have to do it now, we can basically postpone it until the time of site plan, and we say that's inconsistent with the philosophy and the language of the law.
MS. ROBESON: Well, why don't you ask him, in his experience, if it's, if those two need to be linked. No, you don't want to do that?
MR. KLINE: I don't think I want to -- I don't want to ask him that question, no.
MS. ROBESON: All right. Well, I guess where I'm

coming from is you're asking legal questions of him and I don't have a huge amount of basis for this exhibit --
MR. KLINE: Yes.
MS. ROBESON: -- foundation, I mean.
MR. KLINE: I understand.
MS. ROBESON: So you need to find another way to make your point.
MR. KLINE: Very good. Thank you. Let me just check my notes here. I have no other questions. Mr. Chen suggested the record would be more complete if we did submit this bundle, and I'd ask it be made an exhibit in the record of the case --
MR. HARRIS: We --
MR. KLINE: -- which would be Chapter 5 from the state's design manual.
MR. HARRIS: We object. There's no foundation for it. It's irrelevant. What we're governed by is the county's regulations, which Mr. -- which are referenced here but not this document.
MS. ROBESON: Do you want to respond?
MR. KLINE: It is the parent document from which all the counties adopted basically their own --
MS. ROBESON: Well --
MR. KLINE: -- regulations. So it does have some relevance, yes.

MS. ROBESON: Well, I need a witness to tell me what it is. I --
MR. KLINE: I don't have that witness.
MS. ROBESON: -- I trust you implicitly, but Mr. Chen gave me a case about attorneys testifying earlier. And so I'm going to be mindful of that case, and I really don't have a foundation for that document. Is it a --
MR. CHEN: This is a state reg, state reg. It's not -- he's not testifying. He is offering --
MS. ROBESON: So you're saying I take official notice of it. Is it published anywhere?
MR. KLINE: Sure. Sure. I mean, we would have gotten it off the Internet. I can get you the citation --
MS. ROBESON: Well, I will --
MR. KLINE: -- where it's found.
MS. ROBESON: I would prefer to have the --
MR. KLINE: Sure.
MS. ROBESON: -- the official citation of the document. If we can verify it, I'll strike this as Exhibit 124, which is the single sheet of paper you gave me, and I will take in that, subject to your providing documentation --
MR. KLINE: Right, sure, understand.
MS. ROBESON: -- of exactly where it's codified or published.

MR. KLINE: And I'll copy it and send it to everybody who's a party.
MS. ROBESON: Okay. So --
MR. HARRIS: We maintain our objection that --
MS. ROBESON: I understand.
MR. HARRIS: -- it's both, there's no foundation and it is irrelevant.
MS. ROBESON: Okay. So please, if you can hand that to me, I'll mark that as 124, and I'm just going to call it for now Chapter 5.0, Environmental Site Design. Okay. Anything else, Mr. Kline?
(Exhibit No. 124 was marked for identification.)
MR. KLINE: I have no further questions of Mr. Bossong.
MS. ROBESON: Okay. Mr. Chen.
MR. CHEN: Thank you very much.
REBUTTAL CROSS-EXAMINATION
BY MR. CHEN:
Q Mr. Bossong, I'm still a little bit unclear in your answer to Mr. Kline's question about the applicability of Section 19-65 to a development plan amendment. Was your testimony that it does not apply but it could be, it could apply on further review? I mean, I wrote down here in quotes the words further review. That's why I'm a little

bit confused.
A What I'm saying is further review at the site plan stage level. When we submit a site plan, I have to utilize Chapter 19 for that level of stormwater management design and for the final water quality plan design. So I do have to use Chapter 19 in the future for the design of the stormwater management facilities as we move forward.
Q So that, as I understand your testimony, Section 19-65 would therefore, based upon what you've just explained, not be applicable to a development plan amendment process?
A If -- I guess, ask the question again.
Q Sure. Let me do it this way. Does Section 19-65 apply to the District Council's consideration of a development plan amendment?
A Yes.
Q So that all the requirements of Section 19-65 are applicable to the District Council's consideration of a development plan amendment?
MR. HARRIS: Objection.
MS. ROBESON: Basis?
MR. HARRIS: It's calling for a legal conclusion.
MR. CHEN: Well, he's been testifying all morning about what the ordinance --
MS. ROBESON: Just a second.

MR. CHEN: I apologize.
MS. ROBESON: He has testified as to process. I do have a question. In your experience, have you submitted a water quality plan amendment -- I mean, a preliminary water quality plan in conjunction with a development plan amendment?
THE WITNESS: I have not.
MS. ROBESON: Have you ever done a development plan amendment?
THE WITNESS: Yes.
MS. ROBESON: And what case was that?
THE WITNESS: I know I've done them but not in an SP area.
MS. ROBESON: Okay. Continue, Mr. Chen.
MR. CHEN: I haven't gotten an answer yet to my last --
MS. ROBESON: Ask your question again.
BY MR. CHEN:
Q Does Section 19-65 -- excuse me. In what way does Section 19-65 apply to the District Council's consideration of a development plan amendment?
A I guess I would answer that in that if there are -- if it is a significant amendment, then it may have to be considered.
Q Is the project that is being proposed by the DPA,

development plan amendment, that is before the District Council in this proceeding a significant amendment?
A It is not, and I think that was confirmed also by DPS and by Park and Planning technical staff review.
Q Why is it not?
A Because the change, or the DPA does not change the preliminary water quality concept. There's no impact to the preliminary water quality concept and therefore no impact in the future because it will be all designed and approved at the final -- again, the last stage, site plan -- the final water quality plan.
Q Is there any documentation or any approval from any regulatory agency that says that the project proposed by this DPA does not have any impact on the approved preliminary water quality plan?
A I think, I think both Park and Planning and DPS confirmed that there's no impact and therefore no requirement to change or -- it was no change in the preliminary water quality plan. They say it's acceptable; in my opinion, it's acceptable. It's been approved, it works, and the final details, as with all plans, will be worked out at -- as with most stage plans, it has more than one approval process to go through -- will be done at the final site plan and final water quality plan in an SPA area.
Q And just for clarity, sir, what are the documents

that reflect the approvals that you've just mentioned?
A My understanding is there -- I saw a letter from John Carter to the Hearing Examiner, and I also saw several e-mails -- one, I believe, from Rick Brush and one from Mark Etheridge from Montgomery County Department of Permitting Services to the Hearing Examiner as well -- about the preliminary water quality plan and final, future final water quality plan.
Q Okay.
MR. CHEN: Just as an aside, Madam Examiner, I believe those are the footnotes that I made reference to at the commencement of this morning's proceedings that you're going to check into to make them part of the record. Is that correct?
MS. ROBESON: Yes.
MR. CHEN: Thank you very much.
BY MR. CHEN:
Q So that -- and I guess this is a simple answer -- so that, in accordance with your testimony, we would look to that from Mr. John Carter and the e-mails that you've just referenced for those approvals. Is that correct, sir?
A I'm not saying they were approvals. They're already saying you have an approved preliminary water quality plan. I think it was more reconfirmation of the approval of the preliminary water quality plan and no need

to do anything, they'll -- it'll be reviewed in the normal sequence of Montgomery County review process for stormwater management and water quality plans at the site plan stage.
Q Okay. Could you please identify in the record, sir, the water quality inventories and plans for the project that is proposed by this DPA?
A The actual, it's -- I think it has an exhibit number. I mean, do you want me to --
Q Yes. I'd like the exhibit number for the water quality inventories and plans.
MR. HARRIS: I'm sorry. What? I missed the question. I apologize.
MR. CHEN: I'd like the exhibit number of the water quality inventories and plans for the project that is the subject of the pending DPA.
MR. HARRIS: I believe it's Exhibit 119.
MS. ROBESON: A.
THE WITNESS: A.
BY MR. CHEN:
Q And do I understand you to be saying that the approvals that are required under Article V of Chapter 19 will occur at site plan? Is that my understanding of your testimony, sir?
A What I'm saying is, through the process, the next step in the process is to prepare final water quality plans

at time of site plan submittal. That's the normal process in Montgomery County.
Q When you say the approved preliminary water quality plan --
A Uh-huh.
Q -- when was that approved?
A Originally, initially it was approved in 2003 and then again in 2004.
Q Is there any document that is an approved preliminary water quality plan that reflects the development proposed by this DPA?
A Yes. The original preliminary water quality plan showed this area, showed development very similar to what's on DPA.
Q It's very similar. I'm asking specifically, does -- is there any approved preliminary water quality plan that approves, has been approved, excuse me, that reflects the development that is the subject of this DPA?
A You're asking basically two, two questions there. One is, in my opinion --
Q Excuse me, sir. I'm not asking for your opinion. I'm asking for, is there a document, has there been an approved preliminary water quality plan for development as reflected in the pending DPA?
MR. HARRIS: Objection.

MS. ROBESON: Basis?
MR. HARRIS: I know of no requirement that says the preliminary water quality plan has to reflect the development.
MS. ROBESON: Well, that's a legal argument. I'm going to let him answer.
THE WITNESS: The exact layout of the DPA is not the same as the approved preliminary water quality plan.
BY MR. CHEN:
Q Similarly, is there an approved final water quality plan for the development that is proposed by the pending DPA?
A Ask that question again.
Q Yes. Similarly, is there an approved final water quality plan for the development proposed by the pending DPA?
A Yes.
Q What is that?
A For a partial area. As I mentioned earlier, 81 percent of the MXPD area, which is the, you know, which is the DPA in front of you, has final water quality plan approval.
Q With the form of development proposed by this DPA?
A When you say form --
Q Yes.

A -- what do you mean by form?
Q I mean the project that is being proposed by this DPA.
A I would say yes, because you still have buildings, parking, roadways, open space, so yes.
Q Are they the same -- excuse me. What is the date of the approved final water quality plan?
A We basically have, there are several final water quality plans, being -- the latest is in, actually in 2013.
Q Which one is that? What's the date of that?
A I have to get the exact date. It most likely was April or May of 2013.
Q Do you have that in front of you?
A I do not.
MS. ROBESON: Is that listed in --
BY MR. CHEN:
Q Yes. What exhibit?
MS. ROBESON: -- Mr. Carter's letter? Is that one of the ones listed on page 3 of Mr. Carter's letter, which I will see if his, is Exhibit 122?
MR. CHEN: Is the letter itself 122, or is it the whole e-mail?
MS. ROBESON: The letter isn't -- it's not separately identified. Do you want it -- we can make it 122B.

MR. HARRIS: 122A is the Park and Planning --
MS. ROBESON: That's what --
MR. HARRIS: -- letter?
MS. ROBESON: That's what I have, and I --
MR. HARRIS: Technically, there were two Park and Planning letters. So --
MR. CHEN: Yes, but one dealt with binding elements and one dealt with --
MR. HARRIS: Yes, right.
MS. ROBESON: What I'm going to do, if you, 122A I have as a -- I see what she did. There's a cover memo, saying we have, a cover e-mail --
MR. CHEN: Yes.
MS. ROBESON: -- saying we have attached a response to your Request No. 2, and then there is the letter. So -- dealing with the, from Mr. Carter on the preliminary water quality plan -- so I can mark that, have her mark that as 122B.
(Exhibit No. 122B was marked for identification.)
MR. CHEN: That would be the letter?
MS. ROBESON: That would be the letter.
MR. HARRIS: The letter on the water quality issues, ma'am?
MS. ROBESON: October 8th, 2013, letter from

Mr. Carter, and on page 3 of that letter --
BY MR. CHEN:
Q Mr. Bossong, do you have that?
MR. CHEN: Excuse me. I apologize for interrupting.
MS. ROBESON: That's all right.
BY MR. CHEN:
Q Sir, do you have that in front of you?
A The letter dated October 8th, 2013, from John Carter to the Hearing Examiner? I have that.
MS. ROBESON: Yes, and on page 3 is a chart.
THE WITNESS: Is a -- yes. I have that in front of me.
MS. ROBESON: Okay.
MR. CHEN: May I follow up, Madam Examiner?
MS. ROBESON: Yes, go ahead.
BY MR. CHEN:
Q Sir, do you see on that page 3 the table of approvals?
A Yes.
Q Are the approvals that you just mentioned listed?
A Yes.
Q Which ones are they?
A You have, going down the list, the latest, the latest two approvals was 4/4/2013 and then 5, May 2nd, 2013,

Q Okay. So that, as I understand your testimony, sir, the April 4, 2013, approval was for the Winchester III Site Plan Amendment?
A And final water quality plan.
Q Yes, sir. Yes, sir.
A Yes.
Q Okay. And it describes the use approved. Is that right, sir?
A Yes, it does.
Q Does it describe the use that's being proposed by this DPA? Do you know, let me, do you know what this DPA --
A Within --
Q Hold on. I'll withdraw the question. Sir, do you know what is the use approved by the pending DPA?
MR. HARRIS: Is there a use approved by the DPA?
MR. CHEN: Yes.
BY MR. CHEN:
Q Do you --
A Commercial.
MR. HARRIS: I don't think the DPA --
MS. ROBESON: No. Sought to be approved, do you mean?
MR. HARRIS: Yes.
MR. CHEN: I apologize, sought to be approved.
BY MR. CHEN:

Q Sir, what is it?
A My understanding, it's commercial. I mean, it's MX, it's MXPD. So it has residential components, has retail components; it has commercial components.
Q I'm just talking about the pending development plan amendment that proposes and requests authority for certain uses. Are you aware of that?
A Yes.
Q Okay. What are the uses that are being proposed?
A Well, there's a change from hospital use to commercial retail use.
Q Do you know what kind of commercial retail use?
A Well, it shows on there office buildings and a retail outlet and community retail.
Q Okay. Going back to that page 3 and the Winchester III, are any of those uses that you've just described a subject of that approval? Do you know?
A I'm reading here. My understanding, the area of those approvals has final water quality plan approval.
Q Do you know if they include the use that's being proposed by this DPA?
A It includes the area and use of this DPA, yes, a portion of this DPA.
Q What portion?
A In using Exhibit 109, the only areas, sorry, the

only areas that do not have final water quality plan approval from DPS --
Q What exhibit are you on, sir?
A I'm on Exhibit 109.
Q Okay, thank you.
A Are the areas -- and I think I've already testified on this earlier -- is the area that's dashed in circle that has Green Area 12 and south of that or lower on the page/exhibit where it's labeled future development, the dashed area that has, that circles Green Area 15. Those two areas do not have final water quality plan approval because site plans at that time had not been designed. Also, have to understand that there's areas outside of those two pods I just talked about also have roadways, and so forth, which are also approved through the infrastructure site plan back in 2007.
Q They also have building locations too. Is that correct, sir?
A On this Exhibit 109?
Q No, I didn't say on that exhibit. I said that -- you just said that that area has approvals for roads. Is that right?
A For stormwater management purposes, yes.
Q Yes. And buildings too. Is that right?
A That's, that's correct, for stormwater management

purposes, yes.
Q Okay. Now, for stormwater management purposes, have any buildings or roads been approved for the use that's being requested by this DPA?
A Roads been approved? Location 121 is approved.
Q I mean within the geographic area of the DPA.
A Of these? Of the two areas I just talked about?
Q No. I'm talking about where the retail center is supposed to be located.
A Okay. This is the boundary. Let me go to Exhibit 59. The orange here is the boundary of development plan amendment.
Q Right.
A There are approvals for development. There are construction drawings -- there's things under construction out there right now --
Q I understand that.
A -- that have been approved for portions of areas within the DPA.
MS. ROBESON: And that would be, are you referring to portions of Area B?
THE WITNESS: Area B, Area C.
MS. ROBESON: And is Area B and C -- yes, thank you -- are those, why don't you describe, I understand where you're pointing to on Exhibit 109 --

THE WITNESS: Uh-huh.
MS. ROBESON: -- but why don't you describe on Exhibit 59, the development plan --
THE WITNESS: Okay.
MS. ROBESON: -- which portions do not have final water quality approval.
THE WITNESS: Okay. Portions that do not have final water quality plan approval, excuse me, on Exhibit 59 is most of A, and you can see here, it says Cabin Branch Avenue on Exhibit 59, everything to the east would not have final water --
MS. ROBESON: East of what?
THE WITNESS: East of Cabin Branch Avenue.
MS. ROBESON: Okay.
MR. CHEN: May I approach?
MS. ROBESON: Yes.
MR. CHEN: Okay.
BY MR. CHEN:
Q Sir, what are the water quality protection facilities that are proposed for the uses that are proposed by this DPA?
A It depends on where in the DPA you're talking about. As I said, some of the areas --
Q How about A --
A Okay.

Q -- that Area A -- what are they?
A What's proposed?
Q Yes.
A Infiltration facilities, bio-facilities, grass swales.
Q And where's the evidence in the exhibit that describes them?
A In the preliminary water quality plan.
Q No, no. I apologize. I misstated. I just want to know the exhibit number that identifies the water quality protection facilities. I mean, there could be, you know. There's so many exhibits, I don't --
A That would be Exhibit 119A --
Q Okay.
A -- the approved preliminary water quality plan.
Q And when was that approved?
A 2003 and 2004. Actually --
Q Okay.
A -- for this one, 2003 for this section.
MR. CHEN: Okay. That's all I got.
MS. ROBESON: All right. Redirect, Mr. Harris.
REBUTTAL REDIRECT EXAMINATION
BY MR. HARRIS:
Q Does the 19 percent of the area within the DPA -- well, strike that.

You were asked questions about the ESD to the MEP. Will the design and detailed calculations of those ESD measures for the portion of this area that doesn't have final water quality plan be decided at the time of final water quality plan?
A And site plan, yes.
Q And just to confirm, is it your opinion that -- do you have an opinion as to whether the ESD requirements can be met within that area?
A They --
MR. CHEN: Objection.
MS. ROBESON: Basis?
MR. CHEN: I don't think they've identified what's going to be up there. They don't know it yet. They're relying upon a 2003 approval and they're all confident about what's going to happen, but that's the best they can do. They got to go to site plan, and I understand that and I respect that, but --
MS. ROBESON: I'm going to let him answer.
MR. CHEN: Okay.
THE WITNESS: Ask --
BY MR. HARRIS:
Q So, in your opinion, can the ESD requirements under the regulations be satisfied for that portion of the MXPD zoned area that does not already have final water

quality plan approval?
A Yes.
MR. CHEN: Objection. Duly noted.
MS. ROBESON: Noted.
BY MR. HARRIS:
Q And does that require an amendment to the preliminary water quality plan, or does it simply require an approval of a final water quality plan?
A It does not require an amendment to the preliminary water quality plan but will be decided at the final water quality plan stage.
Q And are the impervious calculations for development recomputed at final water quality plan approval to confirm compliance with the regulations?
A Yes.
Q And will that be done here?
A Absolutely.
Q And are the specific location and design of water quality features set at preliminary water quality plan or at the time of final water quality plan?
A At the time of final water quality plan.
Q And can the specific design and location of those features differ from what may have been shown in a preliminary water quality plan?
A Yes.

Q Are the size, location, and nature of buildings fixed at the time of a preliminary water quality plan?
A No, they are not.
Q Are they fixed at the time of a final water quality plan?
A Yes, they are.
Q And will that be done here?
A Yes.
Q And will the design of the ESD features for the ultimate development be coordinated with the site plan design for those buildings at the time of final water quality plan?
A Yes.
Q Irrespective of whether Chapter 19-65 applies or doesn't apply to this, do you have an opinion as to whether the coordinated design you just spoke of, about water quality features at the time of site plan and final water quality plan, does that address the spirit of 19-65, calling for coordinated approval?
MR. CHEN: Objection. It goes beyond the examination and it's, I didn't know spirit means --
MS. ROBESON: Well, I thought you asked, or Mr. Kline asked him that same question. So I'm going to let him answer and give it the weight it deserves.
THE WITNESS: I'm sorry. You're going to have to

rephrase it or ask again.
BY MR. HARRIS:
Q Did Mr. Kline ask you a question about the intent of Section 19-65, calling for coordinated review of water quality features and development features?
MR. CHEN: Objection. He's now going to the intent of the legislation.
MR. HARRIS: I just asked --
MS. ROBESON: What are you asking --
MR. HARRIS: I'm --
MS. ROBESON: -- because, actually, I think we never got to -- he never testified on that because you objected to him asking about the intent. So is this critical, because I --
BY MR. HARRIS:
Q Mr. Bossong, is there a site plan approved for a hospital on this property?
A Yes, there is.
Q A site plan?
A Oh, no, I'm sorry. No, there is not, not a site plan.
Q If the project were to go forward with a site plan -- with a hospital, would that then require a site plan approval?
A Yes, it would.

Q And would that site plan approval incorporate a need to have a final water quality plan approval?
A Yes, it would.
Q And might that final water quality plan approval differ to any degree from the preliminary water quality plan concept?
A No.
Q Does the preliminary water quality plan -- never mind. I'll strike that.
MR. HARRIS: I have no further questions.
MS. ROBESON: All right. Recross. Mr. Kline?
MR. KLINE: (No audible response.)
MS. ROBESON: Mr. Chen?
MR. CHEN: No, thank you.
MS. ROBESON: Okay. Mr. Bossong, you may be excused. Mr. Harris, how many more witnesses do you have for rebuttal?
MR. HARRIS: Two more.
MS. ROBESON: And those would be Mr. Bogorad --
MR. HARRIS: Mr. Bogorad and Mr. Unterberg.
MS. ROBESON: Okay. We will take an hour for lunch, and we will be back at 1 o'clock, all right?
MR. HARRIS: Thank you.
(Whereupon, at 11:58 a.m., a luncheon recess was taken.)

MS. ROBESON: Okay. We are back on the record. At the lunch break I found an e-mail from Ehsan Motazedi from DPS, responding to the request for information on the binding element. So I'm going to mark that as Exhibit 125.

Mr. Chen, I did go back and double-check what was and what wasn't in the record as far as those e-mails, and there is -- Ms. Tesfaye's e-mail on the binding elements is not in the exhibit list. It's in the record; it's just not in the exhibit list. So that -- I think you all have already received a copy because I saw all of you cc'd -- so that will be 126. All right. So this e-mail from Ms. Motazedi will be 125, e-mail from Motazedi on binding element, and then 126 will be Ms. Tesfaye's on binding element.

(Exhibit Nos. 125 and 126 were marked for identification.)

MR. ROBINS: Right.

MS. ROBESON: Okay. All right. Now, we don't usually include, when it's from Ms. Behanna-Moseley's scheduling, you know, coming up with a date, we don't usually include those in the record. So I'm not including those right now. All right. With that, Mr. Harris.

MR. HARRIS: Yes. We're recalling Mr. Len Bogorad as an expert.

MS. ROBESON: Okay. Mr. Bogorad, you're still

under oath.

MR. BOGORAD: Yes.

(Witness previously sworn.)

REBUTTAL DIRECT EXAMINATION

BY MR. HARRIS:

Q Okay. Mr. Bogorad, with respect to testimony about demand for office development that I think Mr. Ferguson and maybe Mr. Noonan both spoke of, can you clarify what your testimony was?

A Yes. They seemed to say that I was not predicting a demand for office for many years. And what I did testify to is that there is demand for office and will be more over time in the I-270 corridor but that the office market is challenged for various reasons and there's a lot of competition for the demand that will be there, and I testified that the specialty retail proposed in the DPA would help Cabin Branch be more competitive for that office demand.

Q And with respect to your testimony about the impact of outlet retail and questions as to how tested that phenomenon was, can you amplify your testimony on that point as well?

A Yes. I actually went back to the transcripts because I was a little confused about some of what was said about what I said. So on page 53 of my direct testimony on

August 12th --

MS. ROBESON: Which date? Oh, August 12th?

THE WITNESS: August 12th, yeah. I said that it's, quote, it's a somewhat untested proposition that outlet retail would be the kind of catalyst that you would see demonstrated in places like Reston Town Center and Bethesda Row, closed quote. This is because the vast majority, as I think I said at the time, the vast majority of outlet retail centers have been built in more outlying areas that don't have any potential for office development, as distinct from Cabin Branch, which is in a major metropolitan area, on a prominent interstate highway that's had a long history of office development. So there really have been very few opportunities to test the impact of outlet centers on attracting office development.

BY MR. HARRIS:

Q Did you identify in your testimony examples of outlet retail that do have positive impact, and if so, what are your conclusions about those?

A Yes --

MR. CHEN: Objection, asked and answered. That's what he testified about.

MS. ROBESON: Wait. Just a second. Your -- I apologize. I was looking for something, and I missed your question.

MR. HARRIS: Okay, and I forgot how I asked it.

BY MR. HARRIS:

Q You were asked about outlet retail --

A Yeah. I mean, so far I've only talked about my direct testimony, but --

Q Yes, and then I believe that Mr. Noonan questioned the impact -- your testimony about the impact of outlet retail on office development, and I wanted to see if you could clarify that.

A Yes. I think, just to explain what I think is the situation, they were, they were pulling -- they were asking, asking about or raising the question maybe with one of the other witnesses that asserted that I had said that it was totally untested whether outlet retail would have any effect on office or not. And I did go back to the testimony, and the fact was, in my direct testimony, I said that I thought it was untested, that the ones I could think of at that time were in areas that didn't have any demand for office, but because the questions came up even in the midst of my direct testimony and it was two days before my --

MS. ROBESON: Right.

THE WITNESS: -- cross-examination, I was able to actually consult with some of my compatriots in other parts of the country, and as you may or may not recall --

MS. ROBESON: I do.

THE WITNESS: -- I did identify, particularly in Austin, there was for the first time an outlet center that was in an area --
MR. CHEN: Objection, asked and answered.
MS. ROBESON: I'll let it in for the, just to keep the flow going, but you don't have to repeat --
THE WITNESS: You got the idea, yeah. Yeah.
MS. ROBESON: -- your prior testimony because I did read it.
THE WITNESS: Okay.
BY MR. HARRIS:
Q Have you uncovered anything since then that amplifies your conclusions?
A Yes. I saw quotations from Mary Evans, who's the president of the Cy-Fair, C-Y dash F-A-I-R, Houston, Chamber of Commerce, which, which serves an area where the Houston Premium Outlets opened in March 2008, and that -- she was quoted in saying that the outlet center has become a lure for new businesses to the area, closed quote. And she said: If I'm talking to a company thinking of moving here, the first thing they say is, tell me about shopping, education, where you are in reference to the airport. Shopping is always the first thing on the list. When we're giving information on Cy-Fair's demographics, we always include shopping, which is definitely an amenity. It always comes

up, closed quote.
MR. HARRIS: Okay. I believe we have in the record Exhibit 110, which is an excerpt of The Loudoun Newsletter on September 6. I did bring extra copies, but I also would like to have marked as an exhibit a related document.
MS. ROBESON: Okay. I'll mark this as 127. Can you tell me what it is?
(Exhibit No. 127 was marked for identification.)
BY MR. HARRIS:
Q Okay. Mr. Bogorad, can you, Exhibit 127, can you identify what Exhibit 127 is?
A This is the one on the top here?
Q Yes.
A Yes. This is the statement of justification that the Peterson Companies submitted to Loudoun County regarding a rezoning of the Crosstrail development in, in Loudoun County.
Q First, with respect to Exhibit 110, can you --
A I'm sorry. This is 110 here and this is --
Q Yes. I'm sorry. 110 is The Loudoun Newsletter.
A Uh-huh, okay.
Q Yes. Can you explain what you gleaned from that article?

MR. CHEN: Objection. The document has been in and it speaks for itself.
MS. ROBESON: Well, I'm going to let him testify on it because I think -- from the transcript, I think I asked for a, more of a foundation. So I am going to let him testify.
THE WITNESS: Yes. The, the final paragraph -- this generally relates to this case, and the argument that the Peterson Companies is making to the county was that the presence of retail on the site that they're proposing would make it more likely that they could attract office to the development, very similar to what kind of things that have been discussed here. And the quote, I think the most relevant one is the last paragraph on that first page, which says: The developer asserts that the shops, restaurants, and personal service uses proposed for development will create an amenity base that will help drive a higher quality employment center that grows more quickly than would be possible under the current zoning.
And let's see. It also says on the next page that they, they quoted my firm. This is the fourth paragraph on the second page, that Mr. Banzhaf's letter in support of this also points out that the retail catchment analysis done by RCLCO, or Robert, Charles -- it says Robert, Charles, Lesser & Co., our full name -- on behalf of the applicant

states that the development sits in a favorable area for new retail development and that RCLCO's report contends that an anchor, like Costco, Sam's Club, Wal-Mart or Target, quote, will be a major draw to the site, enabling other retailers at the site to achieve significantly higher captures of area demand than they otherwise might.
And let's see, and then there was talk about office, I believe. Anything else here? I guess that's the main, that's, I think the quote -- the first quote I read is probably referring to something in our study, let's see, yeah, in terms of the amenity base, right.
BY MR. HARRIS:
Q And --
A And I believe that was it on page 4 of the statement of justification, which you asked me to look at.
MS. ROBESON: Wait. Which is this? The --
THE WITNESS: This is, sorry, Exhibit --
MS. ROBESON: -- Crosstrail statement of justification?
THE WITNESS: Yeah. What's the exhibit number?
MR. HARRIS: Exhibit 127.
MS. ROBESON: Okay.
THE WITNESS: 127. So the article in the newsletter was summarizing this statement of justification, and the statement of justification obviously has more

detail. And it says on page 4 of that, if you go down to the, I guess you'd call it the third paragraph on page 4, the RCLCO study estimates, or actually, the one below that, yeah, sorry, the RCLCO study noted that while it is difficult to predict how much office space and how many rooms will be attracted to a specific development, particularly in a competitive market such as Loudoun County, regardless of the specific quantity of non-retail development that a development can capture, it has become clear that having a desirable, successful, enticing retail component is a significant help in increasing office and hotel absorption.

And the next paragraph said: RCLCO concludes the era is long gone when many businesses were attracted to, quote, office perks, unquote, and business, quote, business parks, unquote, with only office and industrial uses and an occasional sandwich shop to provide amenities to employees and visitors. In the future, most of the office absorption in the county is likely to be captured by multiuse developments with substantial and varied retail, as is planned in the post-zoning scenario for Crosstrail.

BY MR. HARRIS:

Q And did the Peterson Companies accept your conclusions to that effect?

A Yes, as far as I know, and they're using it in

their justification.

Q And are those statements consistent with your opinions with respect to the outlet retail proposed at Cabin Branch?

A Yes. It's really exactly the same point that I was making there as I have in this testimony.

Q Okay. You were asked, or there was testimony, I should say, about the importance of a supermarket to the town center and the effects of a supermarket in Cabin Branch on the town center, including some cross-examination of Mr. Unterberg. Did you hear that testimony?

A I did.

Q And did you agree with Mr. Unterberg's characterization about demand for grocery there?

MR. CHEN: Objection. As I understand, the question is, does he agree with another witness that his client has presented to the Hearing Examiner.

MR. HARRIS: Strike that. I'll move on to another question.

MS. ROBESON: Okay.

MR. HARRIS: Not that important.

BY MR. HARRIS:

Q Did you have occasion subsequent to the earlier hearings to evaluate the potential for supermarkets in Clarksburg?

A Yes. I calculated the demand for full-size supermarkets and other grocery stores in Clarksburg, assuming the area is totally build out with homes.

Q And could you tell us what you concluded?

A Yeah. I began by analyzing the demand for grocery stores in Clarksburg, again, assuming the total households that are likely at build-out and taking account of --

MR. CHEN: Objection. This is totally irrelevant to the issues before the District Council. The issue that's critical, at least as I understand it, is master plan compliance, not a demand study.

MS. ROBESON: I remember extensive questioning from Mr. Kline about why can't you meet this master plan requirement for a grocery store in Cabin Branch. So I'm going to allow the testimony on this.

THE WITNESS: Yes, and also, I think, really it's to the impact on the town center. So I began by analyzing the demand for grocery stores in Clarksburg, assuming the total households at build-out -- so once all the homes are in the area, how many, how much shopping center space and supermarket space, particularly, can be supported -- and I took account of the increasing competition from food stores outside of Clarksburg, particularly the 123,000-square-foot Wegmans that just opened a few weeks ago in Germantown, about six to eight minutes from Clarksburg, depending on

where in Clarksburg. I pulled data on grocery store spending per household in Clarksburg from ESRI, which is a highly respected private data company which basis its analysis on data collected by the Federal Bureau of Labor Statistics and by the U.S. Census Bureau.

So my calculations found that at build-out of Clarksburg there will be sufficient demand for only 129,000 square feet of supermarket space in Clarksburg, which would be sufficient to support only two point four full-size supermarkets, assuming 53,000 square feet each in Clarksburg, and of course, build-out of housing in Clarksburg won't occur for many years. But, in other words, there would only be sufficient demand for one additional full-size supermarket in Clarksburg beyond the Harris Teeter that's going to be opening very soon in Clarksburg Village. So --

MS. ROBESON: When you say Clarksburg, are you counting the whole study area?

THE WITNESS: I am, yes.

MS. ROBESON: Okay.

THE WITNESS: So this is in line with exactly --

MS. ROBESON: Within the --

THE WITNESS: -- what was done for the master plan originally --

MS. ROBESON: Okay.

THE WITNESS: -- in terms of demand and so on, which, you know, exactly. So without, without adoption of the DPA, a potential full-size supermarket considering locating in the Clarksburg Town Center would be, in my professional opinion, very concerned about the potential for a full-size supermarket at Cabin Branch because they're going to do the same kind of analysis and say we only have demand for one additional supermarket, the Harris Teeter is already there, we have to take account of the fact that some of the shopping dollars are going to be leaving to go to Wegmans and Costco and so on, so there is only demand for one other full-size supermarket, do we want to open at the town center knowing that there's this right to build a supermarket at Cabin Branch and that might really decimate our business, and in my opinion, that's going to be, make it very difficult to attract a supermarket to the town center.

The -- furthermore, it is my professional opinion that the town center from a market perspective would not be able to proceed without a full-size supermarket. Clarksburg Master Plan, I think, was absolutely correct when it said on page 46 that, quote, this plan recognizes that retail uses are critical to the vitality of the town center. A grocery store is particularly important since this type of use can serve as a magnet for other commercial operations, dry cleaners and banks, for example, unquote. So it is, you

know, it is a critical issue if, as I read the master plan and my understanding of what's happened here, that the town center's vitality and building to go ahead is a key part of the goal.

So I then proceeded to calculate the potential in Clarksburg for a combination of two full-size supermarkets plus a smaller grocery store, such as a Trader Joe's or a MOM's or a Fresh Market, and my analysis, my calculations did determine that there would be sufficient demand for this combination, which, as you recall, I said two point four full-size stores. That point four is basically the smaller store. There would be sufficient demand for this combination of food stores in Clarksburg at build-out, which would be consistent with the town center getting the second full-size supermarket and Cabin Branch getting one of the smaller grocery stores.

BY MR. HARRIS:

Q How do you reconcile your conclusions then with the assumptions done 20 years ago in connection with the master plan?

A The assessment made at the time of the original master plan -- that at build-out there, Clarksburg could support three full-size supermarkets -- might well have been reasonable at that time, although it's probably worth noting that the staff analysis conducted for that master plan in

1994 actually found that there was demand for only 75,000 square feet of neighborhood center retail based on build-out population and employment west of I-270. The plan went ahead to recommend 120,000 square feet, and these are both including supermarkets and other things that would be in a neighborhood center. So for whatever reason, the plan went somewhat farther, but in any case, the ultimate plan, of course, was for three full-size supermarkets in associated neighborhood centers -- one in the town center, one in Cabin Branch, one in Clarksburg Village -- but I think it's critical to recognize from a market analysis perspective that the 1994 analysis was prepared before the Washington area had anything like a Wegmans, which captures a substantial share of grocery spending in areas where it's located and is famous for drawing in shoppers from farther away than a normal supermarket would. This is, Clarksburg is clearly part of their, you know, market area and beyond, but this is, this distance, clearly they're going to get a lot of shoppers from Clarksburg, and so this is something that wasn't known at the time. So it's nothing that they did wrong, but things have changed.

The other thing that's changed since that is that Target has supermarkets now, you know, supermarket components to their stores, Wal-Mart does, Costco has become much more a big deal and, of course, Wegmans is a

supermarket in Germantown, Target is a supermarket in Germantown, Costco is in Gaithersburg. So -- and even when the 2011 decision was made in terms of the update of this analysis, as I read it, it's very clear that they were sticking with, you know, they didn't reexamine this; they were using the same three-supermarket kind of calculation that was in the original master plan and did not go back to look at what has happened to the competitive situations. So I think that's really, it's important to recognize that those are probably accurate analyses but only, what are we talking about, 20 years ago or something like that. The --

Q Given your conclusions on market analysis, do you see any downside, any problems, if you will, by keeping a prospect of a full-size grocery at Cabin Branch?

A Yes, I do, and I've heard that mentioned in some of the testimony since I testified. In concept, that would be great, it would keep things flexible, it would allow, allow the original plan to possibly happen, but I think it's -- in terms of the exact size of the community neighborhood retail -- but I think, as I said, it's critical, in my view, from a market perspective to not have this potential competitor looming over the store that really needs to be attracted to the town center for the original master plan to be implemented. And so I do think keeping this option open would be very detrimental to the future of the town center,

and I do think it's informative that David Flanagan of Elm Street Development wrote, wrote the Hearing Examiner that specialty outlet retail will complement and augment the retail development in the town center as long as a supermarket is not included in Cabin Branch. He's the one who's trying to attract this supermarket and, I think, feels very strongly, just from what I can see in the letter, not surprisingly to me, that that's very important to not have this potential competitor hanging over him.

Q So if there were not a full-size supermarket in Cabin Branch, from a market perspective, do you see a possibility of having other neighborhood retail at Cabin Branch?

A Yes. As I said, you can -- from the supermarket perspective, I think there is demand down the road, I don't know how soon it'll be, but for Trader Joe's and Fresh Market or MOM's and so on, you know, on the order of 20,000 square feet. A store like this can serve many neighborhood shopping needs. It can be a destination for those who choose to walk to a supermarket-type thing and get some food of that sort. Furthermore, there's undoubtedly demand for various restaurants and stores in the specialty outlet center that will provide desirable neighborhood services and can be walked to by many of the residents at Cabin Branch.

So I think, as build-out of Cabin Branch occurs,

there could certainly be demand for some additional neighborhood retail, but without a full-size grocery, I don't believe the demand outside the outlet center would ever reach the 120,000-square-foot estimate from 1994, but I think that's a reflection of times changing and the need to protect the town center, essentially.

Q Do you have any observations about the walkability of grocery services in Clarksburg and how that relates to this DPA for Cabin Branch?

MR. KLINE: Objection.

MR. CHEN: Objection.

MS. ROBESON: Basis?

MR. CHEN: Market analysis is one thing. Walkability is a totally different discipline. He's not a planner. He's not a transit expert. He's a market analyst. How does that tie to walkability?

MS. ROBESON: Mr. Harris, does he --

MR. HARRIS: Maybe I can rephrase the question.

MS. ROBESON: That's fine.

BY MR. HARRIS:

Q Do you have experience in evaluating the number of people or percentage of people who walk to a grocery store within a given area?

A In general terms, that's certainly a factor that we consider in our market analysis when we're doing analyses

for a master plan community.

Q And based on that experience, what would you predict for Cabin Branch?

MR. CHEN: Objection. They haven't -- no testimony about any study done, no analysis done at all.

MS. ROBESON: Well, that's, I think, what they're getting to. So I'm going to let him continue.

THE WITNESS: Yes, a couple of things. The, you know -- I mean, walkability is great. Walking to supermarkets and neighborhood retail is great, but we look at it from a market analysis perspective, what's really going to happen on the ground and so on. And I, and I think it's also, it was enlightening for me to look back at the staff's demand estimate for Cabin Branch back in the original study. I heard some comments, one of the other witnesses from, that one of the other attorneys brought here that this was, the intention of the staff was that all these shoppers would be coming and walking from within Cabin Branch, and that's not at all what the analysis shows. You could not support a supermarket even back then with just those residents.

Only about one-half of the households, including in staff's -- included in the staff's demand estimate for Cabin Branch were actually, would actually be living in Cabin Branch once it was built out. So, at most, only about

one-half of the demand for the neighborhood shopping would have coming from Cabin Branch residents. And, furthermore, the reality is, as we can all imagine, just, you know, you have three supermarkets that were planned that are all within a few minutes of each other, and most people are going to choose one store or another for a given shopping trip. There will be somewhat of a tendency, we find in doing market analyses, to go to the closest one, but when they're that close to each other, one might well go to another store on one trip, it's a good sale, they're driving by there to take their kids to school, all kinds of reasons why; there's a lot of intermixing of demand. So the reality is that probably less than half of the demand, even based on the staff's analysis, would not have -- would have been impossible to be walkability because it wasn't even coming from within, in Cabin Branch.

MS. ROBESON: Did that include the employment? I mean, you're measuring the residents.

THE WITNESS: Yeah. Well, they did give some credit for employment apparently. The calculations are not clear, but basically, what they were doing is looking at the entire -- if I could perhaps approach this map for a moment, which is --

MS. ROBESON: And that map is?

THE WITNESS: -- 90, I guess. They were looking

at the entire potential demand at build-out from all of this area that was west of I-270. So, if I'm reading this correctly, that would include the Cabin Branch neighborhood, Ten Mile Creek area as well. And so they took all of the build-out here, much of which, about half of which was not part of Cabin Branch neighborhood, and said, okay, based on all of this -- which was a reasonable thing to do; there were not going to be any competitive supermarkets or whatever, neighborhood centers serving that area as directly -- so they were doing the right thing, but I heard some expert saying that this was based just on demand from Cabin Branch and that's just not the, not the way they did it. They shouldn't have done it that way, and they didn't do it that way.

I think it's also, just one other note from a market analysis perspective is that, you know, as much as with planners -- and I do have a planning degree and I like walkability -- but the reality is most shopping trips in suburban areas to supermarkets are done by car. There is more walking to restaurants and banks and other things of that sort, and certainly that walkability will be quite possible to the outlet center, but this is -- you know, it's one thing to think of this as, you know, it is a neighborhood-serving center, but it's not just serving this neighborhood.

BY MR. HARRIS:

Q I believe it might have been Mr. Noonan who talked about the impact of specialty retail at Cabin Branch on, I think what he might have been assuming would be specialty retail in the town center. Do you, do you remember his testimony, and if so, what observations do you have about that?

MR. CHEN: Objection. This is saying what did you agree or disagree with this witness. If there's a specific point that a witness has said, a specific opinion that a witness has, an expert has expressed and this expert disagrees, I have no objection to that, but the way this question is posed, I don't think it's relevant.

MS. ROBESON: Why don't you just ask him whether he agrees with Mr. Noonan's testimony regarding the impact on retail in the town center.

MR. HARRIS: That is fine.

BY MR. HARRIS:

Q Can you answer the Hearing Examiner's question?

A I do not, to the extent I remember exactly what he said, I do not, did not agree with him --

Q Okay.

A -- and do not agree with him.

MS. ROBESON: And for what reason?

THE WITNESS: Yeah, several things. I mean, one reason is, as I just discussed, there is a very significant benefit to the town center, removing this potential competitor at Cabin Branch, in terms of the supermarket demand, given that the, you know, the demand is relatively limited.

I also believe the specialty retail at Cabin Branch will be helpful to the town center by making Clarksburg more of a retail destination with a variety of retail in the whole Clarksburg area, and it will bring jobs to Clarksburg that will create demand for retail and residential demand that will also help the town center. And I also believe the additional retail that will be built at Cabin Branch under this proposal will not significantly compete with the retail that's likely to be attracted to the town center.

MS. ROBESON: Now, when you say town center, are you referring to the, I forget the roads --

THE WITNESS: Yeah.

MS. ROBESON: -- I think it was Stringtown -- what do you mean by town center?

THE WITNESS: Yeah, that's an, that's an important question. It's very --

MS. ROBESON: Are you referring to the town center district, or are you referring to a smaller portion of the town center?

THE WITNESS: I think -- you know, there's been a lot of confusion about this, and you know, you may want to ask Mr. Unterberg for more master plan elaboration, but my reading of it is --

MS. ROBESON: Okay, but which town center are you talking about?

THE WITNESS: Yeah. Yeah. Let me, in fact, yeah, let me, let me try to elaborate on that, ma'am. The way I read the master plan -- and I read master plans a lot in the context of my market analysis, but I don't claim to be an expert on market plans, market, on master plans -- but as I read the master plan, the, and I actually pulled out some quotes here, it says the -- what I see in the master plan is the following: I see that they're calling for a total of -- this is on page 46. It clearly states to me that commercial uses proposed for the town center total 300,000 square feet, so, and I believe at that point they're talking about the entire town center district, although I -- and they were a little ambiguous, but I think that's, that's the way I parse it in looking at the different parts. And it's very clear to me in reading that that that 300,000 square feet includes office and retail. So that's the other confusion, is that we're going back and forth between retail and office, and retail is commercial. And it then recommends a maximum square footage of 150,000 square feet for the neighborhood

center. So I think that is clearly that smaller town center --

MS. ROBESON: Triangle.

THE WITNESS: -- as opposed to the town center district --

MS. ROBESON: All right.

THE WITNESS: -- and that's a, I read that as a subset of the total of 300,000 square feet of retail and office that they're talking about for the entire district --

MS. ROBESON: Okay. So are --

THE WITNESS: -- because there wouldn't be much office in the town center. So --

MS. ROBESON: So is your testimony, comparing the impact on retail in the town center, are you comparing it with the neighborhood center or are you comparing it with the whole district?

THE WITNESS: Both. Let me --

MS. ROBESON: Okay. So --

THE WITNESS: -- that's exactly where, yeah, where I was going; so I appreciate that. So then I go to the next page of the master plan, page 47, and it says, with respect to the town center district -- as I read it, the larger area -- that, quote, the balance of proposed retail and office uses, parenthesis, 70,000 to 105,000 square feet, is proposed to be located throughout the town center district

and consists of infill retail within the historic district in accord with historic preservation guidelines, closed quote.

So, as I'm reading the numbers, it's a little hard to get them all to add up, but I think we're talking about 150,000 office and retail, I'm sorry, 300,000 office and retail in the town center, the neighborhood center -- you know, we'll call it town center and town center district --

MS. ROBESON: Okay.

THE WITNESS: -- that might be clearer. Okay. So we're talking about, and perhaps I could just use the -- so it's 150,000 in the neighborhood center. That is a subset of a total of 300,000 square feet of -- and that's 150,000 of retail, as I read it -- 300,000 square feet total in the town center district of office and retail. So 150,000 of that is the retail within the town center, the neighborhood center, we'll call it. That would leave about 150,000 by math, but then they proceed to say that everything that's left is 70 to 105,000.

So I think there is some inconsistency there, but in general terms, we're talking about certainly less than 150,000 of office and retail that they're talking about within the town center district and that that additional retail at least, a portion of that consists of infill retail within the historic district.

All right. Sorry for all of that. You know, I do find it confusing, but I think that -- I think the implication, stepping back, with respect to retail, which is really the topic here, and exact numbers, I don't think one can really parse exactly, but I think the basic concept is there would be a neighborhood center anchored by a supermarket, the supermarket would be critical to getting that neighborhood center, it would total about 150,000 square feet including an anchor supermarket; then there would be some additional retail, but that is going to be infill retail within the historic district. They do not contemplate any sort of larger center or whatever. They do not mention at all, despite the testimony that I heard from Mr. Noonan, they do not mention specialty retail or comparison retail in the town center district, to my, unless I'm missing it somehow, but I certainly didn't see anything that mentions that.

So then the question is, okay, what is this other retail and does that -- well, let me step back a moment. So I think I've talked a lot, and I won't elaborate anymore, unless you want me to, on how the neighborhood center, this 150,000, is not, in my view, going to be at all directly competitive with the retail proposed if you don't have the supermarket.

Okay. So now we have the other retail.

Presumably what --

MS. ROBESON: Exactly.

THE WITNESS: -- Mr. Noonan was talking about was going to be this maybe specialty retail, even though the plan doesn't say that. All right. So now from a market analysis perspective, I then looked at what is the likelihood that this additional retail, this infill retail would be specialty retail that would be competing with the outlet center, because that then becomes a question of would the outlet center have impact on that portion of the town center district, which is also important, presumably, to the plan, and in my view, there's several issues with that.

I do not -- first of all, the types of chain retailers that would be going into the outlet center would never consider an infill kind of situation in a small concentration of retail in an historic district. They need, they -- it's critical to them that they be part of a larger concentration that can draw people from, you know, many miles, that can draw people off of the interstate highway, and so on. So you would not, you would not have the same stores. That's, there's no question in my mind about that.

Beyond that, this is, even, even for other types of stores, this is just not the type of area, this little -- small amount of retail in the town center historic district would not have the same potential store sizes or visibility

or regional access or critical mass of square footage to be an effective comparison shopping concentration. I think it's going to be some smaller neighborhood-related stores and it would be fantastic for interesting restaurants, and so on, that would not be directly competing with the most, probably entirely chain restaurants that you'd have at the outlet center.

So sorry for the long-winded answer, but I think, I think it's, you know, as I read the master plan, the outlet center would not be competing with the town center center itself and it would not be competing with the retail that they contemplate elsewhere in the town center district.

BY MR. HARRIS:

Q What about the question of restaurants? You --

A Yeah.

Q -- briefly mentioned that. Can you expand on --

A Yeah.

Q -- how the two areas would function together?

A Yeah. So just to elaborate slightly, I want to just add that they --

MS. ROBESON: Well --

THE WITNESS: -- both areas would have restaurants.

MS. ROBESON: Okay. Before you start, you don't need to repeat your testimony as to the neighborhood

center --

THE WITNESS: Right.

MS. ROBESON: -- but if you want to address the other portions of it.

THE WITNESS: Okay. That's fair enough, although I, you know, I did hear people say, well, maybe the supermarket would be competing but there would be restaurants competing in the town, in the neighborhood center also. And I do think, I think the same thing applies to that as well as the additional retail elsewhere in this, in this historic district, that these are going to be very, very limited, if any, chain restaurants. There might be a Chick-fil-A or a Subway possibly, something like that, but basically they will be a concentration of much more interesting restaurants but restaurants that would not be drawn to or likely to be accepted into an outlet center, quite honestly. They're, for a lot of reasons, I can elaborate on it if you want, but they're going to be different types of restaurants. There's definitely part of the demand for restaurants that wants chain restaurants and they could be the same people, but on a given restaurant trip, there's some demand that goes to chain restaurants, some of the fast-food, some of them sit-down, and some demand that goes to more interesting, usually independently owned or maybe part of a small chain. Many, many of them

have international flavor, ethnic aspects to them and so on, and there's no question in my mind that both of those can survive together and can complement each other.

BY MR. HARRIS:

Q Let's turn to the question that, I think Mr. Noonan was the one who spoke most about it, in terms of the extent to which this development at Cabin Branch would somehow take away from the focus, whatever it may be, of the town center area. Did you hear that testimony? Can you --

A Yes, I did.

Q -- offer your observations on that?

A Yes, I heard it. I have two comments. First of all, if the town center is not successfully developed, it's -- and a full-size supermarket, as I said, is an essential anchor to get that developed -- the town center will never become a focal point of Clarksburg, as --

MS. ROBESON: Wait. Are you referring to the district or the smaller town center or both?

THE WITNESS: Well, I think it applies to both. I think the -- you know, as I said, I don't, I don't think what happens in the historic district is going to be all that affected, one way or -- well, I don't think, yeah, I don't think either is going to be affected one way or the other, but the way I read the master plan, it's -- and I've been doing work in Clarksburg for many years -- it's always

been this, what we've been calling neighborhood center, that's been what the residents want, what's going to be the heart of Clarksburg and was intended to be from the beginning. Yes, there was commentary about historic district, and so on, and that's important, but that -- the real focal point that I think everyone is talking about, and certainly they have been over the decades, has been this supermarket-anchored town center, whatever you want to, you know, as opposed to the whole district, although I suspect the same issues, you know, probably apply to the whole town center district. But basically, if you don't, if the town center with its supermarket, which the comprehensive plan I think correctly said was essential for having the town center go ahead, it can't possibly or logically be a focal point if it doesn't get developed, and if it continues to sit there because they don't have a supermarket for another X number of years or forever, it will never be the focal point. So it's critical, in my view, as I said, that we don't have this competitive supermarket that's hanging over the head of trying to get that supermarket there.

And secondly, I see many, numerous examples, repeatedly, of retail concentrations that each have liveliness in attracting people and are, you know, good places that are relatively close to each other and they don't kill the other one. You know, a few examples include

Potomac Yard and Old Town Alexandria down in Alexandria, Washingtonian Center up on 270 and Falls Grove and King Farm and now Crown Farm, all working together without killing each other by any stretch of the imagination, Downtown Rehoboth and three outlet centers out on Route 1, Bethesda Triangle and Bethesda Row, Leesburg Premium Outlets in downtown Leesburg. I mean, there's just lots of examples. There's no reason why we have to say one of these can't be a lively, exciting place and that that's going to kill the other one.

BY MR. HARRIS:

Q With respect to the employment issue, the, I think it was Mr. Ferguson may have testified that it was his opinion that retail did not constitute employment because of the number of employees that it has. Do you offer, do you have any thoughts about his testimony in that regard?

A Yeah. I disagree with that. He's -- and I think he said hotel was an employment use and retail wasn't. Typically retail has a similar number of employees per square foot to hotel, more square, more employees per square foot than light industrial and somewhat fewer per square foot than office. We calculated that this outlet center will have 1659 total permanent employees on the site, a very substantial concentration of employees. So I don't see that as an argument for why this would be not employment and

hotel or office would be employment.

Q Is there any place that you've seen in the '94 master plan or the appendix to it that quantifies the future demand for comparison retail in Clarksburg?

A No. The technical appendix dated June 1994 on page 12 states that the staff evaluated future retail space needs for both neighborhood or convenience retail, on one hand, and comparison retail on the other hand, but for some reason it only provides results for neighborhood retail centers and that's where we've been talking about 75,000 west of I-270 and 130,000 square feet in the town center.

Q Final question then. You were here for most of the testimony, I think. Did you hear anything from any other witness that in any other way would cause you to change your opinion that you offered in your initial testimony?

MR. CHEN: Objection. I don't -- that's not a proper question. Again, if there's a specific witness who gave an opinion that this expert wishes to contradict, that's fine, but to say did you hear anything else that you disagree with, I just don't think that's a proper question.

MS. ROBESON: I'll let him answer. I think it's valid for the weight it deserves.

THE WITNESS: I believe I have heard all of the testimony, actually, but no, I did not find anything that

changed my opinion.

MR. HARRIS: No further questions.

MS. ROBESON: Okay. Mr. Kline, the finger was pointed at you.

MR. KLINE: That's why you don't want to have your back to Mr. Chen.

REBUTTAL CROSS-EXAMINATION

BY MR. KLINE:

Q Kind of doing this chronologically, Mr. Bogorad, was the name of the, I guess the retail facility in Houston, was it called Cy-Fair?

A The one I just quoted about?

Q Yes, exactly.

A It's -- let me see. Houston Premium Outlets is what it's called.

Q Okay. Well, you read something and you, I think you were quoting from somebody, Ms. Evans, and you said a lure for new business. And what I wanted to know is, did she use the term office, because that's really what the point was you're trying to make, it's a lure for office. Did she just say new business, or does it say office?

A The quote says, new businesses to the area if I'm talking to company about moving here --

Q Thank you.

A -- so as I understand, company moving here, most

likely that would be office. I'm quite sure she wasn't talking about just other retailers but, you know, could be wrong.

Q The discussions we had about The Loudoun Newsletter and the Crosstrail, if I remember correctly, your testimony was that the premise that fashion retail would stimulate office development was a totally untested, I can't remember quite what the phrase was, but untested.

A Well, as I elaborated in my direct testimony, I said that by the time I had my, you know, rebuttal, my cross-examination, I had concluded --

Q Yes, you came up, you came up with examples, right, sure.

A -- that there were some tested then.

Q Right. Okay. Well, you've given us an education in other -- you have given us an education of the spectrum of retail centers that are available. Is Crosstrail a fashion retail outlet center?

A It's not an outlet center. The current proposal is for a so-called power center, a big-box center with -- which, you know, even though I believe that that, as I said in that report and as was quoted here, even though I believe that that will be definitely beneficial in competing for office, I believe that an outlet center with more of a good feel to it, in terms of walking around and smaller stores

and restaurants and outdoor types of things that you don't typically get in a power center, that that would have actually more benefit.
Q Your testimony has been anybody who comes will help --
A No, that's not --
Q -- any retail will help?
A Well, that any -- I mean, I don't know about any --
Q Okay.
A -- but that retail, in general, is a plus and is, you know, quite necessary to be competitive.
Q Right. In any event, Crosstrail is not what is being proposed for this property, Cabin Branch, correct?
A No.
Q Right. And, in fact, I guess on the stores that are talked about -- Costco, Sam's Club, Wal-Mart -- those are the things that the Planning Board wanted to preclude occurring in Cabin Branch, correct?
A I believe, yes. I've read that, yes.
Q Yes, right. So this is a power center, and we don't want to have a power center, and you're not proposing a power center, correct?
A I'm not proposing anything, but I don't believe the developer is proposing one.

Q The applicant is not proposing a power center. Do you recall the -- and I'm working, unfortunately, off an interim reference edition; I think I've got the changes correct, or I'm sorry, the pages correct out of the master plan -- but do you recall that in the Cabin Branch section of the 1994 master plan, there was a specific reference for a grocery store within the Cabin Branch section? Correct?
A That's my recollection and that's consistent with what I've been saying, yes.
Q Okay. Yes, sure. Okay.
A I can't say I could find the quote, but I, that's what I've --
Q Understood. On my page 46 and based on you talking about page 46, I think we're talking about the same thing. It talks about a grocery store is particularly important since this type of use can serve as a magnet for other commercial operations, paren., dry cleaners and banks, for example. Now, that's --
MR. HARRIS: Wait a minute. Wait a minute. Wait a minute.
MR. KLINE: Okay, sorry, 46. I'm looking at my 46.
MS. ROBESON: Which page are you on?
MR. HARRIS: Page 46, regarding the town center area?

MR. KLINE: Yes, exactly. That's what I was going to say.
THE WITNESS: Oh, the town center we're on now?
MR. HARRIS: Yes, right.
THE WITNESS: I'm sorry. I thought you were talking about Cabin Branch.
BY MR. KLINE:
Q No, I understand. I understand. All right. Now, albeit that is a quotation related to the town center --
A And could you refer to me where you are now?
MS. ROBESON: Which page?
THE WITNESS: Oh, I see, yes. It's the same quotation I just read, right?
MS. ROBESON: Wait. Which page?
MR. KLINE: Okay. I believe, 46.
MR. HARRIS: Yes, it is.
THE WITNESS: Yeah.
MR. KLINE: It is 46, yes, and it's the second paragraph, or it's, okay, it's --
THE WITNESS: It's the fifth paragraph.
MR. KLINE: Fifth paragraph down.
MS. ROBESON: All right.
BY MR. KLINE:
Q Okay. It's the second sentence in the fifth paragraph down. Does that sound right?

A Yes. That's the one I just read a few minutes ago.
Q Okay. As a principle -- admittedly, this relates to the town center -- but as a principle, would you say it's equally applicable to Cabin Branch, that a grocery store would stimulate other types of retail commercial operations?
A If you want a full-size neighborhood center, it's very important to have a supermarket as part of that, exactly.
Q Okay. Then doesn't the loss of the grocery store alter the essence of the intended community center for Cabin Branch?
A I don't know about essence. I believe what's being proposed is consistent with having a range of neighborhood retail within Cabin Branch, both within the outlet center itself and, as I said, some additional retail, probably down the road, but eventually within the town center. If you wanted a full-size neighborhood center in Cabin Branch, in all likelihood, you would, you would want to have a supermarket there. As I said, I think that would be incredibly damaging to the town center, but --
Q Sure. Okay. Well, therefore, do you believe that the 1994 master plan needs an update regarding the economic assumptions and the recommendations for mixture of land uses?

A I'm not a master plan expert. It seems to me that if master plans are intended to be lasting -- which, you know, in my view, they are -- that things have to be adapted, to some extent, as things change, but that doesn't mean they have to be modified. I think it's consistent with the spirit of the entire master plan to be talking about what's being proposed, but again, I'm not a master plan expert.

Q You gave us a lot of information about your reading of the town center and the competition this year. What's your understanding of the total amount of office and retail square footage that is permitted in the town center?

A Town center district?

Q Yes.

A As I, you know, as I said, it's a little ambiguous, but I read it, in terms of commercial -- so this is the fourth paragraph on page 46 -- in terms of commercial uses, up to 300,000 square feet are proposed. This --

Q And you --

A -- recommendation exceeds the finding of the Planning Board retail studies that up to 153,000 can be supported. Additional square footage would be desirable and would be consistent with the plan. And whether, you know, I mean, quite honestly, the amount of office that they're proposing is, you know, somewhat irrelevant --

Q Right.

A -- to what I've been commenting on. You could, you know, I suppose one could argue that does include office or doesn't. I think it's ambiguous.

Q Well, did you think that the term, the highlighted or bold term, commercial uses, did include both retail and office?

A That's, that would be my reading of it, but again --

Q Okay. All right. So if I did, if I did your math right or correctly, you allocated -- I'll rephrase that -- the master plan allocates 150,000 of that to a neighborhood retail center and --

A I think that's quite clear, yes.

Q -- and the remainder, whether that's either 150 or 70 to 105, depending on how you do the numbers, would be allocated to the infill retail?

A That's my reading, and of course, where they say 70 to 105, they say this is retail and office. So there they are being explicit, even though when they said 300,000, they used commercial, which I interpret as retail and office, but --

Q Okay. On my page 40 or whatever is Table 2, titled -- you have the same thing?

A Uh-huh.

Q All right. The Summary of Maximum End-State Development shows for the town center district how much square footage of employment and retail square footage?

A Yeah, I saw that also. It's, I would, I would say we're into biblical interpretations. They were trying to somehow reconcile different chapters. You know, if they hadn't, if they hadn't said proposed retail and office in the town center district of 70 to 105, I would have thought, well, maybe they're just talking about retail there. That would -- then everything would actually hang together, and maybe that was where the error was. Maybe they're saying that there's about 300,000 square feet of retail, 150,000 of that is in the neighborhood center, the other 70 to 105, plus a few extras which they didn't count, is in the historic district. That would actually all hang together and would be consistent with the total of employment and retail so-called being 770 on page 40. So that's possible --

Q Given that range of --

A -- but none of those would change my opinion as to what I said --

Q I understand, but given that range of numbers, you can understand why Mr. Noonan could have concluded that there was in fact more retail square footage there than you have estimated was available?

A No, I really don't, because I think, I think the only possible, if you want to accept all these numbers, the only thing I could think, can come up with is that they were really talking about retail and they threw in and office, and so -- because this is, you know, it seems to me this is all, the only --

MS. ROBESON: It threw in and office on page 46?

THE WITNESS: On page 47 but not page 46.

MS. ROBESON: 47, yes.

THE WITNESS: Yes. So that they were really saying retail is 300,000 or maybe a little less and maybe a little of that was office but that they were mostly thinking about retail, and then they knew they needed some retail in the historic district because that's the logical use and, if they didn't allow for that, the historic district wouldn't be lively. They knew they needed a good-size neighborhood center with that critical supermarket. That was 150,000, and so that was the retail they were talking about. And then when you go over to the total over here, 770,000, so if that was 300,000 of retail, then you have 470,000 of other employment uses, that, you know, I mean, I'm getting way beyond what I should be trying to judge, but I guess the point I'm making is that that's -- I don't see any reading that would indicate that they're talking about more retail than that, certainly in the heart of this town center

district.
BY MR. KLINE:
Q And that being 300,000 or --
A Than the 300,000, yeah.
Q Correct. Okay. Okay. Thank you. I had a series of questions, but I guess it starts with a foundation question, and the answer will be yes or no. Is Washingtonian itself -- are you familiar with Washingtonian?
A Yes, in general terms.
Q Okay. Would you consider that to be a town center development?
A It's debatable. I suppose, in some fashion or other --
Q Okay. Are you --
A -- but it's also a power center with other specialty -- it's an interesting hybrid, to say the least, but --
Q Are you familiar with the tenant base at Washingtonian?
A In very general terms. I couldn't quote the numbers or even specific tenants, although I'm not sure --
Q Do you know if there are tenants in Washingtonian Town Center that would also be on the list of tenants that you mentioned in Leesburg Premium Outlet Center?
A I did look at it after the -- it's, unfortunately,

been a few weeks. I think you mentioned a few that --
Q Yes.
A -- seem to be actually the only ones that I saw that were; so if you want to repeat those. I believe you were correct in asking about those two or three, but there weren't very many.
Q Okay. Do you recall if I mentioned Joe Banks --
A Yes.
Q Black and White?
A Yes.
Q Loft?
A I believe loft, yes.
Q Okay, fine.
A But, you know, I didn't -- I did go back to the list of Washingtonian, and I believe you had found all of them.
Q Right. So it is conceivable then that in a town center you could have some uses that also would like to be in a retail outlet center?
A Well, that's why I said it's a hybrid. The Washingtonian is anchored by big-box stores. They happen to have two stories, but they are serving exactly the, you know, the Target kind of thing and that if you had those kinds of stores in a, quote, town center, unquote --
Q Yes.

A -- and the reason I'm calling it a town center is it does do a good job of having a walkable area and --
Q Right.
A -- smaller stores and so on -- but the reason why those stores are there is it's right on 270 and, most importantly, it has that base of large anchors that are drawing in those kinds of customers.
Q There was a series of questions asked you about the loss of focus from the town center. Do you see that the focus of Clarksburg now will move to the west side of Cabin Branch because of the dynamism of the retail outlet center and the restaurant package and everything else that, amenity package that goes with it?
A No, I don't.
Q Don't. And that's because?
A I believe that if the -- assuming, again, that the town center actually has anything happening -- but if that, if that is done with the necessary supermarket and with the associated restaurants and other interesting retail that I think they have the market potential to attract, if they have that supermarket and other amenities, and so on, that make it a gathering point, and the fact that it is sort of embedded in the, in the overall community rather than sort of at the, you know, an exit on the interstate, I think it definitely has the opportunity to be the focal point that

everyone's wanted for many years. That's, you know, so that I don't, I don't see this as adversely affecting that.
As I said, I think you can certainly have lively, two lively places in an area like Clarksburg and will, and I think this will attract more customers, some of whom -- you know, I can certainly see people who are coming to shop at the outlet who don't want a chain restaurant, they look up in Yelp and they say, wow, there are actually some interesting restaurants in the historic district, it's only a few minutes away, very interesting restaurants in the town center proper, you know, I'm going to eat there instead, and that provides business for those, for the town center and support for that.
Q Thank you.
MR. KLINE: I have no further questions.
MS. ROBESON: All right. Mr. Chen.
MR. CHEN: Thank you.
REBUTTAL CROSS-EXAMINATION
BY MR. CHEN:
Q Sir, on page 46 it does project 300 square feet of commercial use. Is that right?
A 300,000 square feet proposed, yes.
Q How many employees do you think that would have?
A It's going to depend on the mix exactly, but let's see -- and you know, this does range quite a bit -- we've

looked at, we've analyzed amount of square feet per employee in retail and in office many times and it's not always -- 650 perhaps.

Q And --

A That's just an approximation, of course, but --

Q Thank you. And how many employees did you say were going to be in the outlet center and the associated uses?

A Yeah.

Q Was it 1300, you say?

A Sixteen hundred and -- 1659 is what we had calculated based on the in-plan model, and you know, it's possible this, you know, depending on the mix of the 300,000, it might be more, it might be more than I said, but that's, that's what we calculated for the mix of stores that were expected to be in the power, in the outlet center.

Q And under the master plan, sir, how many employees would be generated by the retail uses that are provided for for the Cabin Branch area?

A Let's see. If you could first, that was a hundred and --

Q Twenty.

A Hundred and twenty thousand. Again, it really depends on the mix. Supermarkets tend to have a relatively small number of -- about, perhaps 270, something like that.

Q Okay.

A Again, very much approximations, to say the least, but --

Q Okay. And in your testimony -- and the question, the terminology used by Mr. Harris and then you relative to the grocery store, you used the term market perspective. Do you remember that, sir?

A No, I don't.

Q Okay. I thought that you were expressing your opinion that from a market perspective --

A Oh, okay, that from a market analysis -- from the perspective of the work I typically do every day, yeah.

Q Yes, that your opinion was that the Cabin Branch area should not have or would not be appropriate to have a full-size grocery store.

A Well, it's -- I mean, I think I need to elaborate to answer, rather than yes or no. It's, I, I calculated how much demand there was for a neighborhood shopping -- for supermarkets and other grocery stores in the Clarksburg area. In my view, you could have --

Q Was it two point four?

A It was two point four. From a market analysis perspective, there is support -- you could have a full-size supermarket eventually in Clarksburg, in Cabin Branch, but also from a market analysis perspective, in my view, that

would make it extremely difficult to also have one in the town center because there's not enough demand for both. And from, you know, I'm trying to look at the market analysis issues that are associated with everything that the master plan is calling for, not just what they're saying with respect to Cabin Branch, because they are so closely intertwined, and you know, and I've been involved with various aspects of implementing things in Clarksburg and arguments over implementation of the master plan, and in my view, the creation of a successful town center is very much part of what the master plan's priorities were. And from a market analysis perspective, I'd love to say you could do that and do one in Cabin Branch, but in my view, you can't; so there has to be a choice.

Q When did you do this analysis?

A It was after, it was after Mr. Unterberg was questioned about, I think he said, you know, I think -- I think one of you asked him how did you, you're asserting that there, you couldn't support a supermarket in both, both the town center and at Cabin Branch, and he said that he was relying on my professional opinion. And you asked him, well, that's just an opinion, isn't it; and so I was, I thought it was an accurate judgment that I made originally, but I was a little offended, I guess, and I did some calculations and found that I was right.

Q So you did your market analysis relative to grocery stores in the last two months?

A Yes. It's not, you know -- the calculations, yes.

Q And based upon your market analysis, you have concluded that in the Clarksburg area the population would support two point four grocery stores?

A At the build-out of, at -- once all the houses are built, yes.

Q But the master plan calls for three, isn't that correct?

A That's correct.

Q So am I correct in concluding that in your opinion the master plan's recommendation for three grocery stores is no longer correct?

A Yeah. I think I explained that in some, in some length, but I'm happy to go through it again. The, because of changes in, you know -- and retail changes all the time and it's been changing a lot, and in particular, the appearance of Wegmans, which had not been anticipated, has changed things. And so it's not a huge difference between three and two point four, but the reality is that's enough of a difference. So that, in my view, you cannot have two more supermarkets beyond the one that's already under construction.

Q Would you recommend that the master plan

recommendation therefore be changed?
A I don't think it's necessary. It seems to me that's the kind of thing that -- I mean, if we started changing master plans every time there was some change in market dynamics of this sort, you'd have to be changing them all the time, but that's, you know, again, I'm not an expert in master plans, but that's certainly my opinion, as a master's in planning, city planning, and some other works with that.
Q But given that educational background, you do recognize that the master plan does explicitly provide for a grocery store in the --
MR. HARRIS: Objection.
BY MR. CHEN:
Q -- Cabin Branch community, doesn't it, sir?
MS. ROBESON: Just a second. Basis?
MR. HARRIS: I don't think the master plan says that.
MR. CHEN: Oh, okay. We'll leave it at that then.
MS. ROBESON: Okay. That's not really an objection but that's okay. If you're going to leave it, it's okay.
MR. CHEN: That's fine. That's fine. I appreciate Mr. Harris's candor. That's all I've got.
MR. HARRIS: No further -- no questions.

MS. ROBESON: Oh, that's all you had?
MR. CHEN: Yes, ma'am.
MS. ROBESON: Oh, I had a question based on some questions from Mr. Kline, and I guess that my concern is there's no, nothing in this plan that says neighborhood services are going to be provided to the residents of Cabin Branch. And as I read the plan -- let's set the grocery store aside for a moment -- if you except out, you know, the chain restaurants that you say are overlapping neighborhood services and, and I was rereading the staff report and I read that they considered the neighborhood core that little bit of commercial down in Area C, which I think is practically capped at, for some reason 30,000 square feet comes to mind based on the testimony, so what assurance is there that aside from, you're not having grocery store, aside from chain restaurants, what assurance do we have that these residents are going to be, and future office tenants, are going to be served by neighborhood retail --
THE WITNESS: Well, first of all, there's --
MS. ROBESON: -- because the plan doesn't --
THE WITNESS: Yeah. There's never assurance that anything will be built, first of all. So from my --
MS. ROBESON: But there's no --
THE WITNESS: Is there an --
MS. ROBESON: -- assurance in this plan, because

the way the structure is, all the areas go from zero to a max. Why they go from -- they could just have a max, but anyway, so they only have maxes --
THE WITNESS: Uh-huh.
MS. ROBESON: -- and they don't have a minimum, saying I am going to have X amount of this.
THE WITNESS: Well, yeah, that's, I mean, that's more or less what I was about to say, is that you never, you know -- there's no way to guarantee that anything will happen. The market is going to be a determinant of that. If it's not allowed, you can't do more than a certain amount, but you can't build something that there's not a demand for.
I believe that the plan is a great way to get those neighborhood services in, that these master plan community residents and employees will take advantage of, that you do have a good shot at getting some time -- and, you know, timing on these is difficult to predict on things that are outside of the outlet center -- but sooner or later I do think in, potentially in that 30,000-square-foot area, or whatever, that that could be a good place to get the MOM's or the Harris Teeter, whatever, potentially. I'm not -- you know, where exactly is also difficult to judge this far in advance, but that's a possibility as I would think from a market perspective.

The thing that -- the type of retail that there is really a demand for, as evidenced by all of the interest in getting them developed, is an outlet center.
MS. ROBESON: The regional. Would you consider an outlet center regional retail, in general?
THE WITNESS: Yes.
MS. ROBESON: Because there's not going to be a daycare in the outlet center unless it's to serve the shoppers of the outlet center.
THE WITNESS: Yeah, and I don't know how many daycare centers you're really going to, neighborhood centers, you know, some of that can happen. It's -- and I don't, I don't claim to know the exact plan and how much there is on the edges; you often get all kinds of things near regional centers. But I do think that if we're trying to get this development moving in ways that do provide some walkability, have some services and retail that residents want and need and desire, there's a lot better chance, in fact, almost guaranteed probably that it will happen if we are talking about the types of retail and restaurants that they will have as part of the outlet center or associated with it.
So I do think, you know, as much as I was commenting that there's demand and need for non-chain restaurants, there's no question that chain restaurants are

very desired and lots of people love them and that's why they do well. And so I think having the various types of chain restaurants that you will almost certainly get as part of this outlet center is a huge advantage in terms of providing neighborhood services that you would have real trouble getting if you were saying, okay, we're just going to do a neighborhood center, here is the plan contemplated and --

MS. ROBESON: What about demand, though, for dry cleaners and everything that's going to be up in the town center?

THE WITNESS: I mean, there would be demand. I could, you know, a logical thing associated with a 20,000-square-foot food store like a Harris Teeter or a MOM's would be exactly those types of things, dry cleaners. You're already going to have a bank, which is another major neighborhood thing, which is already, already provided for, but you know, a dry cleaners, potentially a daycare center certainly could go in there, you know, smaller, smaller types of stores that do see enough market surrounding them as houses get built out within Cabin Branch to serve them.

I think trying to do more than they're allowing for, without, without a supermarket, is probably -- you're going to have just vacant land sitting there and you're going to have another town center situation where, yes,

we've promised to do X amount of retail but there's not enough demand for it, and so the neighbors say, you know, you had it in the plan, there's a potential neighborhood center there, where is it; well, we can't get it to happen unless there's demand and, you know, it's not coming yet.

So I think timing is a -- you know, we do a lot of work on so-called master plan communities, on large mixed-use/multiuse developments, and I think Mr. Kline asked me a question about it in my original testimony, an article that I'd written about it. I mean, it's, it is, you know, it's a challenge to get neighborhood-serving retail into a master plan community. It's very difficult to get it if it's not right on the highway because you do often need demand captured from elsewhere, and I think this is a really good opportunity to get things that the residents are going to want, that they can walk to, if they want to, that will provide a lot of those services. And there is this other area that, down the road, could well get the kinds of things we're talking about. I mean, you're not -- these other uses, like dry cleaners, don't take very many thousand square feet; so you can certainly accommodate them.

MS. ROBESON: Okay. Any questions based on my questions? No. I mean, cross-examination, and then you'll get redirect.

MR. HARRIS: Oh, okay.

MS. ROBESON: Any questions, Mr. Chen, Mr. Kline?

REBUTTAL CROSS-EXAMINATION (Resumed)

BY MR. CHEN:

Q You just --

MR. KLINE: Go ahead.

BY MR. CHEN:

Q You just mentioned MOM's and Harris Teeter. What was the context of that, sir?

A The context is that in my calculations there is demand for an additional 20,000, or thereabouts, square footage of food stores over and above two supermarkets -- one at, one will be soon at Clarksburg Village and, in my view, from the speculative master plan, one at the town center -- and then you could still accommodate something like MOM's or Harris Teeter.

Q Is there a Harris Teeter already in the Clarksburg planning area?

A Not that I'm aware of, no.

Q Thank you.

MS. ROBESON: Mr. Kline.

REBUTTAL CROSS-EXAMINATION (Resumed)

BY MR. KLINE:

Q Mr. Bogorad, I'm not sure there was actually a definitive answer to the question, and that is, would you recommend that the plan be annotated to specify a minimum

amount of neighborhood retail in the Cabin Branch area?

A I may not -- you know, I'll be honest. From a market perspective, I don't, I don't believe that would be advisable. I believe that if there's demand for it and it's allowed, there, there will very much be, it will be developed. I mean, all master plan community developers that I work with -- and I work with hundreds -- would love to have some neighborhood retail in their development. It's often, they all, they go out to the market, they do this, they do that, they can't get anybody to go into it, but if they can get it, they'd love it. And so I don't see any reason why, if it's allowed, it would not happen if there's a market. And so putting a minimum or not, in my view, you wouldn't get anything different. You're going to get up to the maximum if there's demand. If there's no demand, you, you're still not going to get the minimum. It doesn't, you're not requiring them to build if they can't get the market for it, get the market for it.

MS. ROBESON: All right.

MR. KLINE: Thank you.

MS. ROBESON: Mr. Harris, redirect.

REBUTTAL REDIRECT EXAMINATION

BY MR. HARRIS:

Q I think a point of clarification here. In your direct testimony you spoke about MOM's and a Trader Joe's,

and then when you were answering questions of the Hearing Examiner, might you have been mistaken when you talked about MOM's and a Harris Teeter at Cabin Branch?

A Oh, I'm sorry. I'm sorry. Yes, definitely not. Harris Teeter is the one that's going in Clarksburg Village. That's a full-size supermarket. If I said that, I certainly meant Trader Joe's, not Harris Teeter. Thank you.

MR. HARRIS: That's all I have.

MS. ROBESON: Any recross solely based on that? All right. Thank you, Mr. Bogorad. You may be excused.

THE WITNESS: Thank you. Thanks very much.

MS. ROBESON: And the next up is Mr. Unterberg?

MR. HARRIS: Mr. Unterberg, back again.

MS. ROBESON: Mr. Unterberg, you're still under oath.

MR. UNTERBERG: Can we take a quick break?

MR. HARRIS: Oh.

MS. ROBESON: Yes. We can take 10 minutes. We'll be back at 2:30.

MR. UNTERBERG: Thank you. I'll be right, I'll be right back.

(Whereupon, at 2:20 p.m., a brief recess was taken.)

MS. ROBESON: All right. We are back on the record with Mr. Unterberg. Mr. Unterberg, you're still

under oath.

MR. UNTERBERG: I understand.

(Witness previously sworn.)

REBUTTAL DIRECT EXAMINATION

BY MR. HARRIS:

Q Okay. All right. Mr. Unterberg, there's been a lot of discussion about the town center and what it consists of. Can you briefly describe the components of the town center so it's clear on the record here, as you see the components?

A Yes, I can. The town center district that's in the master plan, it's primarily three components. The first is the town center mixed-use project itself, which is also, it's been called the neighborhood center. This was also known as the Terrabrook and then the Newlands development. This is what's primarily east of Route 355, Maryland Route 355, north of Stringtown Road. It's primarily housing and it has a neighborhood retail center. It's currently owned by Elm Street Development, and I believe it has the ownership entity of Third Try, LLC. The second component is the historic district, which is primarily along Route 355, and that's intended to remain, remain intact. The third component, which is primarily west of Route 355, is the Miles-Coppola properties, and also north of that is the Egan properties.

These are in the district, but they're also within Stage IV of the master plan, which has not opened for development yet, and there's the ongoing question right now when to open Stage IV, and the Planning Board is evaluating that right now and that may be sited sometime next year.

Q Can you describe your interpretation of the master plan with respect to the overall development envelope for the -- for the overall town center district and the respective components of it about which you just discussed?

MR. CHEN: Objection. The document speaks for itself.

MS. ROBESON: Well, he asked for the overall development envelope. I'm going to let him answer that. I don't see that in the master plan.

THE WITNESS: Well, and let me just summarize what my understanding of the three components are, and there's -- just prior to this discussion about the numbers, particularly with the employment and retail. On page 40 it talks about the town center district as a whole is 770,000 square feet, and I believe that's broken down into roughly 300,000 square feet east of Route 355, which would be the --

MS. ROBESON: Wait. Wait. Can you just get me to that -- oh, I've got it. On page 40.

THE WITNESS: Page 40 --

MS. ROBESON: Okay.

THE WITNESS: -- and there's the summary table, and it's the one right at the top. It says --

MS. ROBESON: Oh, I see.

THE WITNESS: -- town center district.

MS. ROBESON: Okay. I've got it.

THE WITNESS: And then if you go over to the right-hand side, the employment/retail square-foot grand total is there, the 770,000. And I believe how that breaks down is there's discussions about the 300,000, which is east of, primarily east of Route 355, and then there's another 470,000 that's west of 355, which is the Miles-Coppola property. Again, with the Newland or the Third Try, the neighborhood center, that has a maximum of 150,000 square feet of retail, and there's been a couple different plans. I think the current plan has a range of 150,000 to 170,000 of which 150,000 is retail. That leaves, of that 300 that's in the master plan, that leaves anywhere, if you say the retail neighborhood center is 150,000, that leaves another 150,000. If that's in the neighborhood center, that would have to be office because there's a maximum of retail that's noted, and -- but there's also, that overlaps with what could be developed in the historic district.

I think with the Miles-Coppola property, the, that's where the 470,000 square feet comes from. That's currently zoned R-200, but it's recommended to be rezoned

MXPD, and in that case, of the 470,000 square feet, if it were rezoned MXPD, 20 percent of that could be retail or 94,000 square feet.

BY MR. HARRIS:

Q Based on your interpretation of the numbers, do you have an opinion about the ability of the town center district overall under the master plan to provide specialty comparison or outlet retail that would compete with what is proposed at Cabin Branch?

MR. CHEN: Objection.

MR. KLINE: Objection.

MS. ROBESON: And the basis?

MR. CHEN: This is way beyond his expertise. He's a land planner. I thought Mr. Bogorad was just here.

MS. ROBESON: Mr. Bogorad is a market analysis. Do you have, are you testifying based on your experience as a land planner as to square footages? Is that what you're testifying to?

THE WITNESS: That's what I was going to testify to, is the square footage --

MS. ROBESON: Okay. I'll let him do that.

THE WITNESS: -- and the general, what's, what --

MS. ROBESON: But don't go into market analysis.

THE WITNESS: Okay.

MS. ROBESON: All right.

THE WITNESS: Generally, from my experience, the outlet centers are looking for 350,000 square feet of retail or more.

MR. CHEN: Object. Just for the record, I object. This is way beyond his expertise, but I understand and I just want to note it clear in the record.

MS. ROBESON: Okay.

THE WITNESS: And so with that, if you look at the --

MS. ROBESON: Have you participated in outlet center developments or -- wait. What did you say? What's looking for 350K, thousand?

THE WITNESS: The -- generally, an outlet center wants to have a critical mass of 350,000 square feet or more.

MS. ROBESON: What's your basis for that?

THE WITNESS: The primary basis is based on Simon Companies and what they're looking for, and they've been looking at different sites. And also, I've seen what the Tanger companies have been looking for, and actually, both of their proposals are in the range of 450,000 square feet.

MR. CHEN: If that's the --

MS. ROBESON: I'm going to let it in and give it the weight, and I'll note your objection.

MR. CHEN: Thank you.

MS. ROBESON: All right. Go ahead, Mr. Unterberg.

THE WITNESS: So if we look at the district as a whole and the three components, something that size, of 300,000 or 350,000 or larger, would not go in the historic district because that's going to remain as is. The Newland or the Third Try neighborhood center, that is to be neighborhood retail and it's also a maximum of 150,000 square feet. And then if you go over to the Miles-Coppola property, with the recommendation, it has a maximum density of 470,000 square feet under the MXPD, but only 20 percent or 94,000 square feet of that could be retail. So none of those three components can meet that requirement, and so for, doesn't -- it would not work to have a center that large in either of those three components of the town center district.

BY MR. HARRIS:

Q Do you believe the relationship of the town center to the rest of the development master plan in the Clarksburg area in any way precludes outlet retail development at Cabin Branch?

A I do not.

MR. CHEN: Objection. Object, same reason as before.

MS. ROBESON: I was going to ask you, I didn't get all of the question. I apologize. Can you --

MR. HARRIS: Okay.

BY MR. HARRIS:

Q Do you believe the relationship of the town center to Clarksburg as a whole precludes outlet retail development at Cabin Branch?

MR. CHEN: Objection.

MS. ROBESON: Well, I'm going to let him answer because I think there is a land use issue here, but I'm still not sure I understand, but I'm going to let him answer.

MR. HARRIS: I would add, Mr. Noonan, a planner, essentially testified to the opposite, which was the reason for this question.

MS. ROBESON: Mr. Noonan said that would become the town center --

MR. CHEN: That's right.

MS. ROBESON: -- because of its mass and its, the number of area, more area-wide activities. So are you asking him will this preclude the town center from becoming a regional focus? Is that what you're trying to get at?

MR. HARRIS: How about if I ask him to comment on Mr. Noonan's testimony that you just summarized?

MS. ROBESON: Comment on Mr. Noonan's testimony.

THE WITNESS: I disagree with Mr. Noonan's testimony that the focus would be redrawn and moved to the

west side of 270 on Cabin Branch due to the fact of there being more retail there.
BY MR. HARRIS:
Q Can you explain that?
MS. ROBESON: Well, I don't think he was just saying retail. I think he was saying general level --
THE WITNESS: Uh-huh.
MS. ROBESON: -- of amenities as well. So if you're going to explain that, that would be good.
THE WITNESS: Well, if we go back to page 40 in the chart --
MS. ROBESON: Yes.
THE WITNESS: -- there's actually three areas that are recommended for MXPD. One is the town center and that's the Miles-Coppola property, which is -- the district itself is --
MS. ROBESON: The western portion of the town center, west of 355.
THE WITNESS: West of 355, correct, and the town center district as a whole is noted as 770,000 square feet, and the west of 355 is noted as 470,000 square feet. If you look at, there's two other areas -- and the Miles-Coppola, which is west of 355, is recommended for MXPD -- if you look at Cabin Branch, which is also on this chart, it's recommended for a grand total of 2,420,000 square feet,

which is three times the 770 of the district, the town center district as a whole. So by the master plan itself, master, Cabin Branch is larger. Also, there's a third property which is also recommended be MXPD which is the transit corridor district, which is east of 270 and where the COMSAT property is, and that's recommended for the grand total of up to five million square feet.
So there's three MXPD areas in the master --
MS. ROBESON: Is that developed?
THE WITNESS: There is the existing COMSAT building, which I believe is vacant right now, and the rest of the property is not developed, but per the master plan and the transit station that would go on that property, it's recommended up to five million square feet.
So of the three, if you take just the districts alone, the town center district, both with the Newland or the town center plus the MXPD portion of 770, that's actually the smallest number or square footage, where Cabin Branch is three times that at two point four million and then double that, double Cabin Branch, COMSAT up to five million, were envisioned in the master plan. So there's, if you -- on size alone, the COMSAT property is the largest for the Clarksburg Master Plan.
BY MR. HARRIS:
Q So do those numbers indicate to you a relative

role of the town center district to the other MXPD areas?
MR. CHEN: Objection. The master plan speaks for itself. It explains the relationship of these different components among each other in the planning area.
MS. ROBESON: I'm going to let him answer and take it for the weight it deserves.
THE WITNESS: Well, I think it does and indicates the town, town center district, which is 770, and then you go to a smaller size, which is then the Newland or the Third Try neighborhood center. It's small in scale compared to the other neighborhoods within the master plan, and it has the appropriate size for that type of development recommended.
BY MR. HARRIS:
Q So would you characterize that in any way compared to a small town?
A It --
MR. CHEN: Objection.
MS. ROBESON: Well, he can -- basis? He can answer that as a land planner.
MR. CHEN: Well, if he has a basis. I mean, I have not heard any analysis that has been undertaken. What is a small town? What --
MS. ROBESON: Well, I --
MR. CHEN: -- is the median size of a small town?

What is the average size of it?
MS. ROBESON: Well, maybe he'll, maybe he will answer that question, and I note that the master plan uses the phrase town scale of development. So --
BY MR. HARRIS:
Q That's really the question. What does that --
MR. CHEN: It's not trying to replicate a small town.
MS. ROBESON: Well, I'm going to let him answer. Go ahead.
BY MR. HARRIS:
Q What does the town scale --
A What was the question?
Q Let me rephrase. What does the town scale of development recommendation for the town center district mean to you?
A Well, and the master plan generally outlines the --
MS. ROBESON: As an expert, what is town scale development?
THE WITNESS: It talks about the scale of buildings. It talks about the -- particularly in the master plan, it talks about a main street. It includes neighborhood services, retail services, post office, other services, public services, firehouse, post office, library,

community center; also, particularly for Clarksburg, it talks about a transit stop. And those, within context of those neighborhood services, that, as far as a town scale, is -- that defines it and how it comes together.

BY MR. HARRIS:

Q And do you have an opinion as to the propriety of an outlet center within that context as compared to an outlet center at the Cabin Branch property?

MR. CHEN: Objection. The outlet center, the proprietariness of a -- I'm not sure I even understand the question, but, or where he's trying to get to, but --

MS. ROBESON: What I -- okay.

MR. HARRIS: I can rephrase it.

MS. ROBESON: Do so.

BY MR. HARRIS:

Q From a master plan objective standpoint, do you believe a town center district or the Cabin Branch property is a more suitable location for outlet retail?

MR. KLINE: Objection, and the objection is, and the objection is, is because we're talking about the Cabin Branch application. We're not doing a comparative --

MS. ROBESON: No. You are doing the -- there are comparisons going all over the place. What I am, what I want to hear from him, and I think where Mr. Harris is going, is what type of regional center was envisioned for

the town center as opposed to the neighborhoods.

MR. KLINE: Well, yes --

MR. CHEN: I was going to say, that's the question. Have him respond to that question.

MR. KLINE: But using the phrase regional center in the context of town center, I mean, the master plan does not use the phrase regional center --

MR. CHEN: That's right.

MR. KLINE: -- so I'm not sure why we would be looking at that. If you said what is the quality or the character the town center is supposed to be, that, I think, is --

MS. ROBESON: Can I pass my questions through you and then, or we could just trade places.

MR. CHEN: Certainly, Madam Examiner, you --

MS. ROBESON: No, I know what you're saying. I just want to get to the chase because I think it's a valid, what he's -- can you describe the nature from a land use perspective of the town center as opposed to the other MXPD-zoned locations in the master plan? Describe the characteristics.

THE WITNESS: The -- well, I think there's a number in the master plan, but for the town center district, which is the, which includes the Newland or the Third Try neighborhood center, that actually is not -- that's an RMX

zone; so it's not MXPD. It --

MS. ROBESON: Well, what's your point about the scale of the town center? What is the, how is the town center supposed to function under the master plan? What's it -- and I mean the town center district --

THE WITNESS: Uh-huh.

MS. ROBESON: -- what's it supposed to do?

THE WITNESS: Well, again, if you break down the components, you have the neighborhood center itself --

MS. ROBESON: Yes.

THE WITNESS: -- which is the Third Try. That has a maximum of 150,000 square feet of retail and that's for neighborhood, and that has --

MS. ROBESON: So one part of it is a neighborhood retail, serving what?

THE WITNESS: Serving the residents of that district, and there's --

MS. ROBESON: Okay. Go ahead. Keep going.

THE WITNESS: -- up to 2,600 and that's -- it also has an employment component, which is the west side, the majority of the employment component, which is the west side of 355, which is recommended to be rezoned MXPD and has the 470,000-square-foot limit. Of that, if it was to be rezoned MXPD, of that, 20 percent or 94,000 square feet could be retail, okay? Both, or neither of those under the master

plan scenario could accomplish an outlet center at 350,000 or larger.

MS. ROBESON: Now, what about the third component? The third component is the historic district.

THE WITNESS: The historic district and that, for lack of a better term, that's supposed to stay as is. There's some development opportunities, but respecting the historic character of that and maintaining the historic structures, that may have some additions to it but it's primarily to remain as it is. So that, again, that could not accommodate an outlet center.

MS. ROBESON: Now, how does that function compare with the satellite, the more satellite MXPD under the master plan? What are you saying?

THE WITNESS: Well, when you go -- if you go to Cabin Branch, which is recommended for the 2,420,000 MXPD, which is actually zoned MXPD, and this whole discussion, where 20 percent is the 484,000 square feet, the outlet center can be accommodated, and we've shown that on the --

MS. ROBESON: And why doesn't this outlet center make this more of a focal point from the area than the town center should be?

THE WITNESS: I think you're looking at -- the town center actually is a neighborhood center that serves that neighborhood, whereas Cabin Branch, it's going to be a

hybrid that serves the neighborhood of Cabin Branch; plus it's also a regional shopping or retail opportunity.
MS. ROBESON: Well, okay, I'm going to let Mr. Harris continue on his questions. I guess my question is somewhere in here -- and I'm looking for it -- it says the town center. Maybe it's Policy 10. No.
THE WITNESS: Policy 6.
MR. KLINE: What page number?
MR. HARRIS: Two six.
MS. ROBESON: Yes. What -- somewhere it says that it's the center of community life.
MR. HARRIS: Page 26.
MS. ROBESON: Yes. So are you saying -- so explain what, as you see it --
THE WITNESS: Uh-huh.
MS. ROBESON: -- explain what that means.
THE WITNESS: Well, part of it says Clarksburg is one of the county's oldest and most significant early communities. It's designated as a historic district on the master plan for historic preservation for many reasons, one of which is that it remains a large degree of the early 19th/20th century character. The plan continues the historic function of Clarksburg as a center of community. It will be part of an expanded town center which will include a variety of uses -- a school, civic, retail, and a

mix of housing types -- assuring compatibility of future development with the historic district, which the historic district has been a guiding principle of the planning process.
To me, that says the town center, with the historic center or the historic district, serves that neighborhood. It is recognized that it's, for Clarksburg as a whole, it's a historic resource, but as far as the scale and then when you look at the numbers -- and the numbers, again, when you look at the district number with residential/retail/employment, it's not the largest and Cabin Branch is larger; the transit or the COMSAT is even larger. So it does focus on it being a town center, but in my opinion, it's really a neighborhood center that also complements the historic district.
BY MR. HARRIS:
Q The bullets that are on page 26, does any of those bullets suggest to you the propriety of an outlet center within the town center?
MR. CHEN: Objection. The document speaks for itself.
MS. ROBESON: I'm going to let him answer, but I'll note your objection.
THE WITNESS: Well, actually, reading through them, it does not because it's a smaller scale for the town

center, talks about a main street and so forth.
BY MR. HARRIS:
Q Would it be your opinion that those objectives are inconsistent with an outlet center?
MR. CHEN: Objection.
MS. ROBESON: You can answer. To your objection, I think both sides have parsed through what different sections of the master plan mean and have had the witnesses look at different sections. So I'm going to let it do it. In the end, it's my legal opinion that the best way to do it is to parse through the language of the plan itself, but I'm going to let his testimony in. So you can note an objection.
MR. CHEN: Very respectfully, I don't think my witnesses have engaged in that parsing. I appreciate what you're saying and I think that's an accurate statement. I don't think my expert did that, but --
MS. ROBESON: Okay.
MR. CHEN: -- I abide, certainly abide by your ruling.
MS. ROBESON: All right.
BY MR. HARRIS:
Q Do you remember the question, Mr. Unterberg?
A Why don't you ask it again.
Q Do you believe the bullet points on page 26 are

inconsistent, the vision painted by those bullet points is inconsistent with a major, with an outlet center?
MR. CHEN: Objection.
MS. ROBESON: You can answer.
THE WITNESS: The -- some of these aren't inconsistent with an outlet center, and outlet centers vary, to some degree. Whether or not, like, a library and post office would be an outlet center, that may or may not happen, probably not with a library. The -- Cabin Branch is, facilitates pedestrians and movements, which both projects do. So there are components here that are more -- well, some would apply and some would not apply.
BY MR. HARRIS:
Q Do you believe the Clarksburg Master Plan allows retail development only where it is specifically recommended in the master plan?
MR. CHEN: Objection. Again, the document speaks for itself.
MS. ROBESON: It's noted. You can continue. You can answer.
THE WITNESS: Could you ask your question again? I got lost for a second, sorry.
BY MR. HARRIS:
Q Do you believe the Clarksburg Master Plan allows retail development only where it is specifically recommended

in the master plan?
MR. CHEN: Objection.
THE WITNESS: No, I don't, and the, like most master plan, the Clarksburg plan is specific in some respects but leaves many issues open, and it also is not specific for the amount of retail with a regional draw.
MR. KLINE: Ms. Robeson, can I raise a question, I guess a procedural question?
MS. ROBESON: Sure.
MR. KLINE: If you noticed, that was an answer that was read. That was not, that was not an extemporaneous answer. I'd like to raise a question about whether or not there's been script to this entire presentation and --
MS. ROBESON: Well, you can do that on cross-examination.
MR. KLINE: Okay. All right.
BY MR. HARRIS:
Q What retail recommendations does the master plan make?
A There's three, we talked about the three neighborhood centers. One is the Newcut or the Clarksburg Village, which is 109,000 square feet; the town center, which is also the Newland or the Third Try, which is, maximum, 150,000 square feet; and then Cabin Branch, which is the recommendation for 120,000 for the neighborhood

retail.
Q Are those recommendations for neighborhood retail only?
A Yes, they are.
Q And were -- no, strike that.
Did the master plan recognize the potential for comparison retail in addition to outlet retail, I mean, in addition to neighborhood retail?
A The master plan itself, it doesn't, but the technical appendix did, and we've discussed page 12, which talks about comparison retail or regional retail.
Q Do you believe there was a reason that the master plan made recommendations for neighborhood retail, maximum amounts of neighborhood retail within the three areas you've discussed, and if so, why do you think it did?
MR. CHEN: Objection.
MR. KLINE: Objection. This is rebuttal. I'm not sure what was in our presentation that requires the, that question or the response to that question.
MR. CHEN: And he's talking about what they intended, again, by the master plan.
MS. ROBESON: Well, everybody's talking about that. As far as your objection, I think you were saying -- I thought you were asking questions on they wanted to, or maybe it was Mr. Noonan that was saying they wanted to

ensure neighborhood retail. So I'm going to let him answer.
BY MR. HARRIS:
Q So I've forgotten my exact question, but --
MR. KLINE: Want me to read it for you?
MR. CHEN: Good. Good.
MR. ROBINS: Once again.
MR. HARRIS: Once again.
BY MR. HARRIS:
Q With respect to the three areas that you mentioned where neighborhood retail was recommended, do you have an opinion as to why it recommended those maximum amounts in those areas?
MR. CHEN: Objection, but go ahead.
THE WITNESS: Yes, I --
MS. ROBESON: You can answer.
THE WITNESS: Yes, I do. For, well, specifically, if the -- depends on the zone, and the town center, the Newland neighborhood district, is RMX and that requires a specific recommendation. The Newcut, which is Clarksburg Village, is a PD zone and that also requires a specific recommendation in the master plan.
Also, as I've testified with Cabin Branch, if it were to move forward or had moved forward under RMX, it would need a specific recommendation for the, for RMX to do retail.

BY MR. HARRIS:
Q Had the master plan not made those recommendations for neighborhood retail, would it have been possible to put neighborhood retail into those three zoned areas?
A For RMX and PD it's a requirement of the zone that there's a specific recommendation.
MS. ROBESON: Okay. We have been through this in his direct. So I'm not sure what he is rebutting as far as Mr. Noonan.
MR. HARRIS: All right. I can move on.
MS. ROBESON: Or Mr. Ferguson, sorry.
MR. HARRIS: Yes. Okay.
BY MR. HARRIS:
Q Did you hear testimony from Mr. Noonan about his belief that comparison retail at Cabin Branch would somehow hurt the retail services at the town center, and do you have your own opinion on that?
A I did hear that from Mr. Noonan, and I disagree with it, that it will not hurt the town center, the Newland/Third Try neighborhood center.
Q And are you aware of any communications that the Peterson Companies have made relating to the relationship of outlet retail and its impact on town center retail?
A I do, and also, there's a, there's a letter that was submitted by Elm Street Development.

MS. ROBESON: Is this new?
THE WITNESS: This is an August 20th, 2013, letter.
MS. ROBESON: Is this the same one we already have?
MR. HARRIS: It is a different letter.
MS. ROBESON: It's a different letter. Okay.
THE WITNESS: It's different but very similar.
MS. ROBESON: Well, wait. Let me mark it. It's Exhibit 128, letter from -- 8/20/2013 letter from David Flanagan.
(Exhibit No. 128 was marked for identification.)
BY MR. HARRIS:
Q And, Mr. Unterberg, to whom is that letter written?
A This is written to the Planning Board, and --
Q And what is the regarding line indicate that that's, concerns?
A It's regarding the Clarksburg Limited Master Plan for the Ten Mile Creek watershed.
Q And do you know whether that letter was submitted in conjunction with the Peterson Companies' efforts in connection with the Ten Mile Creek Master Plan?
A I believe it was.

Q And what does it say about the impact of outlet retail in Clarksburg on the town center?
MR. CHEN: Objection on a couple grounds. First of all, this is not even a master plan where he's being asked his professional opinion as to something in a planning document. I object to this document being before the District Council. It is a self-serving document.
Certainly, to -- if you're going to accept it, I don't think it should be accepted in the record, and certainly, this witness should not be allowed to sit here and read the document into the record and express an opinion about the document, which has been from one developer to the Planning Board in objection apparently to another development. This is very improper evidence.
MS. ROBESON: Well, I will -- was this before the Planning Board hearing on this case?
MR. CHEN: No.
MR. HARRIS: Yes.
MS. ROBESON: Just a second.
MR. HARRIS: Oh, not on this case.
MS. ROBESON: Oh, this is for the Ten Mile Creek watershed. Well, I am not going to let this one in, and --
MR. HARRIS: All right.
MS. ROBESON: -- the reason is, you know, he can't testify to what David Flanagan meant. David Flanagan is --

MR. HARRIS: I wouldn't ask him that.
MS. ROBESON: -- not here to be cross-examined. So in this case, I am going to exclude this. So I'm not going to permit this in the record.
MR. HARRIS: May I make an offer of proof then?
MS. ROBESON: Yes.
MR. HARRIS: If we were allowed to submit this to the record, Mr. Unterberg would have testified that this letter was submitted by the Peterson Companies to the Planning Board to justify support for an outlet center on the Miles-Coppola property and that in this letter Mr. Flanagan specifically states that outlet retail will not have an adverse impact on the town center. By doing so, it seems to me that the Peterson Company, by using this letter to their advantage, is acknowledging that outlet retail will not have --
MS. ROBESON: So you're introducing it as impeachment --
MR. HARRIS: Correct.
MS. ROBESON: -- of a witness that's not here?
MR. HARRIS: An impeachment of Mr. Noonan and, to some extent, Mr. Ferguson, who effectively testified to their belief that outlet retail at Cabin Branch would harm the town center.
MR. CHEN: May I be heard?

MS. ROBESON: Yes.
MR. CHEN: Okay, a couple. First of all, this witness is not qualified to bring this document in. That's number one. Number two, this document has -- Mr. Harris cannot testify and say how this document was used, okay? There's a way, possibly, that this document could come before the District Council in this proceeding. It certainly cannot be brought in to impeach the testimony, at least of my expert witness. If it is an attempt to impeach a position taken by a party before the District Council in this proceeding, he hasn't done it the right way, and it has to be done a certain way, a correct way. He hasn't done it and thus far this document is not yet permissibly in evidence.
MS. ROBESON: Well, he could go get a true test copy, but you can't testify what it stands for. So if I can take -- if you want to get a true test copy, I can get it in here as an official record, or a certified. It would be a certified, not a true test. It would be a certified copy. I can get it in here as an official record, but he, Mr. Unterberg can't testify as to its contents because somebody has to be here for Mr. Chen and Mr. Kline to cross-examine and he would not be the person.
MR. HARRIS: He was not going to testify as to what it meant. He was just going to testify as to what it

says.
MS. ROBESON: Well, your proffer was, your proffer was to impeach the Peterson Company, and you can get it in the record, but you can't say this is what it was intended to do.
MR. HARRIS: Okay. So your ruling is, because this is not a certified copy, it can't be admitted?
MS. ROBESON: I'm saying that it's not proper for him, for Mr. Unterberg. I'm going through and thinking of the exceptions to the foundation rules, the evidence rules, all right? He can't bring it in because he didn't write it, and then there's the due process rule, that he's not there, that Mr. Flanagan isn't here to be cross-examined on what it says and what it doesn't say.
The only exception that I can think off, off the moment from Chapter 5 in the Maryland Rules is you could get it in maybe as an official document but that still means that he can't, you can't make an assertion about it; it has to speak for itself.
MR. HARRIS: Okay. Then I accept that ruling. By that notion, Exhibit No. 94 should be stricken from the record because that was a memo that Mr. -- that no one testified to, no one. Mr. Unterberg, they attempted to cross-examine Mr. Unterberg about it. He said he didn't know what it was. So we have no proof that it's a certified

copy, and we have no foundation for it.
MS. ROBESON: Well, that, there wouldn't be a certified copy.
MR. HARRIS: Why not?
MS. ROBESON: Because it's not a public record.
MR. HARRIS: That's where they purported to get it.
MR. CHEN: As I recollect, this is a document issued by Mr. Harris himself. There's a big difference.
MR. HARRIS: I never admitted that.
MR. CHEN: Well, it --
MS. ROBESON: Wait.
MR. CHEN: -- bore your name and signature. Let's get the document out.
MR. HARRIS: Do you want to call me as a witness? You can call me as a witness and be bound by whatever I say.
MR. CHEN: I can call you as a, call you as a witness, say is this your letter, yes, bam, that's it.
MR. HARRIS: There's still no foundation.
MR. CHEN: That is a foundation.
MS. ROBESON: Well, no, we're not calling Mr. Harris as a witness because he can't testify in his own case, all right?
MR. HARRIS: I had voiced an objection previously to Exhibit 94 --

MS. ROBESON: Yes, and I don't have the record. I, I remember the objection, and I -- I don't know what day this was.
MR. HARRIS: That was September 6.
MS. ROBESON: Well, let's find it then.
MR. HARRIS: It's a document that --
MS. ROBESON: Yes, I know what the document is. I remember it.
MR. HARRIS: Okay. But, I mean, there has been no foundation for it, and per your -- I agree with your assessment of the rules of procedure. I accept it with respect to what would have been Exhibit 128, but to the extent that is the rule, that rule applies equally to Exhibit 94.
MR. CHEN: And if he's going to be allowed to go back into my case --
MS. ROBESON: Well, that's why I, that's why -- let me see what we said because I wasn't 100 percent sure it was admitted.
MR. HARRIS: My recollection was that it was offered, I reserved judgment on it because I had not read it at that time, we proceeded with the case; subsequently, I renewed --
MS. ROBESON: Okay. Just --
MR. HARRIS: -- or voiced my objection.

MS. ROBESON: -- just let me read for a minute.
MR. HARRIS: Okay, sure.
MS. ROBESON: If we want to go off the record for five minutes, we can.
MR. CHEN: If we're going to talk about evidence and going back into my case, I want to stay on the record.
MS. ROBESON: Well, I'm just reading for --
MR. CHEN: Oh, okay.
MS. ROBESON: That's why I went off the record. If you want to sit here while I read, that's fine.
MR. KLINE: So she can --
MR. CHEN: We can take a break for five minutes.
MR. KLINE: -- stretch her fingers.
MS. ROBESON: Yes.
MR. CHEN: Take a break for five minutes.
(Whereupon, at 3:12 p.m., a brief recess was taken.)
MS. ROBESON: Okay. We're back on the record. I did look at the transcript from the 6th, and I used both the table in the front where the exhibit was introduced on page 4 of the transcript and then the index in the back, and I don't see an objection for Mr. Harris about admission of that exhibit. So the cat is out of bag on that one.
MR. HARRIS: Well, let me, may I clarify? What I see in the transcript is they offered it, I said wait a

minute, I haven't read that yet --
MS. ROBESON: Well --
MR. HARRIS: -- okay? That's at page, page 20 of the transcript. On page --
MS. ROBESON: You said that. Which line?
MR. HARRIS: Line 24 and 25.
MR. CHEN: He still had to do it before we closed my case.
MR. HARRIS: I did. I later objected to it.
MS. ROBESON: Where is that?
MR. HARRIS: No place in here does it say that exhibit has been admitted. I can't find that right now.
MS. ROBESON: Well, we don't do that until the end. What I don't have is an objection. You say I want to read through it and can I make you a copy of that, but I don't see an objection. And it comes up again on page 136, and I see no objection there. So that is in the record.
Now, I do have an objection here, and Mr. Flanagan is not here to be cross-examined. Definitely, Mr. Unterberg cannot answer questions on it. So my only suggestion would be to put it in as an official document, which -- I was just looking through the rules -- it's my recollection that that calls for certification, which is just something they write on the document that says it's a true copy. But even then, you know, there's a question of whether there's someone here

to be cross-examined on this letter for the proposition -- if you want to say it stands for this proposition and I have an objection, somebody has to be here for cross-examination as to what is meant by this letter.
MR. HARRIS: That's fine. I accept that ruling. We won't press that issue anymore, but to clarify, no one testified as to Exhibit 94. There was no one who could be cross-examined in terms of the authenticity of that document or what it said. So --
MS. ROBESON: I understand that, but we let, we let written documents in -- it's an administrative proceeding, as you know -- we let written letters in from the state, from a lot of parties at different times. I don't, I did not see any evidence as to why it was posited except to say there's one statement from Mr. Chen somehow, for some reason, to show that it was a consistent expression of the applicant -- this is 94 I'm talking about -- that it's a consistent expression from the applicant that retail was never allowed.
Now, that was a statement from Mr. Kline; so it's not testimony. And other than that, I have no testimony on it, but I don't have an objection to it, all right, at least I don't see any in what I reviewed. So without Mr. Flanagan here, I am not going to -- I have an objection on this. I am not going to let this in, all right?

MR. HARRIS: Fine. Let's move on. I still make my offer of proof, though.
MS. ROBESON: I understand.
BY MR. HARRIS:
Q Let's try to move along, Mr. Unterberg. Were you here for Mr. Ferguson's testimony?
A I was.
Q And did you hear him talk about his background and experience and how much of -- and to the extent you did, what is your assessment of his experience in terms of the Montgomery County Zoning Ordinance and the Clarksburg Master Plan?
A I heard Mr. Ferguson's testimony, and it, you know, I'm not disputing his credentials, but it seems like his experience is primarily in Prince George's County and not Montgomery County and that how much understanding he has or experience with Montgomery County and master plans or development plans was not evident.
Q Did he reflect any experience with development plan cases in Montgomery County and how they deal with the issue of master plan consistency?
A I don't know if he dealt with specific cases, but he did talk to the development plan in 59-D-1.6 in master plan consistency, which is, talked about substantial compliance, and I think most, or his interpretation was that

it was absolute compliance which I, excuse me, disagree with.
Q You disagree with that conclusion. And on what basis do you disagree with that conclusion?
A Particularly with development plans I've been involved with, there has been substantial compliance, whether it's the Planning Board, the Hearing Examiner, or the Council. They have interpreted that appropriately, and it is not an absolute or locked in stone with compliance of the master plan.
Q Is this property within a priority funding area in Maryland?
A I believe it is.
Q And do you know whether the Maryland Code provides any flexibility with respect to requirements for substantial conformity with master plans for properties that are in a priority funding area?
A I believe it's twofold or particularly with priority funding areas, Section 1-101, that if you're in a priority funding area, it requires substantial conformity, similar to the master plan. If you're not in a priority funding area, there's a stricter standard.
Q In a priority funding area, does it require substantial conformity with the use and density or is it with respect to other aspects of the master plan, if you

know?
A Well, I believe it's all aspects of the master plan with substantial conformity.
MS. ROBESON: What was the citation on that, State Finance and Procurement, because I looked for that the other day and I couldn't find it.
MR. HARRIS: There are two provisions, Madam Examiner. There is Section 1-101 of the Land Use Article and Section 1-304 of the Land Use Article. 1-304 of the Land Use Article specifically refers you to the definition of priority funding areas that's in the other code.
MS. ROBESON: Okay.
MR. HARRIS: Okay.
BY MR. HARRIS:
Q Did Mr. Ferguson's discussion of the Washingtonian project and the master plan recommendations for that reflect to you a misunderstanding of the master plan there?
A I believe there was a misunderstanding because I believe he testified to the 1990 amended, amendment to the Shady Grove Master Plan when he was speaking to Washingtonian. Actually, the development plan for Washingtonian was approved in 1985, which the 1985 Gaithersburg Vicinity Plan would apply that development plan, not the later 1990 amendment.
Q And did the 1985 master plan make any

recommendation that would allow retail as part of the MXPD there?
A Well, and I've already testified to this, but the '85 master plan talked about corporate employment uses, but the Council approved the development plan with 20 percent retail per the MXPD zone.
Q Turning towards the County Council's approval of the original development plan and the rezoning in Cabin Branch, do you recall whether the Council made any finding with respect to the permitted amount of retail at Cabin Branch, and if so, what was their conclusion?
MR. CHEN: Objection. The Council resolution is in evidence. Its findings are in the resolution. The Examiner, yourself, has --
MS. ROBESON: Actually, which resolution are you referring to? The Planning Board or the Council --
MR. HARRIS: The Council's resolution.
MS. ROBESON: For what?
MR. HARRIS: For G-806, which is an attachment to the staff report, which maybe I can find it here.
MS. ROBESON: Oh, okay. All right, yes.
MR. HARRIS: Okay. The staff report in this case.
MR. CHEN: Is it 5?
MR. HARRIS: Pardon?
MR. CHEN: Is it 5? What's the resolution number?

MR. HARRIS: Oh, part of the staff report, Mr. Chen.
MS. ROBESON: Well, it has to be filed with this development plan. So --
THE WITNESS: It was, yeah, it was also filed.
MR. CHEN: It's an -- yes.
MR. HARRIS: It -- yes.
MS. ROBESON: -- it would be in the earlier --
MR. HARRIS: It shows up in a few places.
MS. ROBESON: 5.
MR. CHEN: Look at Exhibit 5.
MR. HARRIS: That would be it, yes, correct. Thank you, Mr. Chen.
MR. CHEN: I'm glad you found it.
MR. HARRIS: That's one of the places. So --
MR. CHEN: Objection for the --
MS. ROBESON: And your objection is what?
MR. CHEN: The document speaks for itself. It contains findings you've even --
MS. ROBESON: What are you intending to show with this document?
MR. CHEN: No, he's not asking for the document. He's asking the witness to --
MS. ROBESON: No, I know. What do you want the witness to testify to?

MR. HARRIS: That at that time the Council acknowledged that under that development plan approval up to 10 percent of the two point four million square feet could be retail.
MS. ROBESON: Is that written in the document?
MR. HARRIS: Yes, ma'am. That was --
MS. ROBESON: Okay. Then --
MR. HARRIS: -- what I was going to have him read.
MS. ROBESON: Well, we don't need to, he doesn't need to read it.
MR. HARRIS: Okay.
BY MR. HARRIS:
Q Okay. So if that document does indicate that up to 10 percent of the two point four million square feet can be retail, does that tell you anything with respect to whether the 120,000-square-foot recommendation in the master plan was an absolute cap?
MR. CHEN: Objection. Again, the document speaks for itself. In fact, the resolution cannot alter the master plan. As a matter of law, it can't.
MS. ROBESON: Well, that's legal argument. That's not the --
MR. CHEN: Well, okay.
MS. ROBESON: -- basis of an objection. So I'm going to let him testify whether that would have permitted

more than -- you can answer the question. Hopefully you remember it, no.

THE WITNESS: Top of page 14 of that document, it discusses the 120,000 square feet of the retail or neighborhood retail, but it also acknowledges that there could be more and that -- it specifically talks about 10 percent, and it also acknowledges that there's a 20 percent limit or cap with the MXPD. So there's the 120,000. It does acknowledge that, in this case, 10 percent. Ten percent of 2,420,000 is 242,000 square feet. So it does acknowledge more than the 120,000 square feet.

MR. CHEN: Again, move to strike. The document speaks for itself.

MS. ROBESON: Yes, that's overruled. I'll let it in for the weight it deserved.

BY MR. HARRIS:

Q Did you hear Mr. Ferguson's conclusions, conclusion that retail uses are not employment uses, and do you agree with any such conclusion?

A Again, I heard his testimony and I agree in part. He talked about Euclidean zones and how those are traditionally separated out, and I do agree with that. He did talk about MXPD, though, and I didn't wholly agree with what he was saying.

MS. ROBESON: Why?

THE WITNESS: He was reclassifying office or -- particularly office in terms of number of employees and hours of operations. I don't see that in the code. So he was defining different, particularly office or employment, in a particular way but that's not what I see in the zoning ordinance. He talked about, particularly, employment and office having, well, again, the different number of employees and that's not in the ordinance.

BY MR. HARRIS:

Q Did he admit that a hotel is an employment use?

A I believe he did.

Q And do you know whether a hotel typically has fewer employees than a typical office use?

MR. CHEN: Objection. He's a land planner. He's not a market analyst. He's got no expertise on what typically employment is for different land uses, at least I haven't heard it.

MS. ROBESON: Let's see where he goes with it. I'm going to let it in.

MR. HARRIS: It was really the flip side of the testimony that Mr. Noonan, the other planner, testified to.

MS. ROBESON: Exactly. So --

BY MR. HARRIS:

Q So did he admit that a hotel is an employment use, even though it typically has a lower number of employees

than office uses?

A I believe he did.

Q Looking at the MXPD zone, how does that classify uses?

A It classifies -- well, there's four different classifications, which is residential, commercial, the industrial, and transitory.

Q And under what group would office fall?

A Office falls under the commercial category.

Q Where would retail fall?

A Retail also would fall under that commercial category.

Q Does the commercial category refer to uses permitted in any other zone?

A Well, MXPD refers to the C-2 zone, which has a wide variety of uses permitted.

Q Are uses in the C-2 zone permitted in the MXPD zone?

A Yes.

Q And is retail use permitted in the C-2 zone?

A Yes, which is under that same category: commercial.

Q And is there any place in the MXPD zone that says the uses have to be specifically recommended in a master plan?

A There's no place that says that.

MR. CHEN: Objection, move to strike. The zoning ordinance speaks for itself.

MS. ROBESON: Noted. You can keep going.

BY MR. HARRIS:

Q Do you believe the MXPD zone allows the proposed retail services as part of a mixed-use employment center?

A Yes, it does.

MR. CHEN: Same objection.

THE WITNESS: It does.

MS. ROBESON: What's your basis for that?

MR. CHEN: He's --

MS. ROBESON: Just --

MR. CHEN: Oh, I apologize. I thought you were talking --

MS. ROBESON: No, his basis.

THE WITNESS: I hope not. Well, it's -- under the C-2 zone, retail, general retail is permitted which that would qualify.

MS. ROBESON: Okay. Go ahead.

BY MR. HARRIS:

Q Turning to Mr. Noonan's testimony about the 2011 Clarksburg Master Plan and, I believe, his opinion that it effectively reconfirmed all of the other provisions of the '94 plan, do you have an opinion as with respect to whether

that is the case or not?
MR. CHEN: Objection. The document speaks for itself, and it's my recollection that his testimony was that when you look at the document itself, meaning the 2011 document, that the document recognized that, not that it was his land planning expert opinion; it was that the document itself, and my recollection is he even pointed to language in the 2011 amendment.
MS. ROBESON: Why don't you ask him whether the 2011 amendment intended to whatever, do you agree with that.
BY MR. HARRIS:
Q Did the 2011 amendment intend to make any land use -- any recommendations with respect to the nature of land uses at Cabin Branch?
MR. CHEN: Objection. The document speaks for itself.
MS. ROBESON: That's noted. I'm going to let it in.
THE WITNESS: Well, I believe that that was narrow in scope to change the staging for the neighborhood retail and did not address any of the land use recommendations.
BY MR. HARRIS:
Q You were asked about Policy 7 in the master plan with respect to transit- and pedestrian-oriented neighborhoods. Do you have an opinion of how the Cabin

Branch project and this DPA respond to that?
MR. CHEN: Say it again. I apologize. I apologize, Mr. Harris. Would you repeat the question?
BY MR. HARRIS:
Q Policy 7 --
MR. CHEN: Right, yes.
BY MR. HARRIS:
Q -- you were asked about that.
MR. HARRIS: I wanted to know if he has any opinion as to how the Cabin Branch project and the DPA respond to that policy.
THE WITNESS: Yeah, and a couple thoughts. Policy 7 is page 28 in the master plan, talks about transit-, pedestrian-oriented neighborhoods. Both, well, the Planning Board and then, with the original development plan, the hearing examiner and the Council recognized the transit/pedestrian orientation.
If you go back, the big picture with the policies, the titles: Mix of Uses, and then it has a number of bullet points. It's been demonstrated and I've testified that there are mixed uses, not only employment, retail, office, the whole MXPD grouping we've been talking about, it also has the residential, the public, and so forth.
Interconnected Streets. We have a gridded street pattern and that's been reinforced and particularly

discussed in the staff, the current staff report, technical staff report.
Diversity of Housing Types. We've talked about that and the variety and the mix of housing. That's been part of the overall Cabin Branch.
And then, also, the other is the Street-Oriented Buildings and how this is a traditional neighborhood design. Alleys, the buildings, residential and commercial, are put up to the front of the street to address the street. Services and parking are primarily in the rear.
BY MR. HARRIS:
Q Do you have an opinion as to whether Cabin Branch, with this development plan amendment, will constitute a walkable or pedestrian-oriented neighborhood?
A I do, and again, the street pattern alone, I've talked about the sidewalks, the bike trails, the nature trails. Particularly on 121 there's, well, there will be a bike trail that crosses 270 across, with the new interchange, to connect to the other, the eastern side of the interstate. And we have a network of bike trails within the community, and we've talked about that.
We also, with the people that live there, they have the opportunity to walk to multiple facilities, not only, you know, their job, whether they're working in the retail or the office, they can walk to the parks and the

recreation facilities. And whether it's a five-minute walk, 10-minute walk, 15-minute walk, depending on where they live or where they, their destination is, that's, that's all facilitated in the plan.
Q And will the outlet facility itself be a walkable environment?
A It will and it's part of that network, and it, the outlet center itself, by definition, has pedestrian malls or pedestrian walkways within it, and then those are connected with the system, with the neighborhood. Not only we've talked about the Wellspring greenway and the trail system that connects east to west, also would be access to the bike route on 121.
Q Do you believe this DPA is in substantial compliance with the master plan recommendations?
A I believe it is.
Q Do you believe it meets the technical requirements of the MXPD zone?
A Yes. I've testified to that.
Q To what extent have you observed public support for this proposal?
MR. CHEN: Objection. Objection.
MS. ROBESON: Yes. You don't need to answer that.
MR. HARRIS: Okay.
BY MR. HARRIS:

Q Will the development allowed by this DPA help Clarksburg to become a town as envisioned in the master plan?
A I believe it will, but it's one of the components of the overall Clarksburg. And it's the appropriate scale with the 2,420,000 square feet, plus the almost, well, it's a little under 2,000 units, plus the 500 senior units per the master plan.
Q And will it help to achieve the vision for Cabin Branch as a mixed-use community with a -- well, a mixed-used community?
A Yes, it definitely does that.
Q Okay.
MR. HARRIS: I have no further questions.
MS. ROBESON: If COMSAT were developed and all of the Cabin Branch employment were developed, would you consider those regional uses?
MR. CHEN: Objection.
MS. ROBESON: Would they draw from a larger population than Clarksburg?
THE WITNESS: I think they would do both because of the scale and the size. They're both part of neighborhoods. So they're built into that fabric, or will be built into that fabric, so the people that live there have the opportunity to work there, and obviously that won't

happen with everyone that lives there. They won't obviously have a job at whatever office building or whatever employment center is built, but then they will have a regional draw. And I think part of that, too, was -- particularly the transit station on the COMSAT was addressed because there's discussion in the master plan that there's a new interchange, which is the Newcut Interchange. There's also a proposed park-and-ride lot on the COMSAT property. So it will have some, a regional draw. So --
MS. ROBESON: Did you have an objection, Mr. Chen, or did I rephrase the question sufficiently?
MR. CHEN: Rephrased question was much better than the initial question.
MS. ROBESON: All right. Cross-examination, Mr. Kline.
REBUTTAL CROSS-EXAMINATION
BY MR. KLINE:
Q Mr. Unterberg, sorry about that, you're familiar with the pendency of the Ten Mile Creek Limited Master Plan Amendment?
A Say the first part of --
Q Are you familiar with the pendency of the Ten Mile Creek Master Plan, Limited Master Plan Amendment?
A The pending, yes, I am.
Q Okay. And does that Ten Mile Creek Limited Master

Plan Amendment include the Miles-Coppola property?
A Yes, it does.
Q Okay. And are you familiar with the land use and zoning recommendations contained in the drafts of the Ten Mile Creek Limited Master Plan Amendment as they relate to the Miles-Coppola property?
A I've seen the draft.
Q Okay. Those recommendations could generate more than 470,000 square feet of development on that property if they were adopted by the Council, isn't that correct?
MR. HARRIS: Madam Examiner, objection here. This is going way beyond the extent of Mr. Unterberg's testimony.
MS. ROBESON: Well, he did testify as to, that -- he testified that there wasn't enough space in the town center to accommodate a 470,000-square-foot project or a regional outlet center. So I think that it goes to that and it's a valid basis for impeachment.
BY MR. KLINE:
Q Mr. Unterberg?
A Was there a question?
MS. ROBESON: Yes.
MR. MR. KLINE:
Q Yes, there was a question. It got objected to. Do you remember the question?
A I'll have to ask you to repeat the, repeat the

question.
Q If the recommendations are adopted by the County Council in the staff draft of the limited master plan amendment, would that not -- would that not have the potential of allowing for more than 470,000 square feet of commercial office/retail development on the Miles-Coppola property?
A I believe there's two recommendations currently, and one is for a --
Q Just answer the question I asked.
MR. HARRIS: He can answer the question.
MS. ROBESON: No. Just a second. No cross talk. Okay. Mr. Unterberg, answer Mr. Kline's question.
THE WITNESS: From what I've seen, the one -- I don't know the exact number offhand -- but the one proposal could have more --
MS. ROBESON: One alternative?
THE WITNESS: One alternative could --
MS. ROBESON: There's two alternative proposals.
THE WITNESS: I believe one is more residential in nature and then one is --
MS. ROBESON: So they're hedging their bets.
THE WITNESS: -- has a variety of commercial and retail that -- and focus on more retail with that recommendation, yes.

MS. ROBESON: All right.
BY MR. KLINE:
Q Okay. And if the non-residential option, the more commercial retail, commercial office/retail recommendation was adopted, that would have the effect of amending the 1994 Clarksburg Master Plan, wouldn't it?
A Correct, whatever is adopted would amend the master plan.
Q Sure. Okay, fine.
MR. KLINE: Can I draw everybody's attention, could I draw everybody's to page 14 of the Council resolution, approving --
MS. ROBESON: Of which Council?
MR. KLINE: This is the Council resolution approving the zoning application of G-806 that was referenced in the question.
MS. ROBESON: Okay. So Exhibit 5 or the staff report --
MR. KLINE: Yes, ma'am.
MS. ROBESON: -- either one.
MR. CHEN: What's the resolution dated?
MR. KLINE: 15-326, page 14.
MR. CHEN: Mr. Harris, got that?
MS. ROBESON: Okay.
BY MR. KLINE:

Q Are you with me, Mr. Unterberg?
A Yes.
MR. KLINE: Everybody okay?
MS. ROBESON: Yes.
BY MR. KLINE:
Q The second sentence on the top of page 14 as I'm looking at it says retail uses would occupy roughly 10 percent of the commercial floor area, well below the 20 percent limit. First of all, there is a binding element to the development plan, limiting square footage to 120,000 square feet of retail in Cabin Branch, correct?
A The development plan, that's 120,000 square feet of retail.
Q Okay. So that 120,000 square feet would be what percent of the 2,420,000 square feet that is allowed in Cabin Branch? Thank you, because I don't have a calculator.
A I have to pull out my calculator, which is the --
Q Thank you. Thank you.
MR. HARRIS: I want to object a minute. I'm not sure the --
MS. ROBESON: For just a minute?
MR. HARRIS: Pardon? I'm going to object. I don't --
MS. ROBESON: Sorry.
MR. HARRIS: -- see on the development plan the

premise that Mr. Kline stated, that there's a binding element of 120,000 square feet. I may have missed something, but I don't see it there.
MS. ROBESON: I thought it was there.
BY MR. KLINE:
Q Mr. Unterberg, are the columns on the left-hand -- on the right-hand side that have basically the yield summaries, are these considered binding elements for now?
MR. CHEN: What exhibit number is that?
MS. ROBESON: That's --
MR. KLINE: It's Exhibit No. 59.
THE WITNESS: The --
MR. HARRIS: To the extent that binding elements are allowed, right, Mr. Kline?
MS. ROBESON: Well --
MR. HARRIS: There are no binding elements.
MR. KLINE: Yes. Actually, okay, I see what the problem is. We're looking at the DPA. So we need to have the original.
MR. HARRIS: The binding elements are on the left side. They're the same other than the last one.
MS. ROBESON: Well, wait a minute. 21F, duplicate, is the original. Now, they've -- those would be, even though they're not labeled as binding elements, one could argue they are.

MR. CHEN: Tell that to Mr. Kline.
BY MR. KLINE:
Q Then let me put it this way. On the right-hand side, we have a column that has several boxes, and in the box titled MXPD Yield Summary, the employment category for Cabin Branch that says retail, please read it.
A Retail not to exceed 120,000 square feet.
Q All right. So that may or may not be -- is that intended to be a binding element?
A I'll leave that up to the attorneys.
MS. ROBESON: Well, I will point out that the zone, if I recall, the zone requires the commercial to be described, the MXPD zone, and I don't know where it is, but part of the, requires the breakdown -- and this is something we can argue about later. Why not? I don't have in my papers at the moment the MXPD zone, but there is a section of the MXPD zone that says you have to show the general category of commercial uses.
MR. CHEN: Madam Examiner, if you wish.
MS. ROBESON: Do you have it?
MR. CHEN: Yes.
MS. ROBESON: I think it's the zone.
MR. CHEN: Yes, it is.
MS. ROBESON: Thank you. So -- it is. It's 59-C-7.5(b)(1), and they have to be approved by the location

in general type of commercial uses on the site, must be shown on the development plan submitted and must be approved by the District Council as part of the development plan application. Thank you. I don't know where mine went.

MR. CHEN: Can I draw --

MS. ROBESON: No. I --

BY MR. KLINE:

Q So, Mr. Unterberg, could I ask you to go back and do that computation for me, since I don't have a calculator, of what is 120,000 square feet of the total permitted, 2,420,000 square feet? What is that percentage?

A It's roughly five percent. It's --

Q Five percent?

A -- a hair under, but it's five percent.

Q Okay, fine. Then -- well, is there anything in the technical staff, to your recollection, is there anything in the technical staff report that suggested, as you testified, that there would be up to 10 percent retail uses permitted in Cabin Branch?

A From the original or -- which technical staff report?

MS. ROBESON: Yes, I'm confused on that one --

MR. KLINE: Sure. Okay.

MS. ROBESON: -- I don't know --

MR. KLINE: Sure, fine.

BY MR. KLINE:

Q As part of G-806 --

MS. ROBESON: Oh.

BY MR. KLINE:

Q -- did, and I'll ask it this way, did either the technical staff report or the hearing examiner note that there could be as much as 10 percent of the uses devoted to retail uses?

A Oh, offhand, I don't know.

Q Okay. My understanding of your testimony was that the Council -- the Council acknowledged that retail uses within Cabin Branch could be as much as 10 percent. Is that the way you said it?

A Based on the resolution.

Q Okay. Well, the wording is retail uses would occupy roughly 10 percent of the commercial floor area, and you just told me that it's actually not more than five percent. So this does not, to me -- does this say you can have as much as 10 percent?

A I think it acknowledges that there was other retail contemplated.

Q Okay. And where does that come from? Where in the record would that come from?

A From this document.

Q From this document, which is --

A Which is the --

Q -- which is inconsistent with the five percent number that is shown on there as not to exceed. Okay.

A It's a different number.

Q Well, why doesn't the sentence say then retail uses could occupy roughly 10 percent instead of would? Doesn't the would imply that the 120,000 square feet that was shown on that table was the number that that sentence was referring to?

A That, I don't know.

Q So you don't know where that 10 percent came from other than it's your understanding that the Council was saying that you could go that high?

A Correct. I don't know where that number came from, but it is in the resolution --

Q Right.

A -- that acknowledges -- it talks about 10 percent, but it also acknowledges 20 percent for the zone.

Q Sure, understand that.

A Yeah.

Q And wouldn't you agree that the hearing examiner's report would be the most comprehensive document that would suggest how this language came about?

MS. ROBESON: If you can answer that.

THE WITNESS: Generally, but again, I don't know

the specifics of it.

MS. ROBESON: You know, the document -- I'm surprised Mr. Harris isn't jumping up and saying the --

MR. KLINE: Or Mr. Chen objecting.

MS. ROBESON: Well --

MR. HARRIS: Yes. Yes. I don't necessarily believe in that objection.

MR. CHEN: I would never object to that question.

MR. KLINE: Hopefully, I'm not belaboring it.

BY MR. KLINE:

Q To the best of your knowledge, does the hearing examiner's report, G-806, say anything about retail uses could have gone up to 10 percent in Cabin Branch?

MS. ROBESON: If you know.

THE WITNESS: Well, I believe that's what it says --

BY MR. KLINE:

Q No.

A -- roughly 10 percent. Now --

Q No. I said, does the hearing examiner's report make that suggestion or recommendation?

A Oh, independent of the resolution?

Q Right. No.

A That, I don't know.

Q Okay.

MR. CHEN: No further -- actually, let me just check something here. I have no further questions. Thank you.

MS. ROBESON: All right. Mr. Chen.

MR. CHEN: Thank you.

REBUTTAL CROSS-EXAMINATION

BY MR. CHEN:

Q Mr. Unterberg, go to, back to Policy 7, would you please, sir, on page 28 of the master plan?

A Okay.

Q Doesn't the policy statement recognize two different land uses, one being retail and one being employment?

A Where do you specifically see that?

Q I'd say it'd be the fourth bullet down under Mix of Uses. Why don't you read the bullet, if you would, please.

A Well, yeah, the fourth bullet says, proposes retail and employment use at a pedestrian scale --

Q No.

A -- and oriented to the needs of the residents.

Q Did you say use or uses?

A Proposed retail and employment uses at a pedestrian scale and oriented to the needs of the residents.

Q Thank you. So that it recognizes two different

land uses, right?

A That bullet does, yes.

Q Thank you. Would you please go to the 2011 update of the master plan?

A Do you have that handy?

MR. HARRIS: I got it.

THE WITNESS: Okay.

MR. CHEN: Do you guys have it?

MR. HARRIS: What page?

MS. ROBESON: That is --

MR. CHEN: 11.

MS. ROBESON: Do you have the exhibit number?

MR. CHEN: Yes, ma'am. It's -- yes, Madam Examiner. It's Exhibit No. 86.

MS. ROBESON: Okay. Well --

MR. CHEN: Hang on.

MR. HARRIS: Do you want mine?

MS. ROBESON: Hold on. Thank you.

MR. CHEN: Thank you.

MS. ROBESON: Do you need it?

MR. CHEN: Yes. I think I got it in my head.

MS. ROBESON: Okay.

BY MR. CHEN:

Q Do you have the 2011 amendment?

A Page 11, yeah.

Q Yes, sir. Do you see down at the bottom there's a string of bullets?

A At the very bottom, yes.

Q Yes. And there's a paragraph just above them.

A Okay.

Q Could you read the first sentence of the paragraph?

A The amendment retains the plan's overall land use policies and objectives, parens, 1994 plan, pages 16 through 34, end parens. Is that, or do you want me to read the whole paragraph?

Q No, that, that first sentence is all I asked you to read. So that, the 2011 master plan update does in fact retain the master plan's overall land use policies and objectives, is that correct?

A I believe that's what it says.

Q Thank you.

MR. CHEN: That's all I've got.

MS. ROBESON: All right. Redirect.

MR. HARRIS: No, no questions.

MS. ROBESON: Okay. Now, are you, would you like to do -- so that's the end of your, just to make sure, that's the end of your rebuttal case?

MR. HARRIS: Yes, with, with one note here. I have sensed from you and, to some extent, from the

opposition that there is concern about whether or not neighborhood retail would be constructed at Cabin Branch. We've talked repeatedly about 50,000 square feet of retail that would be classified as neighborhood retail, but the comment has been there's nothing in here that obligates us to do that.

If the Hearing Examiner would find it helpful for the record in this case to add a binding element that says we would do a minimum of 50,000 square feet of neighborhood retail, then we would consider writing something up and submitting it when we submit the final version of the development plan.

MS. ROBESON: Okay. All right. My concern about it -- and I'm saying this so the parties can respond -- my concern about the neighborhood retail, as when I read Policy 7 -- and I know you brought, had Mr. Unterberg testify on Policy 7 -- but I, I can see how this development is walkable, but I thought that Policy 7 was indicating that people shouldn't have to travel between neighborhoods to, travel between neighborhoods to get local services. And so if you have a witness -- that was, it is what he testified to.

I don't know, at the same time -- and I'm just thinking out loud -- that we have, you know, we have a lot of square footages in the master plan, that 20 years later

it's going to be -- I hesitate to mandate a certain amount of particular square footage, although I would feel more comfortable if -- I don't know if it has to be a particular square footage. I can't think of the answer, but I would feel more comfortable if there was something in here just stating that there -- and not just the restaurants, the overlapping uses -- but if there was something stating portions of Area C will be set aside for neighborhood retail or, if not otherwise provided on the site, or something like that. I don't know if we need a square footage.

And the other, if we're talking about amending binding elements -- and after I say this, I'll hear from everybody -- if we're talking about amending binding elements, I'm looking at this Exhibit 125, which is the statement from Motazedi about the binding element, and much as I trust the government to pick up all the pieces and tie them, make sure all the ends meet, I think it's typical that the Planning Board incorporate the binding elements in the site plan, but because I have had cases here where things get lost in the shuffle, I wonder if it would be possible to change that Binding Element 10, which is the Planning Board's recommended binding element, simply to say the -- which the applicant will propose as a condition of site plan approval, and that way we get it both ways. And I don't want to go into the two other cases I've had where something

fell through the cracks, but I would feel more comfortable just knowing that you're under an obligation -- assume, yes, the Planning Board will do it, but you're under an obligation to propose it as part of the binding elements.

MR. HARRIS: The cases in which I've been involved, as I think you indicate, I've always seen the binding elements re-incorporated --

MS. ROBESON: Right.

MR. HARRIS: -- but there is no, I would agree with you, there's no mandate for that to be done.

MS. ROBESON: Right.

MR. HARRIS: I think they still remain binding elements irrespective, but for that reason I have no --

MS. ROBESON: Well, it's to pick up --

MR. HARRIS: -- I have no problem including that additional language.

MS. ROBESON: I have had cases with DPS review of, that things fall through the crack. So --

MR. HARRIS: Yes.

MS. ROBESON: -- I would prefer that just to be added to that Binding Element 10 that the Planning Board recommended.

MR. HARRIS: No objection here.

MS. ROBESON: Now, Mr. Kline and Mr. Chen, do you have any comments on what I just stated?

MR. CHEN: I don't think the Examiner should be telling an applicant what they should be doing to make their application more complete and acceptable to the District Council, frankly. That's part of my problem with the e-mail exchanges, to raise that. I understand and appreciate the notion of an examiner seeking to have a complete record, but this is a quasi-judicial proceeding and that's how it's recognized in the law. And I apologize, I seem to be sometimes, be a little bit too much of a stickler on the form of questions because, notwithstanding the fact that it's an administrative proceeding, there still are rules to be followed, and I am very, very troubled by the exchange I've just heard, as I was with --

MS. ROBESON: Which exchange?

MR. CHEN: The recommendation to the applicant as to how they should reword a binding element. I mean, it's the applicant's burden of proof and burden of persuasion, and you've got well-experienced representation by legal counsel and consultants and an experienced developer. It's their obligation to put their case on. And I walk into your --

MS. ROBESON: But my obligation is, I don't know if the District Council is going to approve this or not, and that suggestion for Item 10 is to make sure that if they do approve it, it really happens.

MR. CHEN: That should be stated then in your report and recommendation.

MS. ROBESON: And I will.

MR. CHEN: That's the time to do it.

MS. ROBESON: And I don't understand your point about the e-mail exchanges either because -- let me finish -- I have the ability to call on technical staff for advice and that's what I was doing.

MR. CHEN: No doubt. No doubt and I'm not going there.

MS. ROBESON: And I still haven't decided the issue. So I don't understand what your objection is.

MR. CHEN: Cross-examination. While the Examiner certainly does have the right, and I respect that --

MS. ROBESON: Well, you can ask for cross-examination. If you want Mr. Etheridge and Mr. Carter to appear, they can -- I will entertain a request for cross-examination, absolutely I will.

MR. CHEN: I would ask then that they be available on the 2nd or March, Tuesday.

MS. ROBESON: All right. Do you have any objections?

MR. HARRIS: I've not seen that done before. I think, you know, the documents speak for themselves.

MS. ROBESON: Well, they don't. They don't

really. We have had technical staff appear and staff from DPS appear and be subject to questions based on their interpretation of the law. So what I don't want to do is unnecessarily, given your schedule, Mr. Chen, of -- I don't want to unnecessarily delay the case, but I will ask them if they are available.

MR. CHEN: Is there a middle ground that, because I agree with you completely about -- I join with Mr. Harris. I'm not interested in extending the proceedings. Maybe there's a middle ground that can be dealt with with this.

MR. HARRIS: For what it's worth, Madam Examiner --

MR. CHEN: Okay. You got a --

MS. ROBESON: No, let him say his middle ground.

MR. HARRIS: Oh, okay. Oh, I'm sorry. I didn't know he was going to propose something. I'm sorry.

MS. ROBESON: I want to hear the middle ground.

MR. CHEN: I'm looking for a middle ground. Do you have a suggestion?

MR. HARRIS: Well, okay, what I was going to say is, I think the middle ground has already been there. Each of us communicated with everyone else during this discussion about binding elements and the discussion about the water quality plan. So DPS and Park and Planning had full opportunity -- we all had full opportunity to make our

positions known and we did, and so it's redundant really, to me, to subject them now to cross-examination. We're not subjecting the Planning Board to come in for cross-examination on their unanimous recommendation of approval. That just isn't done.

MS. ROBESON: Well, what's your concern, because the two prohibitions are ex parte contacts, which has not been done because the communications were on the record, or the due process, which is the ability to cross-examine. So --

MR. CHEN: I, in this particular case, I'll let it go with what Mr. Harris -- I disagree with the analogy to the Planning Board. I don't think that's a good analogy, but the rest of it, as far as the -- the e-mails were shared, and opportunity was afforded to comment on it, but let's let it go at that.

MS. ROBESON: All right. So you're not asking for cross-examination?

MR. CHEN: No. Mr. Harris was, to a certain extent, persuasive with me this afternoon.

MS. ROBESON: Wait. Wait. We have the -- no.

MR. CHEN: Let it go.

MS. ROBESON: All right.

MR. CHEN: I appreciate what he's saying. I don't like -- as I said, I don't think the Planning Board analogy

is a good one, but I do, the other comments he said about the participation occurs to me --

MS. ROBESON: Whether I agree or not with the e-mails, I mean, I --

MR. CHEN: You said what I just -- you said what I wanted to hear you say. That's important. That was very, very important.

MS. ROBESON: Because, you know, there's two things -- and I'll just tell you before you make oral argument -- there's two things going on in my head, and one is that I have to give weight to the administrative, the agency responsible for implementing the law, and two is, you know, there's some pretty explicit language. So how do you balance that?

So with that, are you prepared to make closing statements today or do you want to wait for --

MR. CHEN: We could wait for Mr. Harris to make closing statements, and I'm sure Mr. Kline and I would then be ready Tuesday morning.

MR. KLINE: Well, I was going to ask this: I was going to ask that the record remain open until noon tomorrow because I'd like to basically review the staff report and the hearing examiner's report, G-806, and submit to you a one-line sentence that says there is or there is no reference to a 10 percent number in the Council resolution.

And you can, you can --

MS. ROBESON: Well, I'm not going to close the record because --

MR. KLINE: -- it's in the record already. So you can take --

MS. ROBESON: I'm not going to close the record, well, (a) --

MR. KLINE: Well, they have to submit a development plan.

MR. HARRIS: Right. Right.

MR. KLINE: Right.

MS. ROBESON: -- they have to, if they choose to submit a development plan, they -- so I'm going to hold the, typically we hold the record open for 10 days because we don't get the transcript literally for 10 days. So -- and then there was something that you were going to provide, the state --

MR. KLINE: Oh, yes, the Chapter 5 from the state design manual --

MS. ROBESON: Correct. There's that --

MR. KLINE: -- yes, and I'll circulate it tonight.

MS. ROBESON: There's that and then --

MR. KLINE: Well, would you, would you agree to allow me to submit something, because you have those two --

MS. ROBESON: On what?

MR. KLINE: That's on the staff report and the hearing examiner's recommendation, G-806.
MS. ROBESON: You want to submit written argument?
MR. KLINE: I just want to submit a one-liner that says there is or there is no reference in those documents to the 10 percent number that appears in the Council resolution. You have them in the record. You can take administrative record of it. I'm just trying to facilitate your review of it.
MR. CHEN: Why couldn't that wait until closing argument?
MS. ROBESON: Yes, wouldn't that be more appropriate for closing argument, because, because it's already in the record.
MR. KLINE: Yes, I -- well, I will do it that way if that's what you'd like, yes. I mean, frankly, I think that's more of a housekeeping issue and a fact issue --
MS. ROBESON: Well --
MR. KLINE: -- and I didn't want to waste my oral argument time on it.
MS. ROBESON: Yes, and the other reason I'm not, don't want to close the record exactly yet is I want to make sure that -- sometimes people copy Ms. Behanna-Moseley and sometimes they don't, and I, Mr. Chen found --
MR. KLINE: And sometimes you forget.

MS. ROBESON: Yes, I know. I did it. I was trying to avoid that, but yes. So I just want to make sure that everything that passed is actually in the record, all right?
MR. HARRIS: That's fine. I'm interpreting your conclusion that the record is open for limited purposes: Chapter 5 --
MS. ROBESON: Yes, no more testimony.
MR. HARRIS: Right. Right, but we need to -- okay. Thanks.
MS. ROBESON: Unless, you know -- technically under the case law, if you come in with a change in the plan that somebody wants to cross-examine on, you know, we would have to do that, all right? So what I'm going to do is stop for today so everybody is on the same playing field. I think there's enough in this record to adequately prepare for closing arguments. And we will schedule closing arguments for 9:30 on Tuesday, October 15th, and I, what we'll do is we'll have Mr. Harris, he will get, if we can -- well, I don't usually put time lines on it, but I want to make sure --
MR. HARRIS: I'm okay with time lines.
MS. ROBESON: Okay.
MR. KLINE: Yes, probably a better --
MS. ROBESON: Are all parties in agreement as to

time lines, because I don't want to have to bump up against Mr. Chen's deadline of noon, okay? So a half hour for yours, a half hour -- a half hour for all three, and then Mr. Harris will get 15 minutes for rebuttal. Do I hear any objections?
(No audible response.)
MS. ROBESON: All right. So with that, we will adjourn this hearing until Tuesday, October 15th, at 9:30, and it will be in this room.
(Whereupon, at 4:21 p.m., the hearing was adjourned.)

C E R T I F I C A T E

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Case No. DPA 13-02

By:

Wendy Campos, Transcriber

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OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

FOR MONTGOMERY COUNTY

APPLICATION OF ADVENTIST HEALTHCARE & CABIN BRANCH COMMONS	:	**DPA 13-02**

A hearing in the above-entitled matter was held on September 12, 2013, commencing at 9:11 a.m., at the Office of Zoning and Administrative Hearings, 100 Maryland Avenue, Rita Davidson Memorial Hearing Room, Rockville, Maryland 20850 before:

Lynn A. Robeson

Hearing Examiner

A P P E A R A N C E S

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E X H I B I T S

Exhibit No.		Marked/Received
106	Town of Leesburg master plan	23
107(a)	Aerial photograph marked to show locations of photos	26
107(b)	Narrative description of photographs	26
108	Hughes Resume	143
109	Storm water management drainage area	165

C O N T E N T S

Witnesses:	Direct	Cross	Redirect	Recross
James Noonan				
By Mr. Chen:	20		112	
By Mr. Harris:		27		127
By Mr. Kline			97	
Phillip Hughes				
By Mr. Harris:	142			
By Mr. Kline:		152		
Mark Ferguson				
By Mr. Kline	214		276	
By Mr. Harris		240		

P R O C E E D I N G S

MS. ROBESON: Are we on the -- we can go on the record. I'll call the case of DPA 13-02, a, the application of Adventist Healthcare, Inc., and Cabin Branch Commons requesting an amendment to the development plan and zoning application G-806, approved by the District Council on September 9, 2003, in Resolution No. 15-326. Are there any preliminary matters? Mr. Chen?

MR. CHEN: Thank you, Madam Examiner. As we left it last time we convened, you requested that Mr. Noonan e-mail the parties with a cite for the Leesburg Master Plan.

MS. ROBESON: Yes.

MR. CHEN: And that we would supply the Examiner with a hard copy of the plan for the record.

MS. ROBESON: That's fine. Thank you for doing that. And this will be Exhibit --

MR. CHEN: 106?

MS. ROBESON: Yes.

(Exhibit No. 106 was marked for identification.)

MR. HARRIS: Madam Examiner --

MS. ROBESON: Yes?

MR. HARRIS: -- I'm going to object to the exhibit at this time. There's been no foundation laid for it. I personally see no relevance of it and there's been no

testimony for it. So I don't see how it can be admitted as an exhibit.
MS. ROBESON: I think there was testimony from Mr. Noonan that --
MR. HARRIS: I do not believe so.
MS. ROBESON: I --
MR. HARRIS: If so --
MS. ROBESON: I --
MR. HARRIS: -- I don't recall it.
MS. ROBESON: Well, he testified that he got the plan from the website of the town of Leesburg.
MR. HARRIS: Correct. He said nothing about the contents of the plan. There's been no foundation laid for its relevance here.
MR. CHEN: Excuse me. I think --
(Discussion off the record.)
MR. CHEN: Madam Examiner, Exhibit No. 99 is the excerpt that Mr. Noonan had that we had offered at the last hearing and he had, and in light of what Mr. Harris had just said, you have, I'll direct his attention to it.
(Discussion off the record.)
MR. CHEN: Okay. Go to page 8-1, which I believe is the excerpt and I think this is what precipitated the necessity of the request for the entire master plan.
MR. NOONAN: Okay.

MR. HARRIS: May I intervene here? Before we get into Mr. Noonan testifying, there are some preliminary matters that I thought this was just going to be a preliminary matter, but it sounds as if he's going to be asking Mr. Noonan --
MS. ROBESON: Well --
MR. HARRIS: -- to testify.
MS. ROBESON: I, just to resolve that preliminary matter, I do believe that there was testimony, there has been testimony comparing this to the Leesburg master, or to the fact that this generates office development and I believe that this outlet center generates office development and I believe Mr. Noonan raised the issue that this comparing what occurred at Leesburg. So I'm going to let it in for the weight it deserves so we can move on without getting into -- yes?
MR. HARRIS: That's fine. Just for the record, my notes indicate Exhibit 99, I wrote down, "No questions asked about it."
MS. ROBESON: Well, unfortunately, we do not have the transcript.
MR. HARRIS: Okay. Well, then I --
MS. ROBESON: Yes, Mr. Chen, you can address this.
MR. CHEN: I'm prepared to do it Mr. Harris's way. To clean this up, we can do it after the preliminary

matters, that's fine by me. So if he's got other preliminary matters, we can take them and then we're back with Noonan as our witness and I'll clean this up.
MS. ROBESON: All right. I don't want to put form over substance. I understand what you're saying, Mr. Harris. What are your other preliminary matters?
MR. HARRIS: Yes, ma'am. Thank you. I am fearful that despite best efforts we will not finish today. I'd like to have an understanding, if we can come to it now, when we will next get together.
MS. ROBESON: Well, I did get a notice from our building official that there will be no water in, or electricity in this building on Saturday the 28th, and I think Mr. Bogorad couldn't be here that day anyway. So that date is out. So if you -- Mr. Chen, I think you are the driving force on some of these scheduling issues.
MR. CHEN: Yes. Madam Examiner, I have depositions every day through August 4th, I mean October 4th and I'm glad to show you my calendar. It is virtually every day.
MS. ROBESON: Mr. Harris.
MR. HARRIS: Virtually every day. Which days do you not?
MR. CHEN: Every day.
MR. HARRIS: Virtually or every day?

MR. CHEN: No, excuse me, every day. I'm out of town on Friday the 20th. I've got tickets for something that I had since April, so I'm out of town, but other than that every day has got a deposition.
MR. HARRIS: Every day in September has a deposition you're saying?
MR. CHEN: Yes.
MR. HARRIS: Okay. Except for the 20th, you're out of town the 20th?
MR. CHEN: Yes.
MR. HARRIS: Out of town the 21st?
MR. CHEN: Yes, and the 22nd.
MR. HARRIS: And then you come back the 23rd, but have depositions?
MR. CHEN: Yes, starting at 10:00 that's going to go all day.
MR. HARRIS: Is there any chance one of those depositions could be moved?
MR. CHEN: No. We're under a time deadline set by the circuit court and, quite frankly, we've tried. There's even been issues because the deadline with the circuit court on discovery is September 30th and the court has allowed us to trip over into early October.
MR. HARRIS: What's the deadline now?
MR. CHEN: We're doing depositions through October

4th.
MR. HARRIS: So after October 4, you're wide open?
MR. CHEN: I'm very good, yes. The week of the 7th I'm wide open.
MR. HARRIS: Can we say October 7 then?
MR. CHEN: Works for me.
MS. ROBESON: If you could, I don't -- usually we have our calendar up here, but it's not up here. So I'm going to go -- I need to go off the record for five minutes, I'm sorry for additional delay, and get a copy of our calendar so I know what dates we've committed to. Okay. We're off the record.
(Recess.)
(Discussion off the record.)
MR. HARRIS: For what it's worth, Madam Examiner, we did plan, do plan to call Mr. Bogorad as a rebuttal witness. Mr. Chen is not available through the 4th I understand. That would make Saturday the 5th or Monday the 7th the first available dates after the 4th. Mr. Bogorad is not available either of those dates, but it is possible that we could put him on today so that if we are able to get him on today, I would propose either Saturday the 5th or Monday the 7th.
MS. ROBESON: Well, I guess the thing is, Mr. Bogorad, we haven't finished --

MR. HARRIS: Correct.
MS. ROBESON: -- the opposition case, so he won't be able to address the points that the opposition is going to make, which I don't know what they are, well, we've heard Mr., one expert, but we have another expert coming. Now I can suggest this. When would Mr. Bogorad be available on the 8th?
MR. HARRIS: Not, the first day he would be available, if not today, is the 10th. But, again, I know they have one more expert witness and they have cross-examination of both Mr. Noonan and that expert witness.
MR. KLINE: If I might make the -- I'm assuming by that time we will have gotten to Mr. Ferguson, so you'd be looking at other dates. He will be leaving town late the week of August the 1st. He'll be out of town.
MR. HARRIS: August?
MR. KLINE: I'm sorry, October. So he will not be returning, he would not be available until the 8th himself. And if you think that's the day you would want him, I can't make him available until the 8th.
MR. HARRIS: Okay. Well --
MS. ROBESON: I'm sorry, when was Mr. Bogorad -- is he out the whole week of the 7th?
MR. HARRIS: Until Thursday the 10th, he's back.
MS. ROBESON: Well, what about Thursday the 10th?

I would like to have some order and I would like Mr. Bogorad to be able to address any questions that I have after I've heard all the experts because it is an important, I think, that the impact among the town center is a major issue in this case. And I would like Mr. Bogorad to have the benefit of all the expert testimony.
MR. HARRIS: I appreciate that and certainly that would be our intention. That still could be possible today, but so what I'm saying is --
MS. ROBESON: Well, we don't have Mr. Ferguson today, do we?
MR. HARRIS: Yes, we do.
MS. ROBESON: Oh, that's Mr. Ferguson? Oh.
MR. KLINE: He is available, yes.
MS. ROBESON: Well, then I'm going to reserve and see how far we get because I anticipate extensive cross-examination of Mr. Noonan and, but I -- it's very important to me, I think Mr. Bogorad's testimony is critical to this case and it's very important to me that he be available to address all the issues.
MR. HARRIS: Yes, ma'am. So if I understand it correctly, the option on the table to be resolved later today, if you will, is either the 5th or the 7th if Mr. Bogorad finishes today, or the 10th if he doesn't?
MR. KLINE: Well, it depends on whether Mr.

Ferguson --
MR. HARRIS: If Ferguson finishes today. I see no reason Ferguson won't get on today.
MR. KLINE: Well, can I ask this --
MS. ROBESON: Well, that's speculation at this point. So --
MR. KLINE: Yes, if I can review the bidding for a second because I had the impression we would, you would also be calling your storm water management witness.
MR. HARRIS: Yes.
MR. KLINE: Very good. Okay.
MR. HARRIS: Yes.
MS. ROBESON: So is the 10th, now the 10th is a Planning Board day, so if you --
MR. HARRIS: I've got somebody filling in for me. Today is a Planning Board day and I simply had somebody fill in for me.
MS. ROBESON: Okay. So I am going -- we'll look at the 7th and be optimistic, but I'm also going to reserve the 10th because that is a sure thing and it's always nice. There are few sure things in this world.
MR. HARRIS: Jody, I'm sorry, excuse me, what dates are Mr. Ferguson out?
MR. KLINE: You're leaving town on what?
MR. FERGUSON: I'm leaving town on the afternoon

of Thursday the 3rd and will be back in the afternoon of Monday the 7th.
MR. HARRIS: Oh, okay.
MR. KLINE: So after the 8th he would be available.
MR. HARRIS: Okay. Fine. Thank you.
MS. ROBESON: So we have, well, then we have the 8th or the 10th, correct?
MR. HARRIS: Mr. Bogorad could not do the 8th.
MS. ROBESON: Oh, that's right. That's right. All right. So we will keep those dates in mind. As far as Exhibit -- oh, are there any other preliminary matters?
MR. CHEN: One moment.
MR. KLINE: Well, I'm, yes, I guess since Mr. Harris wisely is sort of thinking ahead, I would also like to think ahead about closing arguments and I would like you to consider telling us how much time you will allow us because we'll have to divvy things up and I mean I realize I'm available clearly when you want to be, but presumably Mr. Harris would like to try and take the last day and make it the last day. So I guess I want to know how much time are you going to allow us for the closing in light of this?
MS. ROBESON: Okay.
MR. KLINE: If you can just tell us now, I --
MS. ROBESON: That's good. I will think about

that. Let me do this. If we're going to -- if -- I think there's enough writing in the record right now that I'm not going to need written closing arguments. My concern is, what I'd like to do is set up another back-up date just in case because it takes a lot of time at these hearings to get a date with everybody's schedule. So we may have a day just for oral arguments where you don't have to bring your witnesses and it will be a short -- you know, I'm not anticipating giving everybody, you know, an hour and a half. But just out of an abundance of caution so we can conclude this case, and you don't have to do it now, but if you could work out at one of the breaks a back-up date, our calendar is on the website or I have a calendar here. I'd just like one date reserved just to be able to clean up any issues and -- go ahead, Mr. Chen.
MR. CHEN: You've got literally right now everybody in front of you, including all the witnesses. And my suggestion for efficiency, let's do it right this minute. We've got the 10th and a whole back-up date behind that.
MS. ROBESON: All right.
MR. CHEN: And I'm pleased to report that not only am I good the week of the 7th, I'm pretty good the following week also, the 14th.
MS. ROBESON: Wow.
MR. KLINE: Let me start the bidding with this

proposal. The day after whatever --
MR. CHEN: Yes.
MR. KLINE: -- is the last day of witnesses.
MR. CHEN: That works.
MS. ROBESON: Well --
MR. KLINE: So the --
MS. ROBESON: -- I am, I am out on the 11th.
MR. KLINE: Okay. So --
MS. ROBESON: So I will be back the 14th.
MR. KLINE: So it could be the 9th or --
MS. ROBESON: It could be the 14th.
MR. KLINE: Are the County buildings open that day? That is a holiday.
MR. HARRIS: The 14th is Columbus Day.
MR. KLINE: That is a holiday.
MS. ROBESON: Oh, that's not on my calendar.
MR. CHEN: The 15th?
MS. ROBESON: The 15th, yes.
MR. HARRIS: 15th, okay. That's if required.
MR. KLINE: Since it only relates to the attorneys, that's --
MS. ROBESON: Now --
MR. KLINE: -- just the three of us?
MS. ROBESON: -- to avoid, to avoid having you spend a lot of money waiting around for me to get through

traffic, I'm going to set these next hearings at 9:30. And I do apologize. Well, I don't know why I'm, well, never mind. We're not going there.
MR. CHEN: Yes.
MR. HARRIS: Okay. So --
MS. ROBESON: The two -- so I have a potential date of the 7th. If we finish on the 7th, we could do, we could use the 10th as the oral argument or hearing.
MR. HARRIS: Fine.
(Discussion off the record.)
MS. ROBESON: And then if not, we have 9:30 on the 15th.
MR. CHEN: That is 9:30 on the 7th, 9:30 on the 10th and 9:30 on the --
MS. ROBESON: Correct.
MR. CHEN: -- 15th? I get very bad the week of the 21st.
MS. ROBESON: Well, there is --
MR. KLINE: We should get done. We've got three days.
MS. ROBESON: We are all going to be really crabby on the week of the 21st so, no, we, I, I do think it's realistic with at least those three dates in reserve that we are able to finish.
MR. HARRIS: Okay.

MS. ROBESON: Any other preliminary? Yes, sir?
MR. HARRIS: Yes. One other one. Exhibit 94, Mr. Chen, I believe offered it, I, that was the memorandum that you offered?
MR. CHEN: Yes.
MR. HARRIS: I forget how it's identified. I indicated at the time that it was five pages, single-spaced and I did not have an opportunity to read it then and that I was reserving an objection to it subject to my review. I didn't even get a copy of it until later that same day.
I have reviewed it and I do want to object to its introduction here. I don't know where it even came from, so somebody needs to authenticate what it is. Again, there was no testimony with respect to it, so no foundation has been offered as to its relevance at all. And to be honest with you, as I look at it, even if it is authentic, I believe it's completely irrelevant here to any of the issues.
MS. ROBESON: All right. Well, I'm going to allow Mr. Chen to address that on redirect because he still has redirect.
MR. CHEN: Just respond, just to respond to that, so the record is clear, Exhibit 94 is a document authored by Mr. Harris. It was obtained from the records of the Park and Planning Commission.
MR. HARRIS: But you can't --

MS. ROBESON: Okay. Well, then --
MR. HARRIS: -- you can't testify, Mr. Chen, if you --
MS. ROBESON: Just a second. Just a second. If it's a public record, I mean if you need to get a true test copy or, you know, some certified copy, it can come in.
MR. HARRIS: I'm not asking for that. I just want to know where it came from that somebody can authenticate that they got it from where they got it.
MS. ROBESON: Well, Mr. Chen, do you have a witness that -- did you get it or did --
MR. CHEN: I provided it.
MS. ROBESON: You provided it?
MR. CHEN: I would have to go find out where to --
MS. ROBESON: Oh.
MR. CHEN: It came from the Park and Planning Commission records.
MR. HARRIS: Well, did it or did it not?
MS. ROBESON: Well --
MR. HARRIS: He doesn't seem to know.
MS. ROBESON: Well, then I'm going to reserve and one of you can, you know, authenticate where it came from.
MR. HARRIS: All right.
MS. ROBESON: All right. Anything else? How about Exhibit -- well, Mr. Chen, I'm going to let you

address Exhibit 106, which is the town of Leesburg master plan, on redirect if that's -- well, actually if Mr. Harris is going to ask questions on it, we should probably take care of that now. So why don't you ask Mr. Noonan about the foundation for that exhibit?
MR. CHEN: Okay. This --
MR. HARRIS: I'm sorry, which one is this, ma'am? 106, this new one, or -- oh, the master plan?
MS. ROBESON: Yes.
MR. CHEN: I'm sorry. Beg your pardon. Okay.
MS. ROBESON: Go ahead, Mr. Chen.
MR. CHEN: Thank you very much.

DIRECT EXAMINATION

BY MR. CHEN:
Q Mr. Noonan, 106 is the Leesburg master plan?
A Correct.
Q This is the master plan that you were referring to last time when you were testifying?
A That's correct.
Q Go to page 8-1.
MS. ROBESON: Now that's --
THE WITNESS: I've got it.
MS. ROBESON: -- one part of the excerpt that's in our exhibit, correct?
MR. CHEN: Yes, it is in --

MS. ROBESON: In the full master plan as well?
MR. CHEN: Yes.
MS. ROBESON: Okay.
(Discussion off the record.)
MR. HARRIS: This has been identified as 106 then, the full one?
MR. CHEN: Yes.
MS. ROBESON: It's been marked as 106.
MR. CHEN: Correct.
MS. ROBESON: It's not admitted yet.
MR. CHEN: Correct.
MS. ROBESON: Okay. Continue, Mr. Chen.
BY MR. CHEN:
Q The master plan for Leesburg does address the issue of office, retail attracting office, is that right, sir?
MR. HARRIS: Objection.
MS. ROBESON: It's leading.
MR. HARRIS: It's a leading question.
BY MR. CHEN:
Q Directing your -- does the Leesburg master plan contain any information relative to office space, office use, rather, being attracted by retail use?
A It has a conclusion in the goal statement in the Chapter 8 for economic development to raise that issue.

Q Would you go to that section please and read it?
A The references would be on the second paragraph under the --
MR. HARRIS: I'm sorry, which page?
THE WITNESS: Page 8-1.
MR. HARRIS: Thank you.
THE WITNESS: The opening, the second paragraph, the first sentence there begins with,
"Tourism and regional retail do not provide the high wage jobs that come with corporate offices and emerging technologies such as high technology, bio-technology and telecommunications which are important to the area's economic competitiveness and to residents' quality of life."
MS. ROBESON: Okay. Does that -- now that does seem to me relevant, Mr. Harris. Does that address -- you may disagree with the statement or you may be able to qualify the statement, but as purely as to relevance, I do think that it's difficult for me to say why that, see why that wouldn't be relevant.
MR. HARRIS: Number one, it doesn't say what he just, the question was. It does not say that retail doesn't support other jobs. What it says is tourism and retail do not provide high wage jobs.

MS. ROBESON: Well --
MR. HARRIS: It doesn't say anything to do about their impact on attracting high wage jobs.
MS. ROBESON: Yes, but relevance is anything that tends to prove one side. It's a low threshold and I think that it does -- you can, you know, critique it on cross-examination --
MR. HARRIS: All right.
MS. ROBESON: -- but I will let it in. So I'm going to mark 106 as the full version of the -- is it town of Leesburg master plan?
(Exhibit No. 106 was marked for identification.)
MS. ROBESON: And -- thank you. That's exactly what I was going to ask for. I guess it's the Leesburg, Virginia town plan to be -- all right. Now with that, we are on cross-examination, I believe. Oh, yes.
MR. CHEN: There was one area left open and that dealt with the photographs that are Exhibit 101(a) through (n). If you recall, Mr. Robins had raised the issue about the photographs and having somebody available to testify.
MS. ROBESON: Yes, he did.
MR. CHEN: And the photographs were, when they were taken and what --
MS. ROBESON: And is this the -- yes, okay.

MR. CHEN: If I may, is our next exhibit number 107?
MS. ROBESON: Yes.
MR. CHEN: Mr. Harris --
MR. HARRIS: You did, yes, thank you.
MR. CHEN: Madam Examiner, I'm giving you, handing you a 3-page document that is marked 107.
MS. ROBESON: Okay.
MR. CHEN: I apologize. I didn't have my copy. Madam Examiner, if you go to Exhibit 100 --
MS. ROBESON: Okay.
MR. CHEN: -- okay. And if you'll see Exhibit 101 are the photographs --
MS. ROBESON: Yes.
MR. CHEN: -- that were before us when we concluded on direct examination of Mr. Noonan --
MS. ROBESON: Yes.
MR. CHEN: -- okay.
BY MR. CHEN:
Q Mr. Noonan, showing you Exhibit 107, can you identify what is this exhibit?
A This is an aerial photograph with some, with locations of the photographs taken for Exhibit 101, the locations where each of the photographs were taken are marked there and they're individually identified.

MS. ROBESON: Are they marked with the green stars?
THE WITNESS: Yes, with a number right next to it which indicates whether it's --
MS. ROBESON: I see.
THE WITNESS: -- Photograph A or through G, or H, I believe.
MS. ROBESON: All right.
THE WITNESS: Quite a few more actually.
MR. CHEN: Okay. So that --
THE WITNESS: And that's Leesburg outlet mall in Leesburg, Virginia.
MS. ROBESON: Now Leesburg outlet mall is outlined in red?
THE WITNESS: That's correct.
MS. ROBESON: Okay.
BY MR. CHEN:
Q Now this is the same aerial photograph that's Exhibit 100 without the indication of the location of the photographs, is that correct?
A That's correct. We just added the -- the starred locations and the identifiers for the photographs.
Q Okay. And paper clipped to Exhibit 107 is a typed narrative?
A Uh-huh. Yes.

Q What is that, sir?
A That's just a quick summary of what each of the photographs purports to show. There's also, we indicated the date the photographs were taken, which was August 6, 2013, anywhere between 10:00 a.m. and 1:00 p.m.
MR. CHEN: Okay. Now, Madam Examiner, my next question is as to each of the photographs taken, do they accurately purport to depict what they show? And in that regard I need to shift to another witness.
MS. ROBESON: Right.
MR. HARRIS: We have no objection to the claim that they accurately reflect what --
MS. ROBESON: You'll concede to that?
MR. HARRIS: -- what they purport to show with the exception of the conclusions that draw from each of those photographs. And those conclusions appear to Mr. Noonan's.
MR. CHEN: Okay.
MS. ROBESON: Okay. Well, what I'm going to do is mark 107. I'm going to mark the photograph 107(a) and I'm going to mark the narrative 107(b).
(Exhibit No. 107(a) and 107(b) were marked for identification.)
MS. ROBESON: And then 107 in general is going to be locations and descriptions of photographs in Exhibit 100.
(Exhibit No. 107 was marked for

identification.)
MS. ROBESON: A will be the aerial photograph marked to show locations of photos. And B will be narrative description of photographs. I'm going to let B in. I note your objection. I'm going to let B in for the weight it deserves and you are able to cross-examine on that.
MR. CHEN: With that, Madam Examiner, I believe then we've satisfied the requirements raised by Mr. Robins relative to the photographs.
MS. ROBESON: Yes. Thank you. And I don't need to excuse her because she was never offered as a witness, so --
MR. CHEN: Right.
MS. ROBESON: All right. Go ahead.
MR. CHEN: And that would conclude the examination.
MS. ROBESON: That's fine. Cross-examination, Mr. Harris.

CROSS-EXAMINATION

BY MR. HARRIS:
Q Mr. Noonan, first of all, I assume you've met with and/or had phone calls with representatives of the Peterson Companies, including perhaps Steve Green, Taylor Chess, Jim Soltesz and Jody Kline?
A I had meetings with Jody Kline and, I believe, Mr.

Chess. He wasn't asking about you. He knows I met with you.
MR. CHEN: Right.
BY MR. HARRIS:
Q Yes. You met with Jody Kline and Taylor Chess?
A I believe, yes, I believe those --
Q I think Taylor --
A -- Jody Kline I'm certain of.
Q Okay. Taylor Chess, I think, is the president of the retail division of Pulte, of Peterson Companies? Yes?
A Yes.
Q I'm sorry. Okay. I just, sometimes you can't hear.
MS. ROBESON: If you know.
MR. HARRIS: Yes.
MS. ROBESON: I mean if you know. It's --
THE WITNESS: I venture it's about five people at these meetings, but I believe that's --
MS. ROBESON: So you're not sure?
THE WITNESS: No, I'm not sure, absolutely sure.
BY MR. HARRIS:
Q And the meetings you discussed and/or phone calls, did that include discussions of the Peterson project?
A Not really. I mean we focused on this case primarily. I mean there were conversations, but I am not,

you know, really -- have a lot of detail about the Peterson project.
Q Do you know what is, what they have proposed?
A Yes, I do generally know what they've proposed.
Q Okay. And in those discussions, then I assume you discussed with the Peterson Company your testimony on behalf of Mr. Cobb in opposition to this development plan amendment?
A Yes.
Q And is it your understanding that they are, they, the Peterson Companies are interested in your opposition to this DPA?
A Yes.
Q And did you discuss with them the strategy for your testimony and the combined opposition to this application?
MR. KLINE: Objection.
MS. ROBESON: Basis?
MR. KLINE: It would be his discussion with Mr. Chen or, I guess I'm not sure we've ever had a conversation on the strategy, but the strategy would not be subject to basically the cross-examination questions.
MS. ROBESON: Well, he doesn't have to reveal the strategy, he just can testify that he had the discussion.
MR. CHEN: Well, I object to the use of the word

strategy.
MR. KLINE: Yes.
MR. CHEN: I don't know what that means.
MS. ROBESON: I see.
MR. KLINE: That's what --
MR. CHEN: That's my hang-up.
MR. HARRIS: Okay. I can rephrase the question.
BY MR. HARRIS:
Q Did you discuss with Mr. Kline and/or Mr. Chess your testimony in opposition to this development plan amendment?
A Yes.
Q And did that discussion include how your opposition might dovetail with any opposition that the Peterson Company itself advanced?
A I suppose it did. I will have to say yes. I don't know that they discussed their strategy with me. We were discussing the direction of my testimony related to the consistency with the master plan. That's the conversations I was involved in.
Q Okay. And would you say, did you have more than 10 such conversations?
MR. KLINE: Objection.
MS. ROBESON: Yes, relevance?
MR. HARRIS: I'll move on.

BY MR. HARRIS:
Q Mr. Noonan, do you know whether your fees are being paid for or reimbursed in any way by the Peterson Companies?
MR. KLINE: Objection.
MR. CHEN: Objection.
BY MR. HARRIS:
Q Mr. Noonan, do you have a position as to the Peterson project? Do you support it?
MR. KLINE: Objection. It's not a matter that's before this Hearing Examiner.
MR. CHEN: What's the relevance of --
MR. KLINE: This is an application for development plan amendment for Cabin Branch and this is, as I said, becoming a dueling shopping center and I think that that's gone way beyond what's necessary to --
MS. ROBESON: All right. Let me let Mr. --
MR. HARRIS: It goes significantly to his credibility here and the, you know, the basis for his extensive testimony in opposition here.
MR. CHEN: May I just be heard on this too?
MS. ROBESON: Yes.
MR. CHEN: The question is his, as I understood it, his position. I don't think that's a proper question put to someone who has been offered and accepted as an

expert. If Mr. Harris wants to ask him have you been retailed to provide your professional services relative to the Peterson project, I cannot object to that. I think that's fair game and I think that does go to credibility.
MS. ROBESON: Yes, I agree and I, so I am going to sustain that objection because I don't care -- he's here to offer his professional opinion. I don't care whether he personally supports the project or I don't think it's relevant I guess whether he personally supports the project or not.
BY MR. HARRIS:
Q Do you believe the Peterson project is consistent with the 1994 Clarksburg master plan?
MR. KLINE: Repeat the objection. Again, we're dealing with property that's not subject, before the Hearing Examiner.
MR. HARRIS: The witness had extensive testimony interpreting this master plan and I certainly have the right to understand what his understanding of the master plan is.
MR. CHEN: I --
MR. HARRIS: Obviously, I understand that they don't want him to say anything about this because they've got virtually the identical project being proposed on the opposite side of the street and they've been talking out of both sides of their mouths from the beginning of this.

MS. ROBESON: Okay. You don't have to characterize it like that. I am well aware of the dynamics of some of the opposition. He's Mr. Cobb's witness. So I'm not sure -- go ahead, Mr. Chen.
MR. CHEN: Again, my problem is with the wording of the question. When you say do you believe, certainly Mr. Noonan has testified about the Clarksburg master plan and certainly, and asked questions about the compliance with the DPA with the goals and objectives of the Clarksburg master plan. A fair question is have you done the same type of analysis and formulated professional opinions relative to the Peterson project? I think that's a fair question. It --
MS. ROBESON: All right.
MR. CHEN: But it's not do you believe, it's, you know, have you formed an opinion based upon your review of the master plan?
MS. ROBESON: So I agree it would be have you had the opportunity to form an opinion.
BY MR. HARRIS:
Q Have you had the opportunity to review the Peterson project in terms of its consistency with the 1994 Clarksburg master plan?
A No, in fact, I have not done any analysis of the Peterson project, with their proposal other than to note

that the location, that it does, it is physically located, as I understand it, within the town center district. But beyond that, I have not looked at the details of the Peterson plan.
Q So if there were testimony that that project is inconsistent with the master plan, you have nothing contrary to offer?
A Again, I have not done an assessment of that plan, so the, I can't tell you whether it's consistent or not consistent with the master plan other than my understanding of where the location and the kind of development that is suggested, seems to be supported in terms of the location for economic development and commercial development in the master plan. But the details I don't know about.
Q So I don't think you answered the question. My question was if there is testimony that that project is inconsistent with the master plan, you have no other opinion with respect to its consistency to rebut that?
A Not -- no, I do not.
Q Okay. If there -- do you know whether that project will have an adverse impact on the town center?
MR. KLINE: Objection. The line of questioning that deals with a property that is not subject to this development plan amendment is beyond the scope of the testimony and the questions being asked.

MR. HARRIS: It is directly related to his extensive testimony about his opinion of how an outlet center on the west side of 270 would have an adverse impact on the town center while at the --
MS. ROBESON: What is the question again?
MR. HARRIS: Do you have an opinion as to whether --
MS. ROBESON: That, just tell me the question. Don't ask him. Tell me the question.
MR. HARRIS: Okay. It was whether he had an opinion as to whether the Peterson proposal for an outlet center on the east side of 270 would have an adverse impact on the town center.
MR. CHEN: That wording I don't have a problem with.
MS. ROBESON: Yes. I'm okay with that --
MR. HARRIS: Okay.
MS. ROBESON: -- too. So I'm going to allow do you have such an opinion?
THE WITNESS: Again, I haven't done an assessment of the Peterson proposal. I mean all I can speak to is my understanding of where it is located and it is located in the town center. But whether the details of that proposal are consistent with the master plan, I haven't done that assessment.

BY MR. HARRIS:
Q And the same question about the impact on roads, you have not done an assessment of that?
A Are we talking about --
MS. ROBESON: The impact of what?
MR. HARRIS: I beg your pardon. Thank you.
BY MR. HARRIS:
Q The impact of the Peterson proposal on road congestion.
A No, I have not.
Q And so if there were testimony that that had an adverse impact, you have no evidence to the contrary?
A I have no evidence to the contrary.
Q And the same question with respect to the Peterson project impact on environmental features, you've done no assessment of that either?
A I have done no assessment of the Peterson project.
Q So if there -- there could, that could have an adverse impact or not?
MS. ROBESON: Okay. He already answered that he hadn't done the assessment --
MR. HARRIS: Okay.
MS. ROBESON: -- and I guess, I don't have the transcript, it's my recollection that the focus of his testimony was not the impact of the Peterson project, but

the impact of this project on the town center.
MR. HARRIS: That is --
MS. ROBESON: So --
MR. HARRIS: That is correct.
MS. ROBESON: -- I think that these questions would have been more appropriately addressed to Mr. Soltesz, the, who was the engineer that --
MR. CHEN: Soltesz.
MR. HARRIS: Mr. Soltesz testified.
MS. ROBESON: Mr. Soltesz.
MR. HARRIS: I don't think he testified to that.
MS. ROBESON: Now if you want to continue on this line, but he's already testified that he hasn't done the analysis of all the issues in the, regarding the Peterson property.
MR. HARRIS: That's fine. My simple point is when, when an expert witness makes a conclusion about one project that is in my mind virtually identical to another project and concludes that the project A is going to have an adverse impact on the town center, then that person must inherently know whether another project will or not or else they don't have enough foundation on which to make the first conclusion.
MS. ROBESON: Well, I --
MR. CHEN: That I object to.

MS. ROBESON: -- yes, I think -- just a second. I don't agree with that -- I don't, well, Mr. Chen, state your objection.

MR. CHEN: Okay. I, first of all, I object to counsel testifying. But leaving that aside for the moment, these are different components of a master planned area where the issue before the District Council and the Examiner in this proceeding involves the Cabin Branch community. It's a different community than that town center so that -- and this witness expressed his opinion upon reviewing the master plan and hearing the testimony that had been presented by the applicant that in his opinion this development in the Cabin Branch community would have a deleterious impact on the town center component. That does not mean he should have also evaluated a totally separate project that I'm not sure the status of, I'll use the word pending, that another project which I don't even know how comparable it is to this project is pending over in the town center. Why should he be doing that when he's focusing on the impact of what's going to happen in this area?

MS. ROBESON: I tend to agree. If I recall his testimony, his testimony was the impact of this project and not the impact of the Peterson project. And he's already testified that he hasn't had the opportunity to review that and, you know, whether he supports -- where I think I see

you going is that he's biased because he supports the Peterson project and, you know, I'm not sure that's a fair impeachment in this case.

MR. CHEN: But I would just --

MR. HARRIS: Ms. --

MR. CHEN: -- just for the record clarity --

MS. ROBESON: Not a fair impeachment, but a relevant impeachment.

MR. CHEN: We don't even know the status of the Peterson project. I've heard that there's a master plan amendment pending. I've not heard that there's a development plan or a development plan amendment pending -- I've heard nothing. The most that I've heard is that there's a master plan proceeding pending so that to say to this witness and to seek to impeach him on a project that not only do we not know its components compared to the components of the pending DPA, we don't even know what is pending.

MS. ROBESON: Well, yes, Mr. Kline?

MR. KLINE: Well, I guess I would only add that to, aside from the fact that it was a statement or rather a question to include in the statement that the two retail outlet centers may be identical, there's just no foundation for that at all. So basically the statement seemed appropriate, as were the entire Council comments.

MS. ROBESON: Well, I'm going to sustain the objection, Mr. Harris. I do understand, you know, what you're attempting to do, but I don't think it's fair, or it's within the scope of his testimony.

BY MR. HARRIS:

Q Mr. Noonan, you were here when your client, Mr. Cobb, testified, weren't you?

A Yes, I was.

Q And did you hear him say that he supported the Peterson project because it would potentially provide sewer to his property in the historic district?

A I think there was a discussion of sewer service at some point during the conversation, so I'd have to say yes.

MS. ROBESON: Okay. Let --

THE WITNESS: I don't know for certain that that was --

MS. ROBESON: Just anticipating --

THE WITNESS: -- Mr. Cobb's testimony.

MS. ROBESON: I don't think this witness testified that it was going to give -- this is cross --

MR. HARRIS: Wait. I was just asking him whether he had heard Mr. Cobb's --

MS. ROBESON: All right.

MR. HARRIS: -- testimony to that effect and I think he just answered reluctantly yes.

MR. CHEN: No.

MS. ROBESON: No.

MR. HARRIS: He did say yes.

MS. ROBESON: We, I --

BY MR. HARRIS:

Q Did you not say yes, Mr. Noonan?

MS. ROBESON: No. Mr. Harris, stop.

MR. HARRIS: He did.

MS. ROBESON: Stop.

MR. HARRIS: I heard him.

MS. ROBESON: He didn't say reluctantly. That was your --

BY MR. HARRIS:

Q Okay. Did you say yes?

MS. ROBESON: We know what he said. The record speaks for itself.

MR. HARRIS: Okay.

MS. ROBESON: Now where are you going with this because I'm trying to --

MR. HARRIS: I'm finished with that.

MS. ROBESON: -- tell you in many ways --

MR. HARRIS: I've got other questions. I've got other questions.

MS. ROBESON: Okay.

MR. HARRIS: I think I've made my point.

BY MR. HARRIS:
Q The Leesburg master plan, you pointed to one page in there and what that page that you quoted said that, would you agree with me, tourism and regional retail do not provide the high wage jobs that come with corporate offices and emerging technology such as high technology, bio-technology and telecommunications which are important to the area's economic competitiveness and to residents' qualify of life, isn't that what page 8-1 says?
A Yes.
Q Okay. And can you point to me any page in here that says that retail development does not add to the attractiveness of an area for employment use?
A No, I don't -- no.
Q And there's nothing in here that says retail has an adverse impact on employment use?
A Certainly not, no.
Q In fact, doesn't this plan recommend a mix of uses in the town?
A It does.
Q And didn't the town of Leesburg approve an outlet center at Leesburg?
A Yes.
Q And would you assume that they found a benefit to having that outlet center there?

A Yes.
Q The photos that you produced, let's turn to Exhibit 107, and the related --
A A and B.
MS. ROBESON: A and B.
BY MR. HARRIS:
Q Well, no, I meant the 101, whatever that was.
MS. ROBESON: Oh, 101?
MR. HARRIS: The photos themselves, beg your pardon.
BY MR. HARRIS:
Q Wouldn't you agree with me that the design of the Leesburg Corner Premium Outlets is different than the design that's been shown on the concept plans here?
A Yes, I would agree.
Q And you would agree with me that that facility was built at least 10 or 15 years ago?
A I believe, yes, I believe it was built in 1998.
Q And I assume you would agree with me that the site there differs significantly from the site at Cabin Branch in terms of, well, first of all, a lot of the development that surrounds the Leesburg Corner predated the Leesburg Corner outlet center, didn't it?
A Much of it did, yes.
Q Yes. And the Leesburg Corner Premium Outlets is

not located within a mixed use planned development like Cabin Branch is.
A That's true, it is not.
Q And, in fact, because of the sequential nature of that property, there are a lot of fences and separate entrances for properties around it rather than one combined, integrated --
A Yeah, that's --
Q -- plan?
A Yes, I would say that is true.
Q And those fences and secure entrances that you note in Exhibit 107, those would have a big impact on walkability of that property?
A On walkability, certainly, yes.
Q And the location of U.S. 15 in between that and the major housing sources to the west would also be a major impediment to walkability there?
A Yes.
Q The Cabin Branch project, the proposed outlet center, though, would be located within a planned community of 1,886 homes?
A Is that a question? Yes.
Q Yes. Yes. I'm sorry.
A I would say yes. Yes. I'm sorry.
Q Mr. Noonan, you submitted a pre-hearing statement

in this case and in that at page 3 --
MS. ROBESON: Do you have the exhibit number of that?
MR. CHEN: I think that's 31.
MS. ROBESON: Thank you.
MR. HARRIS: Thank you.
BY MR. HARRIS:
Q Page 3, my notes say, somewhere in here. Let me find this. Bear with me. Oh, wrong page. Bottom of page 3, the first bullet there, you say that the staff report, that's the staff report in our DPA, argues that the master plan should be set aside --
MR. CHEN: Excuse me, it says states, it doesn't say argued.
MR. HARRIS: Pardon?
MR. CHEN: You just said argued. It doesn't -- my --
MS. ROBESON: Where are you? I --
MR. HARRIS: I'm reading --
MS. ROBESON: I'm not with you.
MR. HARRIS: I'm reading from --
MS. ROBESON: Oh, I see.
MR. HARRIS: -- the bullet.
MS. ROBESON: I see.
MR. HARRIS: It's in plain English.

MS. ROBESON: No, no.
MR. HARRIS: "The staff report argues that the master plan should be set aside."
MS. ROBESON: He, it does say argue.
MR. CHEN: Yes. I missed the page that said that.
MS. ROBESON: Okay. Go ahead, Mr. Harris.
BY MR. HARRIS:
Q Do you see that?
A Yes, I do.
Q Where in the staff report do they argue that the master plan should be set aside?
A On the staff report? Now I'm having to find the right page on the staff report.
Q Here.
A I'm sorry. Let's see.
Q May I call your attention to page 19, might that be --
MS. ROBESON: Okay. Wait, wait, wait. I -- let me just catch up with you, okay?
THE WITNESS: Okay.
MR. HARRIS: Page 19 at the top.
MS. ROBESON: I need the exhibit, I need the exhibit number of the staff report.
MR. HARRIS: Oh.
MS. ROBESON: It's my recollection it's in the

50's, but I'm having all my cases run together. It's 50, Exhibit 50.
MR. HARRIS: Exhibit 50. Thank you, ma'am.
BY MR. HARRIS:
Q Exhibit 50, what page, page 19, I think I directed you to?
A Yeah. I was actually -- I actually used a quote from the bottom of the page, given that the fast pace --
Q What page, I'm sorry?
A 19. We're on the right page.
Q Okay.
A I'm sorry.
Q Okay.
A "Given the fast pace of development in the past decade and the evolution of present day employment centers with increasing distance, want us to take into consideration the fact that the effectiveness and applicability of the specific recommendations of the nearly 20-year-old master plan may not be relevant to current needs and demands."
That's what I was quoting.
Q Okay. Wouldn't you agree with me that that is saying that the master plan should be interpreted flexibly?
A I think that's the intent of the statement, yes.
Q The, in fact, master plans are guidelines in

Maryland, they're not straight jackets, is that correct?
A That's --
MS. ROBESON: Well, wait a minute.
THE WITNESS: That's open to --
MS. ROBESON: Does that call for a legal conclusion?
MR. HARRIS: Okay.
BY MR. HARRIS:
Q In your experience as a planner, have you seen projects that are approved that are not in strict compliance with a master plan?
A Yes, so we have to say.
Q And does that happen more frequently as the master plan is older?
MR. CHEN: Objection. Speculation. If you can answer --
MS. ROBESON: I'll overrule that. I think it's --
THE WITNESS: I think it has --
MS. ROBESON: If you know. I mean --
THE WITNESS: No.
MS. ROBESON: -- the question is if you know.
THE WITNESS: I've done a lot of, but, no. I mean without talking about a specific, I think very often it's less in the case of the age of the master plan than it is in those cases where the master plans actually have competing

and sometimes even inconsistent policy statements. Then what happens very often is there's a reasonable argument that we're consistent with one phrase in the master plan, but not in -- you know, in strict compliance with another and in that sense it becomes more of a guide than a straight jacket.
Q And you're familiar with the Terrapin Run case?
A Yes.
Q And didn't that case, didn't the Maryland court in that case conclude that master plans are flexible and not, you know, rigid documents?
MS. ROBESON: I'm going to stop you --
MR. CHEN: Objection.
MS. ROBESON: -- on that because it does call for a legal conclusion and he's not here as --
MS. ROBESON: He said he's familiar with the case and he worked for the Maryland --
MS. ROBESON: But he's not a lawyer.
MR. HARRIS: He worked for the Maryland Department of Planning that was intimately involved in that case.
MS. ROBESON: Yes, and that case has been overruled. So, you know --
MR. HARRIS: Most --
MS. ROBESON: -- I don't know what to tell you.
MR. HARRIS: We'll take that. I'd like to take

that as the next line of questioning.
MS. ROBESON: I --
MR. HARRIS: Okay?
MR. CHEN: It calls for a legal conclusion.
MR. HARRIS: I just asked him if he knew whether that case said that.
MS. ROBESON: And he said yes. So and your --
MR. HARRIS: And he did say yes.
MS. ROBESON: -- next question --
MR. HARRIS: Okay.
MS. ROBESON: -- what, no, your next question was --
MR. HARRIS: Next question --
MS. ROBESON: -- isn't it true about what the case said?
MR. HARRIS: Yes.
MS. ROBESON: And you can argue what the case said --
MR. HARRIS: Okay.
MS. ROBESON: -- but he's a land planner.
BY MR. HARRIS:
Q Are you familiar with the Maryland Annotated Code, State Finance and Procurement Article?
A Yes.
Q And didn't the state adopt legislation --

MR. CHEN: Objection. Wait. Excuse me. Objection. This goes beyond direct examination of this witness.
MR. HARRIS: It does not.
MS. ROBESON: Where are going with this?
MR. HARRIS: I would proffer that Section 5-7(b)(01) and (02) of the state, of the Maryland Annotated Code, State Finance and Procurement Article, indicates that in priority funding areas a requirement for master plan consistency does not require consistency with the uses and densities recommended in the master plan.
MS. ROBESON: But --
MR. HARRIS: I'm asking him if he's familiar with that.
MR. CHEN: This is -- what's worse, it's not really beyond the scope of direct examination, he's now asking this witness to interpret a state statute.
MR. HARRIS: I just asked him if he was familiar with it.
MS. ROBESON: And I'm going to sustain the objection.
BY MR. HARRIS:
Q Mr. Noonan, is -- how many other cases have you served as a planner in Montgomery County?
A I think I testified at the very beginning that I

had not testified in Montgomery County --
Q And have you ever done any planning work --
A -- at hearings.
Q -- in Clarksburg?
A No.
Q And was the, this case the first time that you had occasion to read the Clarksburg master plan?
A Yes, let's -- my recollection, I hadn't read it.
Q And, in fact, although your pre-hearing statement indicated your conclusion that the staging recommendations in the master plan precluded retail from proceeding before the town center, you've since corrected that when you learned about the 2011 amendment, is that correct?
A That's true, yes.
Q I believe your testimony was that the discussions in the plan with respect to retail focused on neighborhood retail, is that correct?
A That's correct.
Q And there, I think you also said that there's nothing in the plan that makes any comment or recommendation with respect to specialty retail?
A That's correct.
Q But you did recognize that the technical appendix, Exhibit 60(b) maybe --
A Uh-huh.

Q -- page 12, does note that there is a difference between comparison retail and neighborhood retail?
A It actually -- yes, it does.
Q And the demand calculations that the staff had done at that time concerns neighborhood retail only?
A That's correct.
Q And there is nothing in the master plan that says a property owner cannot construct specialty retail so long as the zoning allows it?
A The -- I believe the master plan had specific recommendations for why they recommended the use of the MXPD zone in this area and that did not include the addition of additional square footage for commercial space. It had specific recommendations on a couple of pages, page 101, and again, I believe, on page 67. The specific purposes for which they felt that the MXPD zone should be applied in the Cabin Branch area and those did not include additional commercial retail space.
Q Okay. But my question was is there anything in the master plan that says specialty retail uses cannot be constructed on a property where the zoning allows that use?
MR. CHEN: Objection. Well, you're saying specialty retail?
MR. HARRIS: Correct.
MR. CHEN: Okay.

THE WITNESS: I'm sorry, could you repeat the question?
BY MR. HARRIS:
Q Is there anything in the 1994 Clarksburg master plan that prohibits a property owner from constructing specialty retail on a property where the zoning for that property would allow it?
A I don't think, believe there's specific language prohibiting that. I think you have to, again, read the purpose that the plan indicated, the purpose that the MXPD zone was going to apply to. And then you also have to look at parallel recommendations in the different planning areas in the master plan. For example, in the mixed use zone and other areas, the town center area, it does mention additional 300,000, I might be getting my math wrong here, 300,000 square feet of commercial space in the town center zone. Similar language cannot be found in the Cabin Branch neighborhood. So --
Q Okay. It, is it your opinion that the -- I think you're referring to page 46 of the master plan that's Exhibit 60(a)?
A Yes, that's what I was referring to.
Q And what you're saying is that where it talks about commercial uses, you're saying that that term could include specialty retail use?

A Yeah, my general reading of that is yes.
Q Specialty retail use is a commercial use?
A I would believe so.
Q Okay. I'm going to show you a copy of a portion of the MXPD zone Sections 59-C-7.5 and I'll let you read it, but --
A Okay.
Q -- would you agree with me that the uses that are permitted in the zone and specifically Section 59-C-7.52 allows residential uses, it allows commercial uses and it allows industrial uses?
A Yes.
MR. CHEN: I'm sorry.
MR. HARRIS: Okay.
MR. CHEN: Did that -- pardon me.
MR. HARRIS: And would you --
MS. ROBESON: Just a second.
MR. CHEN: I object to the question. The law speaks for itself. I mean I don't understand the object of getting a witness to repeat verbatim what's contained in the zoning ordinance by, especially handing him the zoning ordinance. If he wants to ask what is your understanding as to what is permitted as to the uses in the MXPD zone, I have no problem with that type of question. But to give a witness a copy of the zoning ordinance and ask him to read

verbatim out of the ordinance I think is, at the very least, an inappropriate form of the question.
MR. HARRIS: He's testified extensively about --
MS. ROBESON: Well, why don't you --
MR. HARRIS: -- in fact, just moments ago --
MS. ROBESON: -- I --
MR. HARRIS: -- that his opinion that we could not do specialty retail in the MXPD zone here.
MR. CHEN: I don't think that was his testimony at all.
MS. ROBESON: I don't think that was his testimony. His testimony was that it's not consistent with the master plan.
MR. HARRIS: Okay.
MS. ROBESON: But if you want to ask him if you feel that you need to and you want to ask him what his interpretation of commercial is based on his experience, you can do that.
MR. CHEN: I thought he --
MR. HARRIS: I think he just said that commercial would include specialty retail.
MS. ROBESON: Right. But I do, I did not hear him say in his testimony that it was prohibited by MXPD. I heard him say that --
MR. HARRIS: Okay.

MS. ROBESON: -- but continue.
BY MR. HARRIS:
Q And so if there is testimony in this case that the commercial land use permitted in the MXPD zone, Section 59-C-7.52(b) says that commercial includes all permitted and special -- all permitted --
MR. CHEN: I'm sorry.
MR. HARRIS: -- permitted and special exception uses allowed in the C-2 zone and that the C-2 zone allows specialty retail, you have nothing to indicate anything to the contrary, do you?
THE WITNESS: I have no doubt that the MXPD zone, the commercial and retail uses and specialty retail uses are one of the many uses that would be permitted generally in an MXPD zone. That wasn't the point I made. You know, I -- the master plan makes fairly specific suggestions, suggestion statements about what the purpose of applying the MXPD zone in the Cabin Branch area should be and that did not include adding additional commercial retail space when it was very well within their ability to say that and they did not say it and I guess that was the point I was making.
BY MR. HARRIS:
Q They also, however, did not say you could not do it, did they?
A No, they did not make any blanket, negative

statements.
Q And if they wanted to, they could have done that as well?
A I presume so. Usually you write a master plan to describe what you want to do and write it so that it's consistent for the goals for a specific area. So that's -- I mean unless there's some resource you want to specifically protect, that's one of the few times you will see a negative statement that you would not do a particular use in a particular area.
Q But wouldn't you agree with me you've already testified that page 46 of the master plan where it talks about commercial uses in the town center, that that's not specific as to allowing specialty retail, but nonetheless, specialty retail would be allowed there?
A Well, again, they recommend application of different zones in the town center as well and one of which is commercial uses. The point I was making when I referred to that particular paragraph was that relative to the relationship between the town center and the various neighborhoods, this is the only place in the plan where you see a discussion of retail and commercial development in addition to the neighborhood retail that they put out specific square foot recommendations for. So it's the clear implication in the master plan that their view of the

specialty or commercial and other kinds of retail in addition, other than the neighborhood retail would occur in the town center and not in the neighborhoods. That was the point of that paragraph.
Q Okay. The Cabin Branch, the recommendations for the Cabin Branch project in the Clarksburg master plan recommend 2,420,000 square feet of employment use, is that correct?
A That's correct.
Q And are you aware that a hotel has been approved there?
A Yes.
Q And is there anything in that master plan that recommends the hotel on the Cabin Branch property?
A I didn't see a specific reference to a hotel, no.
Q And so that appears to be an example of a use that's not specifically recommended in the master plan, but is allowed under the MXPD zone and, therefore, was approved?
A I would have to say yes.
MS. ROBESON: I --
BY MR. HARRIS:
Q And the same is true with respect to the proposed hospital there? There's nothing in the master plan that recommends a hospital there, is there?
A Actually I thought I saw a reference, but I

couldn't locate it right now. But I mean the area was recommended for employment and $24 million of employment uses. It was a variety of different --
MR. CHEN: You said --
THE WITNESS: Pardon?
MR. CHEN: You said dollars. You said typically dollars.
THE WITNESS: 8.4 million -- did I?
MR. CHEN: Yes.
THE WITNESS: Excuse me.
MS. ROBESON: I'll take that.
THE WITNESS: So would I. Sorry about that. It's 2.4 million square feet of employment uses in the Cabin Branch area, so there are a variety of uses that would fit that definition.
BY MR. HARRIS:
Q And hotel is a use that fits within the employment designation.
A I would think so, yes.
Q You're aware that Cabin Branch is in stage 3 of the staging recommendations in the master plan?
A Yes.
Q And on page 1 of your pre-hearing statement, up at the top, the first paragraph --
A Okay.

Q -- about five lines down you say specifically the master plan encourages the early development of the town center through careful staging of public facilities and private development. And then it favors initial development east of I-270. Would you agree with me that it says that?
A Yes.
Q Okay. And would you agree with me as well that it then recommends that stage 3 occur before stage 4 in the overall development of Clarksburg?
MR. CHEN: Where are you reading that?
MR. HARRIS: In the master plan.
MR. CHEN: Okay.
BY MR. HARRIS:
Q Are you familiar with the master plan, Mr. Noonan?
A Yeah, yes, yes.
Q Yes? And are you --
A Stage 3 would generally be before stage 4.
Q Okay. And are you aware that the Cabin Branch project is in stage 3?
A Yes.
Q And are you aware that the Peterson property is in stage 4?
MR. CHEN: Objection. What is the relevancy with the Peterson?
MS. ROBESON: Sustained.

BY MR. HARRIS:
Q You're aware that stage 3 has been open for development and can proceed?
A Yes.
Q And so your statement about encouraging early development of the town center doesn't preclude development at Cabin Branch at this time?
A Absolutely not, does not preclude development at Cabin Branch.
Q Are you aware of anything in the MXPD zone that requires a proposed use to be consistent with the master plan?
A Yes.
Q Can you -- I'll hand you a copy of the MXPD zone and ask you if you could point to that?
A Sure. I believe there's a statement here if I can locate it. It talks about -- okay.
MS. ROBESON: Well, all right, go ahead.
THE WITNESS: Do you want me to continue reading it?
MS. ROBESON: Yes.
THE WITNESS: Okay.
MR. CHEN: Madam Examiner, I think I know where you're going with that, but I'm not going to object to the question.

MS. ROBESON: All right. I can find it.
THE WITNESS: Yes.
MR. HARRIS: Can you?
MS. ROBESON: So if we need to sit here while he finds --
MR. HARRIS: I think it, I think it says compatible.
MS. ROBESON: No. In the objectives and purpose it says it is intended that this zoning category be utilized to implement existing public plans and pertinent County policies in a matter and to a degree more closely compatible with said County plans and polices than may be possible under other zoning categories.
MR. HARRIS: Correct. I heard the word compatible.
MS. ROBESON: It's the same --
MR. HARRIS: I heard the word compatible, not consistent. And, in fact, the word compatible is --
MS. ROBESON: Well, that's legal argument.
MR. HARRIS: -- used throughout the zone.
MS. ROBESON: I'm --
MR. HARRIS: I'm just --
MS. ROBESON: I'm just trying to speed the hearing up.
MR. HARRIS: Okay. All right. I'll move on.

In --
MS. ROBESON: Because whether he says it or not, that's the one that, you know, that's what I'm going to apply.
MR. HARRIS: I expect you will.
MR. CHEN: As well as the other one.
MS. ROBESON: What other -- well, okay. This is legal argument.
MR. HARRIS: Yes. Yes.
MS. ROBESON: We're not going to get in there, but it's language similar to the PD zone.
MR. CHEN: And also the development plan section.
MS. ROBESON: Okay. Well, we -- see, so --
BY MR. HARRIS:
Q With respect to the location of outlet centers, they're not typically located within a town center, are they?
MR. CHEN: Objection. If you know.
MS. ROBESON: Well, I've got to let him answer.
MR. HARRIS: Obviously.
THE WITNESS: Was I instructed to answer the question?
MS. ROBESON: Yes.
THE WITNESS: I'm sorry.
MS. ROBESON: Yes, you are.

THE WITNESS: Definitely, no, I would say no.
BY MR. HARRIS:
Q Okay. And would you agree with me that Potomac Mills, Hagerstown, Leesburg, Rehobeth outlets, none of those is located within a town center?
A That's correct, they're not.
Q And would you agree with me that the town centers in Leesburg, Hagerstown and in Rehobeth all have survived well despite the location of outlet centers outside of the town centers?
A Absolutely, but you're talking about established communities in many of those places. To compare Leesburg, a good example, which has a, which has been there for 100 and some years as a viable municipality, town with an established downtown, to Clarksburg where the master plan is trying to do something, build something new in the area, you know, that speaks, to me that speaks to why the master plan talks about staging and desiring for development in the town center before the neighborhoods that, you know -- and quite honestly, there's been discussions in the planning field for many years about commercial development in peripheral areas negatively impacting the businesses in the downtown areas and it's only reasonably in the last 10 to 15 years that many of these town centers started to recover economically.
So I think the authors of the master plan for

Clarksburg were very concerned about that knowing that they did not have a viable town center like either Leesburg or even more closely Gaithersburg that could survive the competition from this kind of a retail center in the neighborhoods. And I think that's part of the purpose that they expressed for setting that hierarchy and that staging proposals.

Q There are no outlets or specialty retail within the historic district in Clarksburg today, are there?

A No.

Q And there really is no room for construction of that type of space within the historic district, is there?

MR. CHEN: Objection. There's been absolutely no information about the size, the size needed for --

MS. ROBESON: He can answer if he knows.

THE WITNESS: In terms of the historic district, I don't believe there is room for it. I mean I think that's why the town center district is a larger geography than just the historic district and there's a lot of attention being paid to making sure that scale and other, and the density of development surrounding the town center somehow supports and is compatible with preserving the historic district. But the historic district itself doesn't have that level of commercial development currently.

BY MR. HARRIS:

Q And none is planned there?

A I'm not absolutely certain about what -- again, I think there are recommendations in here to preserve the historic district and can develop around it to make it a component of the town center.

Q Okay. With respect to the town center project, I think one of the witnesses explained that the town center consisted of different components. You're familiar with the town center mixed use project?

A Which -- east of --

Q East of 355 between Stringtown Road and, north of Stringtown Road and south of Maryland Route 121?

A Yes.

Q Okay. And you're familiar with a plan for neighborhood retail there?

A Yes.

MS. ROBESON: Just a second. Do you have an objection, Mr. Chen?

MR. CHEN: I'll let it go for now.

MS. ROBESON: Okay.

BY MR. HARRIS:

Q And there is no specialty or outlet retail planned in that location of Clarksburg, is there?

A In the neighborhood retail center?

Q Correct.

A My understanding is that there's not.

Q And the with the development of that neighborhood retail center, there is no other ground within that town center mixed project for construction of an outlet center, is there?

MR. CHEN: Objection. Again --

MS. ROBESON: I don't believe that that was within the scope of his -- is that your objection --

MR. CHEN: Yes.

MS. ROBESON: -- Mr. Chen? I don't think that --

MR. HARRIS: He testified extensively about page 46 and 47 of the master plan saying that there could be more commercial space there which he was interpreting to be, that could be specialty retail and I'm just trying to figure out where he thinks that might go.

MR. CHEN: I'll withdraw the objection.

MS. ROBESON: Yes. If --

MR. KLINE: Then I'll raise an objection.

MS. ROBESON: All right.

MR. KLINE: And that is I believe the question was specialty retail and then in the context of the question was where a regional outlet mall can go within the town center.

MR. HARRIS: Okay. I'll rephrase --

MR. KLINE: And I think the point --

MR. HARRIS: -- the question.

MR. KLINE: Okay. Thank you.

MS. ROBESON: If you have done the analysis.

BY MR. HARRIS:

Q Do you know of any location within the town center mixed use project where an outlet retail center could be built?

MS. ROBESON: Wait, I'm sorry. I don't understand. What are you talking about when you say the town center mixed use project?

MR. HARRIS: That was what I tried to define, east of 355 --

MS. ROBESON: I know. But I don't know --

MR. HARRIS: -- north --

MS. ROBESON: Go ahead.

MR. HARRIS: The Newlands project, the Terrabrook project, it is a mixed use project of some 700 dwelling units --

MS. ROBESON: Okay.

MR. HARRIS: -- I think.

MS. ROBESON: All right.

MR. HARRIS: And a retail center that Dave Flanagan and Elm Street are proposing there. It's north of Stringtown Road, okay?

MS. ROBESON: Okay. You're testifying now.

MR. HARRIS: No, okay, well, you asked me what I

was referring to.
MS. ROBESON: I did.
MR. HARRIS: Okay.
MS. ROBESON: I did and, Mr. Noonan --
THE WITNESS: Yes.
MS. ROBESON: -- do you know of this project?
THE WITNESS: I know of the retail center proposal.
MS. ROBESON: Are you familiar with the other portion of it?
THE WITNESS: I don't have any specific knowledge of what's proposed.
MS. ROBESON: And your question is?
BY MR. HARRIS:
Q Okay. So are you aware --
MS. ROBESON: No, ask me your question.
MR. HARRIS: I'm sorry. Whether he knows if there is any available ground within that town center mixed use project on which an outlet center could be built.
MR. CHEN: Is this for the Newlands area for that?
MR. HARRIS: That's what I've defined now twice.
MR. CHEN: Well, excuse me --
MS. ROBESON: Well, wait a minute. You're way -- you guys know way more about -- and so I need it explained to me. So are you saying --

MR. HARRIS: I can --
MS. ROBESON: -- within 121 Stringtown Road and is there a third boundary or a fourth boundary?
MR. HARRIS: 355 on the east and --
MS. ROBESON: On the east or west?
MR. HARRIS: On west, I beg your pardon, thank you for correcting me, on the west, and then on the east it is, what do they call that, Snowden Farm Parkway.
MS. ROBESON: Okay.
MR. HARRIS: And I think --
MS. ROBESON: I'm going to let him answer if he -- yes, Mr. Kline has an objection.
MR. KLINE: My objection is not to the question as phrased, but I think where it's, what it's trying to imply and that is can you have a retail outlet center within the remaining land in the town center?
MS. ROBESON: Well, when you say town center --
MR. KLINE: Yes.
MR. CHEN: What is the town center?
MR. HARRIS: The town center mixed use project.
MS. ROBESON: Okay. So you're not talking about the town center district?
MR. HARRIS: That's correct. This -- unfortunately, this is confusing --
MR. KLINE: I withdraw my objection.

MR. HARRIS: Okay. Thank you.
MS. ROBESON: I just want to make the record clear --
MR. HARRIS: I understand.
MS. ROBESON: -- when we go up and sometimes these references to particular names or projects, not everyone will know what they are, that's all.
MR. HARRIS: The term --
MS. ROBESON: I understand.
MR. HARRIS: -- the term town center is used three different ways in Clarksburg. One is with respect to the town center district reflected in the master plan, one is with respect to the town center mixed use project previously known as the Newlands project that the, the Terrabrook project, before that the Klebanoff project.
MS. ROBESON: The one --
MR. HARRIS: The one that I just described the boundaries of.
MS. ROBESON: Yes.
MR. KLINE: Which is the neighborhood retail community.
MR. HARRIS: Right. And then the third use, definition of town center frequently is the town center neighborhood retail space that Dave Flanagan and Elm Street wants to propose.

MS. ROBESON: All right. So with that, you know, it is testimony, I know, but I'm desperate for -- yes?
MR. CHEN: I object because I think this goes beyond direct examination. I mean this is -- and I appreciate Mr. Harris's identification of what the terminology is because, frankly, I was confused at one point about it. I now understand that he is talking about apparently another project on the east side of 270 that is beyond direct examination. But --
MS. ROBESON: I'm going to let him answer because there was testimony about the 300,000 square foot number in the master plan. I'm going to take it for the weight it deserves because, for a lot of reasons, but go ahead.
MR. HARRIS: So back to the question. Within that --
MS. ROBESON: Back to the question.
MR. HARRIS: -- boundary area that I mentioned, which I've referred to as the town center mixed use project east of 355 --
MR. CHEN: East of 355?
MS. ROBESON: West.
MR. HARRIS: East of --
MS. ROBESON: East.
MR. HARRIS: -- 355.
MS. ROBESON: Right.

MR. CHEN: This side?
MR. HARRIS: Yes.
MS. ROBESON: He's right.
MR. HARRIS: Correct. And you're looking at it.
MR. CHEN: I'm looking at it.
MR. HARRIS: You're looking at a diagram of page, on page 45 --
MS. ROBESON: 45.
MR. HARRIS: -- of the master plan --
MS. ROBESON: Right.
MR. HARRIS: -- which is an artist -- would you agree with me that's an artist's, you know, you know, sort of --
MS. ROBESON: Well --
MR. HARRIS: -- graph of that area?
MS. ROBESON: -- it says it's an illustrative --
MR. HARRIS: Okay. Fine.
MS. ROBESON: -- sketch --
MR. HARRIS: Okay.
MS. ROBESON: -- so he doesn't have to clarify that.
BY MR. HARRIS:
Q Within that area shown on Exhibit 40, page 45 of the master plan, are you aware of any land that would be sufficient size to build an outlet center?

MS. ROBESON: If you know.
THE WITNESS: I don't know what the land requirements are for an outlet center. What I was, what I was looking at when I testified about this illustration earlier and the illustration in, submitted by the development for the development plan amendment for the Cabin Branch area was that this whole area had a, demonstrated a mix of use that would be typical, would be desired in the town center. That's pretty much what it says here.
Now there's also, to the other side of the historic district, which is centered on Maryland 355, is a transit center and a lot of, you would assume, and I did assume when I read the master plan, that that is the location where you would have much of the additional retail or commercial community activity space separate from what more of the neighborhood-oriented retail center on the other side of the historic district. That seems to be the vision that the master plan is suggesting. Whether or not there is sufficient land there for an outlet center, I couldn't speak to.
MS. ROBESON: Well, the question is in that area shown on Figure 20 on page 45 of the master plan, if you know.
THE WITNESS: But that to me doesn't give me the visual impact of what I view as an outlet center. However,

there could be some very high end and specialty retail or commercial spaces in that location at a much higher density than what I, my vision of an outlet center is. Now, you know, there's always been confusion to my mind in this discussion all along as to, you know, what is being proposed in Cabin Branch. Is it an outlet center? Is it high end specialty retail? Are those mutually exclusive? You know, those kind of issues are, kind of go to the core of some of these. Again, I can't speak to what an outlet center, you know, which in my mind is a much larger provision for external parking and things that are shown in this town center illustrative sketch.
BY MR. HARRIS:
Q But, Mr. Noonan, I think you just said that you don't know whether this development plan amendment is proposing an outlet center or some other type of specialty retail, is that, wasn't that your testimony?
A I think the language in the development plan amendment and those things is, confuses the issue about what is proposed to you. When I saw your proposal, I saw high end, specialty retail kind of centers that consisted with your own development plan amendment justification statement would have set, set the Cabin Branch area forth as a unique experience, an area that would serve as a center for the Clarksburg area and that's where I thought the inconsistency

was.
Now I think an outlet center in terms of my vision for that which is more of what's happening with Leesburg and knowing that's a 20-year-old design, is inconsistent with the Cabin Branch neighborhood proposal for a variety of other reasons in that it doesn't provide the high-end employment in support of the I-270 corridor. It doesn't, it doesn't provide the, you know, the neighborhood environment and recent for a neighborhood scale retail. It's much more high-density and larger scale than that. So it's inconsistent, an outlet center is inconsistent with a variety of areas. You know, whether an outlet center is ever going to be a part of the town center approach is something I really can't speak to, but it seems to me that when you provide high-end, specialty retail and a community focus, not just for Cabin Branch, but for the whole Clarksburg area in the Cabin Branch area, that that conflicts with what the master plan envisions for the town center. And I think that was the core of what I was --
MR. HARRIS: Madam Examiner, out of politeness to Mr. Noonan, I let him go on extensively there. It was not responsive to the question at all. My question was whether he knew whether there was outlet retail planned at Cabin Branch or not and then what he did was he reiterated all of his testimony. If we're going to get through this hearing,

he's going to have to answer the questions and not return to, you know, his stump speech.

MS. ROBESON: Well, I think that he was expressing that he's unsure of exactly what type of retail is being proposed. Now I'm aware of your testimony that -- I think he was reflecting that an outlet is not an outlet is not an outlet which is what, I think, Mr. Bogorad testified, that this is a new breed of premium retail. And then I think that's what he was reflecting, struggling with in his answer.

MR. HARRIS: Okay.

BY MR. HARRIS:

Q And, in fact, your confusion about what kind of retail, your lack of understanding about what the retail would be is reflected in page 3 of your pre-hearing statement, Exhibit 31, isn't it, where you say, "The specialty retail likely to be located here would include retailers like Kohls, Target and Dick's Sporting Goods. Have you heard any testimony here in the five or six days of hearings that that is the type of retail proposed here?

A Not specifically, no.

MS. ROBESON: So you aren't going to have a Dick's?

BY MR. HARRIS:

Q At page 1 of your pre-hearing statement, Exhibit

31, let me find this. Bear with me a minute. I can't find it. Move on. Did you hear Mr. Bogorad's testimony when he spoke?

A Yes.

Q And did you hear his opinion that outlets, outlet retail does not adversely impact neighborhood retail?

A Yes.

Q And did you -- was part of his reasoning that the two are, I'll call it apples and oranges, very different types of retail?

A Yes.

Q And that they draw from different population bases, neighborhood retail drawing from the local neighborhood and outlet retail drawing from a much larger, regional area?

A Yes.

Q And do you have any different opinion about that?

A No.

Q Are you aware that there is a strong desire to have a grocery in the town center retail area?

A Up in the neighborhood where we had a retail area, yes.

Q The neighborhood retail we were speaking of a few minutes ago --

A Yes.

Q -- east of 355?

A Yes.

Q And would you agree with me that the support for, or the ability to build a grocery store depends upon demand for that?

A Certainly, yes.

Q No one would build a grocery store if there were not going to be customers to use it?

A Yes.

Q Do you have any formula or calculation by which you personally could conclude the population base or number of households that would support a grocery store?

MR. KLINE: Objection. I believe that goes beyond the original examination. I don't recall him testifying on that subject.

MR. HARRIS: He testified extensively about the importance of grocery and, you know, both in the town center and in Cabin Branch. It's directly relevant.

MS. ROBESON: I don't know if that's a fair characterization, but I don't have the transcript, but I'm going to let him answer because his testimony did deal with the impact of this development on the town center.

MR. KLINE: Well, then --

MS. ROBESON: So I'll --

MR. KLINE: -- may I alter my objection? And my

objection would be it is not his obligation to do an economic analysis to determine that the master plan recommendation was valid and that's what the question presumes is have you gone out and done a study to say that there is still a need for a grocery store in Cabin Branch? And that's not his --

MS. ROBESON: To the extent, you know, if you had the ability to form an expert opinion on it, expert in the sense of your qualifications, can you answer the question?

THE WITNESS: No. I don't have a formula.

MS. ROBESON: So when you're saying it needs demand, you're speaking as a lay person?

THE WITNESS: I'm speaking as a lay person, but I also read the policies in the comprehensive plan and specifically the -- it says part of -- and specifically with regard to the 2011 amendments, which removed the staging provision that we mentioned earlier, I mean the purpose of that amendment was to allow for neighborhood retail space to start moving forward in the neighborhoods separate from the earlier provisions for the, I think permitting or actual development of a certain amount of square foot in the town, footage for neighborhood retail in the town center. The discussion there was to allow retail development to proceed without delay in the neighborhoods and particularly to allow development of retail, including a grocery store, in the

neighborhood. And that was more of what I was speaking to in terms of what was proposed in the Cabin Branch area.
MS. ROBESON: Okay. In light of that, do you want to rephrase your question or --
MR. HARRIS: I think he's already answered the question, that he's not aware of any basis for calculating the demand for a grocery store. Am I fairly summarizing your comments?
THE WITNESS: I'm sure there is one, but I know what it is.
MR. HARRIS: Yes. Okay.
BY MR. HARRIS:
Q But you are aware that Mr. Flanagan and Elm Street are very anxious, excuse me, anxious to build a grocery store in the town center mixed use project when they are able to do so?
MR. KLINE: Objection. Could you use Mr. Flanagan's letter please?
MR. HARRIS: I'm sorry. Elm Street, Third Try Company, that is Third Try, LLC, I think it's called --
MR. CHEN: Right.
MR. HARRIS: -- appropriately?
THE WITNESS: I have heard that testimony, so --
MR. HARRIS: Okay.
THE WITNESS: -- I'm aware of it.

MS. ROBESON: Is it, wait, wait, wait.
THE WITNESS: I'm sorry.
MS. ROBESON: Are you being serious that it's called Third Try, LLC?
MR. HARRIS: It is called Third Try, LLC.
MS. ROBESON: So when you're talking about Third Try, LLC, that is a company formed by Elm Street whose letter is an exhibit in this file?
MR. HARRIS: That's correct.
MS. ROBESON: All right.
MR. HARRIS: So, yes, so I -- when you've been around Clarksburg as long as I --
MS. ROBESON: Clearly.
MR. HARRIS: -- these things are sort of known, but --
MS. ROBESON: Yes, I --
MR. HARRIS: -- you know. Okay.
BY MR. HARRIS:
Q So you're aware that the community would like him to build a grocery store there and he's willing to do it so long as the demand will support it?
MR. CHEN: Objection to the terminology community. I mean --
MS. ROBESON: Yes.
MR. CHEN: -- if you want to state in the

letter --
MR. HARRIS: Okay.
MR. CHEN: -- give him the letter.
MR. KLINE: Yes, just read from the letter.
MR. HARRIS: Yes. Okay. Which letter --
MR. KLINE: Yes, you just quote from Mr. Flanagan.
MS. ROBESON: Wait. Wait. Does he need to read from the letter? Can you just --
MR. KLINE: No, no.
MS. ROBESON: -- ask --
BY MR. HARRIS:
Q You're familiar with Mr. Flanagan's letter?
A I've heard that testimony.
Q Yes.
A I'm familiar with it.
Q Okay. Fine.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q And would you agree with me that since the 1994 master plan was adopted, there have been a lot of changes with respect to grocery services regionally and, in fact, in the Clarksburg/Germantown area.
MR. CHEN: Objection. This is going back to, again, the economic aspect of grocery stores. It's outside its area of land planning and land use of grocery stores.

He has already testified he does not have an economics background or a formula for when a grocery store should be appropriate for a location and I think this question is another effort to get into that area and this witness has candidly said he does not have any experience nor expertise.
MR. HARRIS: I'll accept that. Would you agree with me, Mr. Noonan, that if there is not demand for a grocery store, you would not expect someone to invest the money to build one?
MR. CHEN: Objection. It's totally irrelevant.
MS. ROBESON: We've already ruled on that issue and you have -- I'm not sure where this detail is going. He testified to what the master plan envisioned. Is this cross-examining him on the master plan is not going to be able to happen? Is that where you're going with this?
MR. HARRIS: That is part of it. The essence of his testimony as I heard it was in his belief Cabin Branch should be held to doing 120,000 square feet of neighborhood retail at a single location. And I'm trying to question the credibility of that statement or the support for it because of any number of circumstances.
MS. ROBESON: Well, he is -- I mean you have the rebuttal to bring your witness on to say it isn't going to happen if that's --
MR. HARRIS: We will. I'm just trying to see if

he knows anything to the contrary.
MS. ROBESON: Well, you've already elicited --
MR. HARRIS: Okay.
MS. ROBESON: -- that he's not an expert in the financial market strategies for grocery stores.
MR. HARRIS: Okay. We can move on.
BY MR. HARRIS:
Q Would you agree with me, Mr. Noonan, that the pattern and location of neighborhood retail has changed over the past 20 years? For example, I think you might have said the video stores, I think you started off with that as a neighborhood retail use and then said, oh, never mind, they really don't exist any more. So would you agree with me that that's one neighborhood retail use that doesn't exist, let's simply the question?
A I would think not. I mean I, the video store reference was in, was in the list of uses in the technical amended and clearly that's not a use.
Q And would you agree with me as well that in the past the proliferation of Home Depot and Lowe's has resulted in, you know, a relatively rare occurrence of a hardware store in a neighborhood retail center?
MR. CHEN: Objection. Again --
MS. ROBESON: If you know.
THE WITNESS: From general observation, not as an

expert, I think that's clear. Yeah.
MR. HARRIS: And would you agree with me as well that with online banking, particularly with the younger generation --
MS. ROBESON: Okay. I understand where you're going with this. I don't think he's the witness to ask and I don't want to preclude you from making a point, but he's already said he's not an expert.
MR. HARRIS: Okay.
MS. ROBESON: You're asking what particular uses are involved in neighborhood retail, I guess, with the ultimate perhaps conclusion that you don't need as much neighborhood retail. That's where I see you going, is that correct?
MS. ROBESON: You got the point perfectly.
MS. ROBESON: And I don't think that he is the witness. You have a far better witness back in the back row there, Mr. Bogorad.
MR. HARRIS: And thank you. Thank you. We can move along then.
BY MR. HARRIS:
Q Would you agree with me that Exhibit 60(c), the technical appendix, done in connection with the master plan had a forecast at least at that time of the amount of neighborhood retail space for various areas?

A Yes.
Q And west of I-270, does it suggest that the potential demand for neighborhood retail space would be 75,000 square feet?
A That's the number on the chart, or on the table, yes.
Q And would you agree with me that potential, that changes over the past 20 years and those over the coming decades could affect that demand?
MR. CHEN: Again, I've got to object. This is not land -- this question doesn't go to land planning or master planning compliance.
MS. ROBESON: It is in the master plan. It's in the technical appendix. So I'm going to let him answer.
THE WITNESS: Could you rephrase?
BY MR. HARRIS:
Q Yes, I've got to remember it. The -- wouldn't you agree with me that changes in retail demand and patters could affect the demand estimates that were done prior to the 1994 master plan nearly 20 years ago?
MR. CHEN: Suddenly.
MS. ROBESON: If you know.
MR. HARRIS: Yes.
THE WITNESS: I know the retail demands were changing.

BY MR. HARRIS:
Q If the evidence in this case were to show that the developer does not plan to do a full-size grocery store in the Cabin Branch area, would you agree with me that that would reduce the forecasted demand for neighborhood retail by say 50 or 60,000 square feet?
MR. CHEN: Objection.
MS. ROBESON: Well, what's the basis of your objection?
MR. CHEN: This is not land planning. This is not compliance with the master plan. This is -- I think this goes back to this area that, maybe the Examiner disagrees with, but I think this goes to market analysis and justifications based upon what developers are willing to do and I don't believe that is within the area that this witness testified about.
MS. ROBESON: I do think it's a fair -- I'm trying to remember his testimony -- it may be a fair question from a land planning standpoint if he knows --
MR. HARRIS: If he knows.
MS. ROBESON: -- to ask him what the size of a full-service grocery store is.
MR. HARRIS: Well, we can start with that.
BY MR. HARRIS:
Q Do you know the average size of a full-service

grocery store?
A I don't have a specific number. I've heard numbers maybe from 60 to 100,000 square feet.
Q Okay. And so your reading of the master plan is that it recommends 120,000 square feet of neighborhood retail, is that correct?
A That's correct.
Q And that assumed a grocery store, is that correct?
A That's correct.
Q And so it would be simple arithmetic that if you were not doing a grocery store, the demand would be the difference?
A I guess on a --
MR. CHEN: Objection to the use of the word demand.
MS. ROBESON: I sustain. Can you rephrase it without demand because he's not --
MR. HARRIS: That the likely retail there that could be supported would be reduced by that amount.
MS. ROBESON: Do you want to note an objection?
MR. CHEN: Well, I think this question could simply say if you reduce that number that you are saying is the amount of a retail grocery store, does that therefore leave a different number for what the master plan demands for this area?

MR. HARRIS: I accept Mr. Chen's question.
MR. CHEN: I actually can do the math, I'm just not quite sure what I'm getting into.
THE WITNESS: Obviously, if you reduce 120,000 by 60 to 100, you've reduced it --
MS. ROBESON: Yes.
THE WITNESS: -- the total square footage.
BY MR. HARRIS:
Q Would you agree with me that building neighborhood retail in the Cabin Branch would compete with neighborhood retail that might be built in the town center district?
MS. ROBESON: Yes?
MR. CHEN: I don't know where we're going.
MS. ROBESON: Mr. Harris, he -- that was Mr. Bogorad's testimony. He has not purported to -- he just said what the master plan needs.
MR. HARRIS: His testimony included his opinion that building specialty retail was going to harm the town center, implying that he has some understanding of the economic implications of these things. Personally, I don't think he does but, you know, I'm trying to understand, you know, the extent of his knowledge on these things. If he says he doesn't know, then that's fine, but it probably then means he doesn't know what the impact of --
MS. ROBESON: Well, I thought his --

MR. HARRIS: -- specialty retail would be.
MS. ROBESON: I thought his testimony wasn't just to the retail, but to this creation of a place or --
MR. HARRIS: We, I will get there too.
MS. ROBESON: Okay. I'm going to overrule Mr. Chen's objection. I think --
MR. CHEN: I didn't object. I said, you asked me, I said I'm going to let it go.
MS. ROBESON: Well, then why am I like, I --
MR. CHEN: It's just out of habit.
MS. ROBESON: I know. All right.
MR. HARRIS: Okay.
MR. CHEN: Seriously, I said --
MS. ROBESON: My bad.
MR. KLINE: He withdrew his objection.
MS. ROBESON: Okay. All right. I'm sorry. Go ahead, Mr. Harris.
BY MR. HARRIS:
Q I believe the question was wouldn't the construction of neighborhood retail in Cabin Branch, let's assume first with a grocery store, compete with the ability to construct neighborhood retail in the town center?
A Again, I don't believe it would and I, I do reference all of my comments about these square footages and things back to the master plan because the master plan did

an analysis, you know. And even if they started there, the square footage of 75,000 square feet for neighborhood retail and the tech will amend it, you know, what they put in the plan was a recommendation for 120,000 square feet. But they also put in recommendations for similar square footage, I could find the table, at New Cut Road, it's got another new name, and neighborhood retail in the town center. So I believe they did the analysis to determine that there was no inherent competition between neighborhood retail development at the appropriate time when the residential development occurred at Cabin Branch and the town center. So I would answer back not back to what the authors of the master plan said on this issue and that they don't feel that that's a direct competition.
Q Okay. And you're aware that Mr. Flanagan has a different opinion --
A Absolutely.
Q -- that he believes constructing that kind of retail here would prevent construction of the town center retail?
A I heard that testimony.
Q And you have nothing to contradict that with other than the staff's estimate in 1994?
A Well, you know, I can't contradict Mr. Flanagan's opinion. He's got an opinion what he needs in terms of

competitiveness. My understanding of the purpose of neighborhood retail in the master plan was to provide a small community center with enough retail and a walkable area accessible to the residents of the various neighborhoods, including the residential portions of Cabin Branch, New Cut Road and the town center area.

Q The, with respect to the inter-relationship between specialty or outlet retail and employment uses, I think you heard Mr. Bogorad testify about the symbiotic relationship or I think he might have used the word catalytic effect of the retail on the attraction of employment. Do you have any data to suggest a contrary conclusion?

A Do I have data in the, for the Clarksburg area? No, I don't have separate data.

Q Have you ever done a study of the inter-relationship between outlet retail and a mixed use employment center?

A No.

Q And would you agree with me that if a 484,000 square, if 484,000 square feet of retail is built at Cabin Branch, that would still leave close to 2 million square feet for other employment uses under the approved development plan that includes 2,420,000 square feet of non-residential use?

A Yes, I do that math too, yes.

Q Okay. You're aware that the planning staff and the Planning Board both concluded that this development plan amendment is consistent with the master plan recommendations, are you aware of that?

A Yes.

Q And you disagree with them?

A Yes.

Q Okay. And you disagree then with council member, former County Council member Knapp who testified in support here?

A I was here and I don't remember that testimony, but --

Q Okay.

A Okay. Yes.

MS. ROBESON: Well, if you know. Did you hear his testimony?

THE WITNESS: I was there. I don't recall that specific --

MS. ROBESON: Okay.

THE WITNESS: -- testimony.

MR. HARRIS: I don't think I have any more questions.

MS. ROBESON: Well, you know what I neglected to do, so you may --

MR. HARRIS: Oh.

MS. ROBESON: -- have more questions? I neglected to allow Mr. Kline to ask questions before you got your chance.

MR. HARRIS: Oh, he did. He asked them last week.

MR. KLINE: I did.

MS. ROBESON: Oh, okay.

MR. HARRIS: Or early this week.

MS. ROBESON: All right.

MR. KLINE: I'd be glad to ask more.

MS. ROBESON: No, no, no, no, no, no. We will do redirect based solely on Mr. Harris's questions. Mr. Kline.

MR. KLINE: Do you want to do it now?

MS. ROBESON: Yes.

MR. KLINE: Yes. Sure.

MR. CHEN: Can we take a 5-minute break?

MS. ROBESON: Yes. In fact, I was --

MR. KLINE: Yes, that would help.

MS. ROBESON: -- just thinking --

MR. KLINE: That would help me.

MS. ROBESON: -- maybe I would be more on the ball if we took a 5-minute break. So, yes, we'll go off the record for five minutes.

(Recess.)

MS. ROBESON: All right. We're back on the

record. I believe we have redirect, Mr. Chen, or who --

MR. CHEN: You were, Mr. Kline you had called, yes.

MS. ROBESON: Thank you.

MR. CHEN: Sure.

MS. ROBESON: I really rely on those transcripts, so clearly -- because I like to focus on what people are saying during the hearing. Go ahead, Mr. Kline.

REDIRECT EXAMINATION

BY MR. KLINE:

Q Mr. Noonan, what I'm trying to do is go in the same chronological order as you brought up your comments. When we were talking about the Leesburg Premium Outlet Center, Mr. Harris, I asked you a question about features that were in the field that sort of impeded walkability from any surrounding uses to the facility, in fact, I'm sorry, between --

MS. ROBESON: We're talking about Leesburg --

MR. KLINE: Yes.

MS. ROBESON: -- Exhibit 107 and 101?

MR. KLINE: Yes.

MS. ROBESON: Okay.

MR. KLINE: Yes, ma'am, Leesburg. Do you recall that question about the features that impeded walkability?

THE WITNESS: Yes.

BY MR. KLINE:
Q In your professional opinion as a planner, how does a regional outlet center serve the needs of the residents of Leesburg surrounding the outlet center?
A Are we talking about walkability now or a broader --
Q Let's skip the walkability until later. Right now what service does it provide to those residents?
MR. HARRIS: Objection. I don't think I asked him at all about that.
MS. ROBESON: You asked him about the walkability.
MR. HARRIS: Yes, correct.
MS. ROBESON: I'm going to let it -- I'm going to let you answer it and --
THE WITNESS: Okay.
MS. ROBESON: Because I think the -- I do think it's relevant because the point you were making is distinguishing Leesburg from this community. So I'm going to let him do it and take it for the weight it deserves.
MR. HARRIS: Beyond that, during some unsuccessful efforts to cross-examine him, it was determined that he wasn't an expert on this kind of retail and so, you know, I don't know how he can be offering his opinion on how a regional retail center serves local residents or doesn't serve them.

MS. ROBESON: Well, he acknowledged there's a difference between comparative retail and neighborhood service retail. So --
MR. CHEN: And he was examined by that by Mr. Harris.
MR. HARRIS: I did not ask him how the regional service center, the regional retail center would serve the residents.
MR. KLINE: My -- the reason I asked the question was the implication of that question was that people could walk easily to the center.
MS. ROBESON: Yes, I'm going to let him answer.
MR. HARRIS: I did ask about that.
MS. ROBESON: And you can object. I thought he did ask about that, but do you want to, do you need to rephrase your question?
BY MR. KLINE:
Q My question was how does a regional outlet center serve the needs of the residents that surround the center?
A Again, you're only talking about Leesburg?
MS. ROBESON: Yes, he was talking about the Leesburg outlet center.
THE WITNESS: I mean Leesburg clearly serves a market that's more regional in nature. It's not a neighborhood retail center. It's not oriented towards a

surrounding, residential concentration of residents. I don't believe it has some of the neighborhood retail functions that are envisioned in the technical report. So its function is to serve a more regional economic market and not local residents.
BY MR. KLINE:
Q And then your, so your answer, would your answer be the same with regard to serving the needs of the employees that might be located in the surrounding area?
A Well, the employees in the surrounding area would obviously have to make a decision, get in their automobiles and drive to that location. So I would think if, you know, it's, they're as likely to go there as they are to any other kind of area of retail outlet for the services they're looking for at lunchtime or other times, but it's not, it's not associated with the office and development, or residential development around it.
Q And why would they get in their car and drive there? What are they going to purchase when they arrive there?
A Well, it's an outlet center. I assume they're going to go for things they don't normally need on a daily basis, but they need on a more episodic basis like, you know, you might buy a suit jacket or something. But on the other hand if there are restaurants in the retail center, in

the outlet center, they could possibly go there for that purpose as well.
Q When you made your site visit, did you notice or did you see any office buildings with high technology offices surrounding the regional outlet center at Leesburg?
A Again, if you go to our list of photographs, a list of photographs, there were some area, there was some office development that could be considered either high tech or high employment. I'm differentiating between the kind of office development you would find in any typical suburban shopping center or government office centers. I mean there were in one photograph in particular, there was a consultant phone that you're familiar with and there is also some high-tech development. In Exhibit 101(j), for example, there's some office development there that could be viewed as more high-tech in nature, a medical firm and other concerns.
Q What was the predominant type of office use that you found surrounding the Leesburg Center?
A Most of it was government-related or oriented towards the general Leesburg area. It wasn't high-tech card or employment kind of thing, it was more office related to, you know, attorneys, dentist functions, if that's an office function, those kind of things.
Q Were you able to conclude by your observations the features that impeded walkability were a detriment --

MR. HARRIS: Objection.
MR. KLINE: -- to moving, detriment --
MS. ROBESON: Basis?
MR. HARRIS: Leading question. Were you able to conclude that?
MR. KLINE: Give an opinion.
MR. HARRIS: Did you have a conclusion as to the effect.
MS. ROBESON: Okay.
MR. KLINE: I'll finish the sentence and we'll use Mr. --
MR. HARRIS: Okay. Okay.
BY MR. KLINE:
Q Did the features that you observed that impede walkability have an effect that you can observe as to an ability to attract high technology office users to this location?
A I don't know that you could speak to exactly whether or not the retail outlet could attract office in that perspective, but certainly if a high-tech office development occurred around it, they couldn't walk directly to this location. There are no sidewalks. There are fences. There are obstructions you very often see in a suburban location for walkability.
Again, as was pointed out, this wasn't planned as

a mixed use development. This was a standalone development. It has all the negatives from a walkability perspective that has. So if the outlet were to attract office development around it, it wouldn't have that mixed use component or feel to it.
Q Drawing your attention to page 46 of the Clarksburg master plan which we have been to other times today, it's correct, is it not, as stated in the beginning of paragraph 4 that commercial uses in the town center can be as much as 300,000 square feet? That's what is proposed?
A That's in addition to the 153,000 square feet of neighborhood retail, yes.
Q So you make a distinction between the two types of retail?
A They make that distinction here, yes.
Q Okay. And that 300,000 square feet of retail that's not neighborhood-oriented could attract specialty stores, could it not?
A I would assume.
Q Is that what you would assume to see in a town center?
MR. HARRIS: Objection.
MR. CHEN: You opened the door.
MR. HARRIS: His testimony before was that he didn't know about those things. I don't think he's gotten

that much smarter in the last half an hour.
MS. ROBESON: Your question was?
MR. KLINE: Would the square footage in the town center that is not suggested to be 150,000 square feet of neighborhood retail appeal to specialty retail users?
MS. ROBESON: That is going -- I'm going to sustain that objection.
BY MR. KLINE:
Q There was questions asked about grocery stores in the town, I'm sorry, in the Cabin Branch neighborhood. Is there anything in the record other than Mr. Flanagan's letter that says there is no need for a grocery store in the Cabin Branch neighborhood?
A I don't know what's in the record.
Q Right. Let me rephrase that. Is there anything that you have heard or read that is to indicate that there is no need for a grocery store in the town center, I'm sorry, Cabin Branch?
A I would again go back and defer to the, what the master plan says. And as it was revised in 2011, that there was, there was a desire still of the authors of the master plan for a grocery store in the Cabin Branch area.
Q You referenced the 2011 amendment --
A Yes.
Q -- the limited amendment.

A The limited amendment.
Q Would you agree that focuses on the question of retail, neighborhood-oriented retail use?
A Yes, it does.
Q In the Cabin Branch and New Cut neighborhoods?
MR. HARRIS: Objection.
MS. ROBESON: Basis?
MR. HARRIS: First of all, it's a leading question. Secondly, as my colleague three seats over will tell me, the document speaks for itself and I don't think that's --
MS. ROBESON: You cannot -- well --
MR. HARRIS: I don't think that's what it says personally.
MS. ROBESON: He can ask what his interpretation is --
MR. HARRIS: That's fine.
MS. ROBESON: -- of the 2011 amendment vis-a-vis --
THE WITNESS: Okay. Am I to answer the question? I'm sorry.
MS. ROBESON: Yes. Yes.
THE WITNESS: I'm pausing because I want to be sure.
MS. ROBESON: I could tell. I apologize. Go ahead.

MR. KLINE: Maybe I can try and find something here to --
THE WITNESS: Well --
MR. KLINE: Go ahead please.
THE WITNESS: Well, again, the purpose of the directive was to assure that a certain amount of retail, neighborhood retail development could go forward in the neighborhoods in particular. And in order to do that, they had to address some of the staging provisions that were in the original master plan, so that's the purpose of the limited amendment was to assure that those retail uses moved forward in the neighborhoods, the neighborhood retail uses.
BY MR. KLINE:
Q Wouldn't the 2011 limited master plan amendment have provided an opportunity --
MR. HARRIS: Objection.
MS. ROBESON: Basis?
MR. HARRIS: Again, a leading question.
MS. ROBESON: Mr. Kline, I know technically that this may or may not be cross-examination, but I do think we have agreed that when it's not your witness you --
MR. KLINE: Okay.
BY MR. KLINE:
Q Did an opportunity present itself at the time of the 2011 limited master plan amendment to reassess the

retail needs in the neighborhoods?
MR. HARRIS: Objection. That was not part of his, my cross-examination of him. It goes beyond any of that.
MS. ROBESON: Well, where are you leading with this, Mr. Kline? You must be trying to --
MR. HARRIS: In fact, I don't think I asked anything about the 2011 amendment.
MS. ROBESON: Well, it could be --
MR. HARRIS: But I know I didn't ask that.
MS. ROBESON: -- to another point. So where, what's your point?
MR. KLINE: Yes. Well, the question that was asked was a technical appendix dealing with how much square footage did the technical appendix recommend and I'm just trying to have the witness state whether or not in 2011 he decided, gee, maybe there isn't a need and we should rethink that at this point in time.
MS. ROBESON: Well, you can ask, you know, whether the 2011 made any changes to the assumptions in the master plan.
MR. KLINE: That's probably a better phraseology than mine, so could you answer the question?
MS. ROBESON: And the assumptions in the, I guess it's the technical appendix, correct?
MR. KLINE: Mr. Noonan --

MS. ROBESON: Do you under --
THE WITNESS: I'm ready to answer.
MS. ROBESON: Yes.
THE WITNESS: Okay.
MS. ROBESON: Go.
THE WITNESS: Go. The limited amendment did not make any changes to the underlying square footage and sort of assumptions that appeared in the master plan. And, again, the master, the master plan clearly lays out on, let me find the right page number, the square footage for neighborhood retail uses in each of the different areas.
MS. ROBESON: Right. We've been through those.
THE WITNESS: We can find it if we needed to.
MS. ROBESON: Yes.
BY MR. KLINE:
Q Then as of 2011, the Montgomery County Council confirmed --
MR. HARRIS: Objection.
MR. KLINE: Confirmed how much retail square footage --
MR. HARRIS: Objection.
MR. KLINE: -- should be found in the Cabin Branch neighborhood.
MS. ROBESON: Basis?
MR. HARRIS: Again, a leading question. Secondly,

way beyond the scope of the cross-examination. I didn't examine him about what happened in 2011. And, thirdly, we had testimony the other day about this. He had ample opportunity to, from Mr. Unterberg, before Mr. Noonan, he had ample opportunity to question Mr. Noonan on direct about this. Mr. Unterberg testified that --
MS. ROBESON: Well --
MR. HARRIS: -- this master plan amendment was extremely limited --
MS. ROBESON: Okay.
MR. HARRIS: -- and was driven by Elm Street.
MS. ROBESON: As to your leading objection, I will sustain that. As to your beyond the scope objection, I think it is within the scope because he is addressing some of the issues that you raised on cross.
MR. KLINE: Well, the question was --
MS. ROBESON: So please try to, you know, in a way that you can ask him as to his interpretation because that's what he's for, as an --
MR. KLINE: The question asked of Mr. Noonan by the applicant's counsel that triggered my line of questioning was will future technical changes in retailing may reduce the need for neighborhood retail and so I wanted to ask him what did the result of this 2011 limited master plan amendment do with regard to the recommendations in the

1994 master plan?
THE WITNESS: This, the limited amendment did not change the underlying assumptions in terms of square footage or purposes of, for neighborhood retail in the various neighborhoods --
MS. ROBESON: Okay.
THE WITNESS: -- and the master plan.
MS. ROBESON: I let that in because it related to the master plan, but I think we excluded Mr. Noonan's testimony on market demands and whether market demands were changing.
MR. KLINE: I just --
MS. ROBESON: Okay?
MR. KLINE: Yes. I just mentioned what the question was, what I thought --
MS. ROBESON: No, I understand.
THE WITNESS: And, again, I did not answer any, I did not make a statement about market demand.
MS. ROBESON: Yes.
THE WITNESS: I just merely said that the limited amendment did not change the underlying assumptions --
MS. ROBESON: Right.
THE WITNESS: -- for the neighborhood retail space.
MS. ROBESON: That's why I'm letting it in, but I

am reminding him that, Mr. Kline, that that testimony as far as market demand isn't part of the record.
BY MR. KLINE:
Q Maybe the best way to just start, the question that was asked triggers my question to you. You were asked will building neighborhood retail in Cabin Branch conflict with neighborhood retail in the town center and your answer to that was, if you could remind me?
A I believe I answered that I did not believe that it did compete because the technical amendment in the master plan envisioned a certain amount of neighborhood retail space in all of the areas in which they had neighborhood, residential development to support those neighborhoods.
MR. HARRIS: Objection. I thought his testimony, and I was cut off, was that he didn't know the competitive impact. All he was talking to --
MS. ROBESON: Yes, I --
MR. HARRIS: -- was what the master plan recommended.
MS. ROBESON: And that's what he answered.
MR. HARRIS: Okay.
MS. ROBESON: But I do agree with you.
BY MR. KLINE:
Q You were asked questions about the MXPD zone.
A Yes.

Q So in your opinion what controls, for purposes of this case, the master plan that says 120,000 square feet, up to 120,000 square feet of neighborhood retail in Cabin Branch or the MXPD zone that says you could have up to 20 percent of the commercial space, of any commercial space?
MR. HARRIS: Objection again. I apologize, but again I was cut off from asking him about those kinds of things because they called for a legal conclusion.
MS. ROBESON: Sustained. Sustained.
MR. KLINE: No further questions of Mr. Noonan.
MS. ROBESON: Okay. Mr. Chen?
MR. CHEN: Thank you.
REDIRECT EXAMINATION
BY MR. CHEN:
Q Mr. Noonan, do you recollect the series of questions that Mr. Harris asked you about the retail square footage and comparing what was in the master plan and the notion of commercial use vis-a-vis retail use?
A Yes.
Q Okay. And you answered those questions, right?
A I hope I did.
Q Were any of those questions --
MS. ROBESON: You were talking anyway.
MR. CHEN: Right. Yes.
MS. ROBESON: Now go ahead.

BY MR. CHEN:
Q Do any of those questions change your opinion that you expressed at the last hearing about the master plan's requirements for retail use in the Cabin Branch community?
A No, they do not.
Q Why?
A Well, again, the master plan speaks to the amount of neighborhood retail uses necessary to support the neighborhood as a center. So it's talking about serving the residents of a neighborhood and a neighborhood community. It's not talking about -- the master plan itself does not speak to the Cabin Branch neighborhood as a center for retail other than the neighborhood-oriented retail space.
Q And do you recall the questions that were posited to you about the grocery store?
A Yes.
Q Okay. Do any of those questions alter your opinion that you expressed at the last hearing relative to the provisions in the master plan for a grocery store in the Cabin Branch community?
A No, again, I believe the master plan is pretty clear that they view a grocery store and neighborhood retail as essential for the livability of those neighborhood communities.
Q Is there anything inconsistent about providing for

a grocery store the size that you've mentioned this morning with the amount of retail that is provided for and the numeric limit provided for in the master plan?
A We're talking about the neighborhood retail and numeric limit?
Q Yes.
A There is nothing inconsistent.
Q Why is that? Could you explain that to the Examiner?
A Well, again, the neighborhood grocery store, whatever side, is viewed in the master plan as one of the key components of neighborhood retail to serve the residents of that neighborhood. It's not viewed as something that is of a competitive nature between neighborhoods. Each one is a standalone, is -- in accordance to the technical amendment at least, has square footage as suggested there that relate to the number of residents that are going to be living in that neighborhood. So the competitive issue is not one of can there only be one. The master plan views that there should be some, those kind of services of whatever the appropriate size in each of the neighborhoods where residential development is to occur.
Q Okay. And Mr. Harris asked if you agreed with the testimony and opinion of Mr. Bogorad --
MS. ROBESON: Bogorad.

MR. CHEN: Bogorad, excuse me, I apologize.
MR. BOGORAD: No problem. Very few people get it right.
MR. CHEN: I'll do it again. So I'll just let you know, it's not intentional. I sincerely apologize.
MR. BOGORAD: No, no.
MR. CHEN: Thank you.
BY MR. CHEN:
Q You, Mr. Harris asked you about that opinion and I believe your answer was that you agreed that outlet retail will not adversely impact neighborhood retail, is that correct?
A Yes.
Q Okay. Now do you also agree that in this specific case, in this specific case, do you agree that the outlet retail --
MR. HARRIS: Objection.
MR. CHEN: Let me get the question out.
MR. HARRIS: Do you agree is a leading question.
MR. CHEN: That's okay.
MS. ROBESON: Well, you're on, you're on redirect.
MR. CHEN: Well, okay, I can change it.
BY MR. CHEN:
Q Do you have an opinion in this particular case as to whether the proposed outlet retail will or will not have

an adverse impact on the neighborhood retail proposed in the town center? Right now the answer, it's only a yes or a no answer.
A I believe it will have --
MR. HARRIS: Objection.
BY MR. CHEN:
Q Just a yes or no, sir.
A Yes.
MR. HARRIS: Objection.
MS. ROBESON: You can't direct him what to say.
MR. CHEN: I didn't tell him what to say. I said it's only a yes or no answer at this point. I asked if he had an opinion. I didn't ask him for the opinion yet.
MS. ROBESON: Okay. Just a second.
MR. HARRIS: Excuse me.
MS. ROBESON: Everybody stop talking. Okay. I'm going to -- you can't direct what -- you were trying to say it's not leading, but you also can't limit him from having, if he wishes to offer more. So can you --
MR. HARRIS: I have a different objection.
MS. ROBESON: And that is?
MR. HARRIS: That is he testified when I asked him that he was not qualified and did not know the impact of one kind of retail on the other. Again, I don't think --
MS. ROBESON: I don't think --

MR. HARRIS: -- I don't think his knowledge has changed.
MS. ROBESON: Okay. Mr. Chen, I didn't think that's what you were asking, but can you --
MR. CHEN: You're right. You're right.
MS. ROBESON: Well, can you clarify the question again? Can you --
BY MR. CHEN:
Q Okay. The question I have was did, does he have an opinion as to whether or not the outlet, the proposed outlet retail in this case would have an adverse impact on the neighborhood retail proposed in the town center? And I was asking only for a yes or no answer to that.
MR. HARRIS: Whether --
MS. ROBESON: Okay. Let him --
MR. HARRIS: Okay.
MS. ROBESON: -- let him answer yes or no.
MR. HARRIS: No, but, no. My objection stands. I'm sorry. He said he didn't --
MS. ROBESON: Okay. I understand --
MR. HARRIS: -- know about those kind of things, so I don't think he, you know, I'll go back to my line of questioning then on that if I may?
MS. ROBESON: Mr. Harris, stop.
MR. HARRIS: Okay.

MS. ROBESON: Do you have an opinion unrelated to market demand as to whether the retail development in Cabin Branch will compete with the town center?
THE WITNESS: Yes.
MS. ROBESON: Okay.
BY MR. CHEN:
Q What is your opinion?
A The retail development of the outlet center can, does very well compete with the potential for retail and development in the town center for the -- I think the clear reason that the, that there's a staging issue and a desire to make sure that the town center concept moves forward and this is a competing center to that -- I'm trying to phrase this the appropriate way -- this will set up a competing center to that that will make it less likely that the town center will succeed in its vision as being the center for activity in the Clarksburg area.
Q Did you finish?
A Yes.
Q Okay. Now Mr. Harris asked you about the zones permitted, excuse me, the uses permitted in the MXPD zone, do you recall that?
A Yes.
Q Okay. Notwithstanding what is authorized in the MXPD zone, what does the master plan propose?

MR. HARRIS: That question has been asked and answered --
MR. CHEN: Okay.
MR. HARRIS: -- about a --
MR. CHEN: I'll take that.
MR. HARRIS: -- dozen times.
MR. CHEN: Okay. I'll take that. I can live with that position.
BY MR. CHEN:
Q Page 19 of the staff report, let's go to that. Are you there?
A Yes.
MR. CHEN: Madam Examiner, do you have it?
THE WITNESS: I am just looking for my --
MR. CHEN: It's Exhibit 50, I believe.
MS. ROBESON: Yes, I had an extra copy, but I'll go to Exhibit 50. All right. I'm there.
BY MR. CHEN:
Q Okay. Page 19. Let's go to the bottom paragraph, sir.
A Got it. We're there.
Q Okay. Read in for the record please the full bottom paragraph where it starts, given the fast pace.
A "Given the fast pace of development in the past decade and the evolution of present day employment

centers with increasing diversity and scale character and mix of uses, one has to take into consideration the fact that the effectiveness in the applicant building, the specific recommendations from the nearly 20-year-old master plan may not be relevant to current needs and demands of the area, but within considerable effort stay within the vision of the master plan and with sensitivity to the present needs of Cabin Branch neighborhood for transformation from its rural farming nature into a vibrant, mixed use community, the proposed DPA provides a good opportunity for development of successful employment center."
Q Do you agree with that paragraph in the staff report as that is a basis upon which to recommend favorable approval of the DPA?
A No, I do not.
Q Why not?
A Well, it has a couple of problems. First is that the vision of the master plan is still in place and there's no, there's no justification at this point in the absence of an amendment to the master plan that the visions of the authors and the community has changed is what should happen in the Clarksburg area. In addition to that, it reaffirms

the intent of the master plan. It says that you have to provide considerable effort, stay within the vision of the master plan and with sensitivity to the present needs of the Cabin Branch neighborhood. The other thing that's said here that's inconsistent is that it actually sets up and discusses and starts to discuss the Cabin Branch area as a center in competition for the town center area.
Q Why is that a problem?
A Well, that's a problem because that goes to the core of the vision of the master plan which this paragraph says we're supposed to make an effort to stay within.
MS. ROBESON: May I --
THE WITNESS: The English --
MS. ROBESON: -- just ask you to clarify in -- where do you see that it's competing as the core, with the core or the focal point of the town center? Where does it, where does that --
THE WITNESS: I --
MS. ROBESON: -- set that up in your opinion?
THE WITNESS: If we refer back to an earlier page here, I can probably find it better in my earlier analysis, okay, excuse me while I find the right page for this.
MS. ROBESON: That's fine. Take your time.
THE WITNESS: Okay. The staff in this makes a general statement --

MR. HARRIS: Excuse me. What page are you on?
THE WITNESS: I'm actually on my --
MR. HARRIS: Oh, your statement?
THE WITNESS: My statement. I'm sorry.
MR. KLINE: Can you give us -- you mentioned staff. Can you give us a page in the staff report?
THE WITNESS: Okay. I would have to go back and look for it there. I'm sorry. My apologies. I'm having to struggle finding the right page in here. Oh, page 9, location design, the proposed specialty retail is located to create a sense of place. It gives identity and vitality to the Cabin Branch community. It will serve as a catalyst for employment-based development and further converts into the development of future, high-tech, high-quality projects in the area. The specialty retail, although regional in how it may be perceived, is located and designed to function as local serving retail and other connections to the Cabin Branch area. The specialty, on page 10, then it goes on to say,
"Specialty will serve Clarksburg and the surrounding areas and is a catalyst for the future of development areas."
So --
MS. ROBESON: I see. Okay. I also notice on page 12 it has employment and place making and I think that's one

of the staff report and I think that's one of the, the place making features. Is there anywhere else?
THE WITNESS: Well, I think one of the things you need to look at is when you pull a statement out of context in the conference plan, the master plan, you kind of change the meeting. For example, on page 13 of the staff report that talks about the town scale of development, it refers to page 16 of the master plan, they talk there about the development plan amendment has 2.4 million square feet in scale as recommended in the Clarksburg master plan and it talks about a step down in height, that the page they're referring to, in fact, 16 in the master plan, page 16, has general policies for the town scale of development that talks more about, strives to maintain an identity for Clarksburg separate from Germantown or Damascus includes the balance of a need for a high-density or transit need for the protected areas and environmental resources.
MS. ROBESON: I see what you're saying.
THE WITNESS: Those kind of policies are actually, policies relate directly and are repeated in the town center district plan and not in the Cabin Branch area. So it's a question of, the narrow question of just density step downs from, between I-270 and then --
MS. ROBESON: Oh.
THE WITNESS: -- the residential rural areas is

another area that it inflects.
MS. ROBESON: Okay. Go ahead, Mr. Chen.
MR. CHEN: Thank you very much.
BY MR. CHEN:
Q Also, Mr. Harris asked you a question about the design of the Leesburg outlets and the design proposed by the DPA, do you recall that?
A Yes.
Q Okay. I'd like to ask you how the design of the DPA compares with the town center as contemplated by the master plan?
A Okay. I think we testified that earlier, if you look at the illustrative sketch that was discussed a little earlier on page 45 of the master plan which is Figure 20, you know, it has the north and west end, which is the top of the page; the residential area with the neighborhood retail center. Then in the middle it has the historic district along Maryland 355 and then below that a higher density, more mixed use area that would be around the transit center as envisioned in the master plan.
But if you look at the organization of features and some of the civic spaces here, that's repeated in the development plan amendment proposal in their illustrations for the north area. Remember, we've pointed it out several times? I think there's one over here.

MR. CHEN: Is that exhibit -- Madam Examiner, I think you, is it 15 or 45?
MS. ROBESON: It's a slide within 45.
MR. CHEN: Thank you. Do you recall --
MS. ROBESON: Yes, I do.
MR. CHEN: All right. I think it's got its own number --
MS. ROBESON: I know which one.
THE WITNESS: -- that one slide.
MR. CHEN: Thank you.
BY MR. CHEN:
Q Go ahead.
A Well, at any rate, if you look at the scale of the features in that and some of the civic uses that are shown in that North District, those things are shown as well in the illustrative sketch in the sense that, so you're getting a sense that the development proposed in the North District here, and it's in the specialty retail area, is it the kind of scale and has many of the community features that are envisioned for the town center itself and not in the neighborhoods.
BY MR. CHEN:
Q Indeed, when looking at that North District, it proposes an amphitheater, is that right?
A Yes, at the lower bottom of the page there's an

amphitheater.
Q And going back to Figure 20 on page 45 of the master plan, there's an amphitheater proposed there too, is that right?
A That's --
MR. HARRIS: Objection.
THE WITNESS: -- correct.
MR. CHEN: Okay. All right.
MS. ROBESON: Basis?
MR. HARRIS: A leading question.
MR. CHEN: Well, is --
MS. ROBESON: Oh.
MR. CHEN: Oh, excuse me, I apologize.
BY MR. CHEN:
Q Directing your attention to Figure No. 20 on page 45 of the master plan, is an amphitheater indicated on the figure?
A There appears to be at the lower, towards the lower left corner down in this area.
MR. CHEN: Thank you. No further questions.
BY MR. HARRIS:
Q You were asked several questions --
MS. ROBESON: Wait.
MR. CHEN: Whoa.
MS. ROBESON: I don't think he's finished.

MR. HARRIS: Oh, I thought he said no further questions?
MS. ROBESON: He --
MR. HARRIS: I misunderstood. I apologize.
MR. CHEN: I get last shot at my own witness, not --
MS. ROBESON: No, I understand. He misunderstood what --
MR. HARRIS: I thought, did he say no further questions?
MR. CHEN: Yes.
MR. HARRIS: He did say no further questions.
MS. ROBESON: But I hadn't closed off the testimony because I was making sure --
MR. HARRIS: I see.
MS. ROBESON: You're very good in anticipating what comes next. So are there no further questions?
MR. CHEN: No further questions.
MS. ROBESON: Okay. And I'm going to let you -- I don't have further questions, so you are -- this is your time to go and recross. I'm sorry, this is - you're raising issues that are important to me, so that's why I want to make sure they're covered in the record. Go ahead, Mr. Harris.
RECROSS EXAMINATION

BY MR. HARRIS:
Q I think you would agree with me that the, and did agree with me before, that the siting of the Leesburg center and its surrounding circumstances are very different than what we have at Cabin Branch?
MR. CHEN: Objection. Leading with do you agree.
MS. ROBESON: Well, he can lead because he's cross-examining.
MR. CHEN: Okay.
MS. ROBESON: It's confusing because --
MR. CHEN: I'm just thinking what's good for the goose is good for the gander, but I defer to the Examiner.
MS. ROBESON: Well, no, I'm going to let him ask leading questions in this case. Go ahead, Mr. Harris.
THE WITNESS: Yes, I agree, the design is different.
BY MR. HARRIS:
Q You testified about the purpose of the 2011 amendment and I think you said that it was to assure that certain neighborhood retail could proceed, was that your testimony?
A Yes, I think I read the statements. The overall purpose was to make sure the neighborhood retail could proceed and they did that by removing some of the staging provisions.

Q And would you -- did you hear Mr. Unterberg testify the other day?
A Yes.
MR. CHEN: I'm going to object on anything Unterberg. It's beyond redirect.
MR. HARRIS: No, it's directly on this point.
MS. ROBESON: Well, what's the topic?
BY MR. HARRIS:
Q Didn't Mr. Unterberg testify that the 2011 amendment was generated by Elm Street Development in connection with the Clarksburg Village Center with its sole purpose being to facilitate that project being able to go forward in lieu of the prior staging prohibition that the town center had to go forward first?
MS. ROBESON: Okay. Mr. Noonan, don't answer yet because I have an objection on the table. Mr. Chen, your objection?
MR. CHEN: A couple grounds. It goes beyond redirect, number one. Number two, it goes beyond what this witness has testified about the 2011 amendment. He said this is the amendment and he didn't go beyond it. He said this is it, this is clear from the -- in fact, he even referred to the language in the amendment when he testified.
MS. ROBESON: I think it was within the scope of Mr. Kline's redirect. So if you can answer, well, I'm going

to let you answer.
THE WITNESS: The only thing I can answer to is the stated purpose in the limited amendment itself and the Council directive to the Planning Department as to why this amendment was moving forward. It, honestly, doesn't mention a specific developer. But I'll -- it does mention the need to have retail development in the village centers to proceed. That's really the underlying purpose.
MS. ROBESON: Okay, Mr. Harris.
BY MR. HARRIS:
Q So the only knowledge you have is what you're reading in that document, Exhibit --
A Yes.
Q -- 86, is that correct?
A Yes. I don't know the history, you know, other than what I've heard in testimony.
Q Okay. You, in response to Mr. Chen's question, you said that you believed outlet retail at Cabin Branch would compete with the neighborhood retail at the town center, was that your testimony?
MR. CHEN: A non-market --
MS. ROBESON: No. I'm going to disagree with you. I don't think he said from a market perspective that the retail would compete. I think he -- I said other than market demands, other than market demands, why would this

development compete with generally division for the town center?
MR. HARRIS: The question I wrote down, does he have an opinion if outlet will compete with the impact on, compete with an impact of town center? Answer: "Yes." He opines that the outlet does compete with the town center.
MR. CHEN: I --
MR. HARRIS: No, if that's, if that's not his testimony, that's fine, but --
MS. ROBESON: Well, that's not what I --
MR. HARRIS: -- that's what I wrote down.
MS. ROBESON: -- heard --
MR. HARRIS: Is that your testimony?
MS. ROBESON: -- because he's already -- well, wait a minute, wait a minute. He has already testified that he didn't think the two retail uses would compete and that's not what I asked him.
MR. CHEN: My recollection is, quite frankly, Mr. Harris, you objected to my question. When we got into it, the Examiner corrected me and formulated the question as you stated it, which I --
MS. ROBESON: That's correct.
MR. CHEN: -- am limited --
MS. ROBESON: So my question to him was in what ways other than market demand, and I know that he's already

agreed with you that the two types of retail will not compete.
MR. HARRIS: Okay. Just for the, for what it's worth, this was five questions before your question, the one to which I'm referring. It was a question by Mr. Chen, not by you.
MS. ROBESON: Well, okay. Then --
MR. HARRIS: But that's fine.
MS. ROBESON: Mr. -- I'll ask it, okay?
MR. HARRIS: Okay.
MS. ROBESON: Are the two types of retail, the neighborhood retail called for in the town center and the outlet retail, are they going to compete with each other?
THE WITNESS: You mean as a general proposition?
MS. ROBESON: Okay. We need to move on. I don't know what a general proposition means. Oh, I do know what you're saying. Okay. You're saying as opposed to in this particular location?
THE WITNESS: And I'm not trying to get Mr. Noonan into Mr. Bogorad's --
MS. ROBESON: Well, I think we --
THE WITNESS: -- area.
MS. ROBESON: Well, I think we are getting him into -- what do you want to cross-examine him on? Is he saying that the two do not --

MR. HARRIS: I am fine if he saying the two do not compete. I'm trying to determine whether that is what he said, which is really the same question you --
MS. ROBESON: Well, I'm --
MR. HARRIS: -- asked.
MS. ROBESON: -- going to let him answer. You -- ask the question again.
BY MR. HARRIS:
Q Sorry. Mr. Noonan, do you believe that outlet retail will compete with neighborhood retail in the town center?
MR. CHEN: In this case?
MS. ROBESON: At this location. He said the town center.
MR. HARRIS: At this location.
THE WITNESS: I -- I thought, maybe I misheard the question before. I thought I was being asked whether the outlet retail was going to compete with the other commercial uses in the town center. I don't know that it competes with the neighborhood retail that's oriented towards the residential development. I would say to that, no.
BY MR. HARRIS:
Q Okay. And there is no other retail than the historic district retail and the planned neighborhood retail in the town center with which it would compete, is there

today?
A Today, existing today? No.
Q And you referred to page 46 as, and concluded that that suggested that there should be some kind of major retail somewhere else in the town center. I, honestly, I don't see that on that page and I'm wondering how you reached that conclusion?
A Well, again, I go back --
Q Page 45, I beg your pardon. I misspoke about the page number.
A Yes, 45, but if --
Q 45, yes.
A Right.
MR. CHEN: 45 is a figure.
MR. HARRIS: Yes.
THE WITNESS: It is a figure. But if you turn to the next page, it talks about an additional 300,000 square feet of proposed, commercial uses in the town center and that's what --
MS. ROBESON: You're saying the town center district --
THE WITNESS: Town center district.
MS. ROBESON: -- and not that limited area in the figure in the illustration --
THE WITNESS: Right.

MS. ROBESON: -- is that what you're saying?
THE WITNESS: I was asked about a design comparison between the town center --
MS. ROBESON: That's correct.
THE WITNESS: -- illustration and the north center. That's a different question to my mind as to exactly where this 300,000 --
MS. ROBESON: Yes.
THE WITNESS: -- square feet of commercial uses would exist in the town center.
BY MR. HARRIS:
Q And that 300,000 square feet could be located throughout the town center, is that correct?
A Presumably.
MS. ROBESON: If you know?
THE WITNESS: I don't know where it would be specifically in the town center.
BY MR. HARRIS:
Q And commercial uses could include office uses?
A It could, yes.
Q And, in fact, doesn't the second to the last bullet limit the retail uses to 150,000?
A Again, that's in the, that's for the neighborhood retail uses, the 153,000 involved.
Q And at the top of page 47, doesn't it say that the

balance of proposed retail and office uses is proposed to be located throughout the town center district and consists of infill retail within the historic district?
A Yes, it does say that.
MR. HARRIS: I have no further questions. Thank you.
MS. ROBESON: All right. Mr. Noonan, you may be excused. Oh.
THE WITNESS: Thank you.
MS. ROBESON: You want re-redirect?
MR. CHEN: My understanding of the Rules of Procedure is that the party calling the witness always gets the last question, but it's not a cross-examination.
MS. ROBESON: I don't think it goes -- my recollection is it doesn't go that far down the scale of recross, redirect, recross, redirect.
MR. CHEN: Well, I'll abide by the ruling, but --
MS. ROBESON: I will allow you -- how many questions do you have?
MR. CHEN: Well, I think --
MS. ROBESON: Because at some point it's got to be cut off and --
MR. CHEN: Okay. We'll cut it off now. I'll ask Mr. Kline his questions, but, please, I would just ask the Examiner for future procedures, I think --

MS. ROBESON: Well, let's do this. I will double-check the rules. I really don't -- I do know there's a provision for --
MR. CHEN: I also agree with the Examiner that this has got to come to an end. I mean --
MS. ROBESON: Yes.
MR. KLINE: But I do believe there could be a couple questions that could probably nail down something in which I think there's confusion about, what is the amount of retail, of what kind in the town center. I think there's definitely -- we're talking past each other on that subject.
MS. ROBESON: Well, I think the confusion comes in the nomenclature town center. It seems to me the master plan says 300,000 feet elsewhere in the town center district because that's what they're addressing. So if that's what the clarification is, I can ask him -- the question that, okay. On this issue I'll let you, I don't want to, rather than me assuming what you wanted to ask, I'll let you have redirect and then I'm going to go check the rules. And if you feel like you need re-re-redirect, but I am 99 percent sure the rules do not go down this level in redirect. But you may have redirect if you want to clarify that issue or whatever issue you wanted to clarify.
MR. CHEN: Well, I appreciate that, Madam Examiner, and certainly Mr. Kline can clarify that. But

outside the context of a pending case, you know, you'll probably hear from me.
MS. ROBESON: Oh, I see what you're saying. You're saying, well, no, it should be here if you feel that due process requires --
MR. CHEN: I --
MS. ROBESON: -- redirect.
MR. CHEN: I'm not going to raise that issue and I'm not but, quite candidly, and I think that the party calling the witness always gets the last bite at the apple, but I'll defer to the Examiner. And for the record, I'm not raising any objection or due process issue.
MS. ROBESON: All right. Well, I am not aware of any rule specifying that and I also know in some cases that we have ended it on recross. So you and I will have a discussion after this case is over because I do respect your experience as a Hearing Examiner.
MR. KLINE: Madam Hearing Examiner, we have three precise questions I think I can, if not clear it up, I can at least figure out where we disagree with the applicant.
MS. ROBESON: All right.
BY MR. KLINE:
Q Mr. Noonan, could I draw your attention to page 46 of the 1994 master plan?
A Okay.

Q What is your understanding of the amount of neighborhood-oriented retail that is recommended to be located in the town center district?
A 153,000 square feet.
Q And what is your understanding of how much additional retail square footage is recommended in the town center district?
A My understanding is it goes up to 300,000 square feet of additional commercial uses, including retail.
Q Paragraph 4 begins with the term, in terms of commercial uses, and the next line talks about Planning Board retail studies.
A Right.
Q Do you understand commercial uses in that context to mean retail --
A You mean retail?
Q -- studies?
A I did, yes, I did.
MR. KLINE: All right. No further questions.
MS. ROBESON: Okay. I'm going to give Mr. Harris re-re-re --
MR. CHEN: Another question?
MR. KLINE: Yes, no.
MS. ROBESON: No, no. That negates the meeting.
MR. HARRIS: I'm fine. I think he answered before

that the commercial can be office use. Now he says it would be retail, so he doesn't seem to know.
MS. ROBESON: Well, I'm not even accepting that as argument which you can make --
MR. HARRIS: I think the record will stand --
MS. ROBESON: The record will speak for itself. We are going to take an hour for lunch. We'll be back at 1:20 with Mr. Kline's expert, Mr. -- Mr. Chen, let me, before we quit, you do not have any other witnesses, correct?
MR. CHEN: That's correct, ma'am.
MS. ROBESON: Okay.
MR. KLINE: My understanding, I thought, was we were bringing in the environmental experts to supplement Mr. Unterberg, the, on the subject --
MS. ROBESON: Testimony about the storm water --
MR. KLINE: Right.
MS. ROBESON: -- management?
MR. CHEN: In fact, if you recall, Mr. Noonan --
MS. ROBESON: That's correct. Mr. Harris, do you have your environmental witnesses here?
MR. HARRIS: Well, we do, but we were anticipating that after their witnesses. Neither of their witnesses has anything to do with that issue.
MS. ROBESON: No. I think that, I think that to

be fair to them, because I don't know what you're going to say, we're going to have your witnesses and your case-in-chief be concluded and then they will be able to present their experts.
MR. HARRIS: Fine.
MS. ROBESON: All right?
MR. HARRIS: Fine.
MS. ROBESON: So with that, 12:20, 1:20 we'll be back.
(Recess.)
MS. ROBESON: Are the parties ready?
MR. HARRIS: Yes, ma'am.
MS. ROBESON: Mr. Harris, go get your witness.
MR. HARRIS: I think I was asked to call a witness on storm water management and --
MS. ROBESON: And I think -- I thought you were going to call one on the forest conservation plan as well? No?
MR. HARRIS: Mr. Unterberg testified pretty ostensibly --
MS. ROBESON: Oh, that's --
MR. HARRIS: -- about that.
MS. ROBESON: That's correct. Okay.
MR. HARRIS: The --
MS. ROBESON: You're right.

MR. HARRIS: No, and so -- you can come up here. We're calling Mr. Phil, Phillip, is it, Hughes from Rogers and I will, as I mentioned at the last hearing, Frank Bossong is really --

MS. ROBESON: Right.

MR. HARRIS: -- has been the engineer of record on this and he's out of town still, so we'll have Mr. Hughes speak today. I think he can address the issues perfectly well, but if not, we'll just have to bring in --

MS. ROBESON: You're reserving the right to --

MR. HARRIS: Yes. Yes.

MS. ROBESON: -- to call Mr. Bossong?

MR. HARRIS: Yes, ma'am.

MS. ROBESON: Okay.

MR. HARRIS: Thank you.

MS. ROBESON: I understand. Okay. Please raise your right hand.

MR. HARRIS: No, you're fine there.

MS. ROBESON: Please raise your right hand.

(Witness sworn.)

DIRECT EXAMINATION

BY MR. HARRIS:

Q Would you state your name and business address for the record?

A Phillip Raymond Hughes, III, and it's 1947 Century

Boulevard, Suite 200, Germantown, Maryland.

MR. HARRIS: And, ma'am, I have a statement of qualifications of resume here that I would like to have identified as an exhibit.

MS. ROBESON: Okay.

MR. HARRIS: I gave copies to the other counsel.

MS. ROBESON: These are 108, which will be Hughes resume.

(Exhibit No. 108 was marked for identification.)

BY MR. HARRIS:

Q Mr. Hughes, can you identify this document for us?

A Yes, that's my resume.

Q Okay. And can you tell us what college degree you have?

A I have a bachelor's of science degree in civil engineering from Old Dominion University.

Q And what professional licenses do you hold?

A I'm a registered professional engineer in both Maryland and Virginia.

Q And do you have experience in the design of underground utility systems and storm water management facilities?

A Yes, extensive.

Q And does that include familiarity with the current

Maryland storm water management regulations?

A Yes, it does. I have testified in front of MDP regarding some of these and had numerous conversations with local organizations regarding them.

Q And have, do you serve on any committees within Montgomery County having to do with storm water management issues?

A Oh, yeah, I'm on the Montgomery County New Products Committee which reviews any storm water management product that is proposed for use in Montgomery County, so any facility that's getting used in the County goes through that committee. I am also on the Best Management Practice Committee which is working with Montgomery County and the design guidelines for all ESD facilities to be used within the County, how they're designed and all the specifications regarding that.

Q And how long have you been with Rogers Consulting?

A Ten years, six months.

Q And what is your position there?

A I'm a senior team engineer and a senior associate.

Q And what does your work consist of at Rogers?

A Storm water management, storm drain, water/sewer design and the like.

Q Did you work before that anywhere else?

A Yes. I worked for a number of years at Bohler

Engineering and then before that at Glenn and Sadler down in Norfolk, Virginia, and before that, Miller Stephenson for a while.

Q And did the work you undertook with those other organizations, was it similar to the work you now describe with respect to Rogers Consulting?

A Yes, sir.

Q And have you been involved in any recent, major projects in Montgomery County having to do with storm water management issues?

A The Wegman's project, Watkins Mill, Shops at Seneca Meadows, Cabin Branch, a number of other projects, Rothbury Square and the list goes on and on, Brightwood Crossing, Spectrum.

Q And other than the Montgomery County New Products Committee and the Montgomery County Best Management Practices Committee that you already identified, are you a member of any other professional organizations or committees?

A Well, the American Society of Professional Engineers and I also am one member of a co-committee for Montgomery County Oakwood Committee.

MR. HARRIS: Okay. The applicant would offer Mr. Hughes as an expert in civil engineering and storm water management.

MS. ROBESON: All right. Any objection?
MR. KLINE: I guess I do have a couple questions.
(Discussion off the record.)
VOIR DIRE EXAMINATION
BY MR. KLINE:
Q I guess the question really is leading up to ultimately have you qualified as an expert in civil engineering before the Hearing Examiner or the Board of Appeals or some other hearing body like this one?
A No, I have not.
Q In this County or in any county?
A No.
Q You have been doing storm water management since 1999 then?
A Before that as I was working while I was in college doing design work for an engineering firm down in Norfolk, so I've probably been doing this 17, 18 years now.
Q Do you have anything to say?
BY MR. CHEN:
Q The notice from your resume, Exhibit No. 103, that under recent, major projects, the last one is entitled Cabin Branch, do you see that? It's on page 2. Is that the project that is before the District Council and the Hearing Examiner in this proceeding?
A Yes.

Q And from reading that you've done apparently the initial water and sewer design, along with the preliminary water quality plan and final ordered quality plan?
A Yes, along with the construction design plans for all the approved phases except for what is on the lower told sections. We just did the final water quality plan for those, did not do the construction design plans.
Q Okay.
A So all of the Winchester phases.
MS. ROBESON: So are there any, no objections to qualifying Mr. Hughes as a civil, expert in civil engineering and storm water management?
MR. KLINE: No objection.
MS. ROBESON: Okay. You are qualified. Now you have to redo your resume. Okay. Go ahead.
MR. HARRIS: Okay. All right.
BY MR. HARRIS:
Q Mr. Hughes, are you familiar with the storm water management planning for the Cabin Branch project?
A Yes.
Q And do you know whether at the time of the development plan approval in 2003 whether a concept for storm water management was prepared at that time?
A Yes, a preliminary water quality plan was prepared.

Q And was that deemed appropriate for approval of the development plan at that time?
A Yes.
Q And following that, did you amend the -- did you do a preliminary water quality plan at that time?
A Yes, the preliminary water quality plan was done and is approved.
Q And was it later amended?
A Briefly.
Q Okay. In 2007, did you do a final water quality plan for the Cabin Branch project?
A I did not, but one was done by LSA or Soltesz now for the site.
Q The final water quality plan that was done in 2007, did that provide for subsequent, detailed, final water quality plan updates with each site plan to be submitted at a later date?
A Yes, and that's how all the site plans have been done going forward.
Q And so do those updates, are they considered to be amendments to the final water quality plan?
A I don't know if they're amendments, but they are just new, final water quality plans for those areas and they supersede that one.
Q Are you aware of the size of the acreage that is

within the MXPD zoned area for this property?
A I believe we're looking at around 283 plus or minus acres total.
Q Okay. Does that 283 plus or minus acres have an approved preliminary water quality plan?
A Yes, the whole site has an approved preliminary water quality plan.
Q And does that 283 acres have an approved final water quality plan?
A Yes, under the infrastructure.
Q And do you have an estimate of the proportion of that 283 acres that, well, is a portion of that area grandfathered under the pre-existing storm water management regulations as opposed to the 2007 regulations that require environmental site design?
A Yeah, on ponds 1, 11 and 13 are all grandfathered and that's 80, 81 percent of that 283 acres.
Q The -- does the remaining 19 percent have a preliminary water quality plan?
A Yes.
Q And does it also have an approved final water quality plan?
A Yes.
Q And do you have an expectation as to whether individual site plans within that remaining 19 percent area

will have updates to the final water quality plan at the time of site plan approval for those, for any development there?
A Yes, they'll have to go back in for a final water quality plan approval to go along with the site plan.
Q And any of those updates, will they incorporate ESD facilities pursuant to the 2007 storm water management legislation?
A The areas that have not been grandfathered will.
Q And can you give us an idea of what kind of facilities those ESD updates are likely to include?
A You're looking at your standard micro-bio filtration, landscape infiltration, possibly green roofs depending on the usage and pervious pavement would also be looked at at that time.
Q And have updates to the approved final water quality plan been completed and approved in connection with respective site plans at Cabin Branch that have been approved in the last four years?
A Yes.
Q And do you have, can you site any of those that have been updated?
A Of the plans we've gone back in would be, I mean everything that we're not talking about now, I mean win one, win two and I know that might not mean anything to you, but

everything along, next to Clarksburg Road and all the remaining Winchester housing developments. So you're probably looking at about 90 percent of the site has been done, has a new site plan, a new final water quality and final storm water management construction plans.
Q And do you have an opinion as to whether the approved development plan and this development plan amendment comply with the provisions for water quality protection under Chapter 19 of the County Code?
A In my opinion they do.
Q And do you anticipate the Planning Board updating the final water quality plan as may be necessary at the time of individual site plan approvals for any new projects?
MR. CHEN: You can't predict what they're going to do.
MS. ROBESON: Well, he can give his expertise. He can, you can opine on it.
THE WITNESS: Based on the previous approvals for the remainder of the site that have all gone forward, new final water quality plans have been done along with each site plan and have gone through the Planning Board with no questions.
MS. ROBESON: Well, I guess --
THE WITNESS: Is that the question?
MS. ROBESON: -- I see your -- well, let me

rephrase it slightly. Do you see any problems meeting the current regulations or do you see --
THE WITNESS: The 2007 guidelines for storm water?
MS. ROBESON: Yes.
THE WITNESS: No.
MR. HARRIS: That's all the questions I have.
MS. ROBESON: Okay. Mr. Kline.

CROSS-EXAMINATION

BY MR. KLINE:
Q I'm going to apologize in advance for my, what I was going to say, this is actually going to be sort of a preschool level because you kind of got dragged in because it came up in forest conservation and I'm trying to --
A I know you were expecting Frank too, so --
Q He was wise enough to go out of town.
A I know.
Q I understand you're not here to tell us about forest conservation, but I'm trying to understand the relationship of all this. So -- and you actually already educated me in one regard. When you've got a green field property, tell me when you sit down in your office to design how it's going to work, what do you start with? I presume you start with a natural resources inventory?
A Yes and --
MS. ROBESON: Before you go there, can you just

define for the record what a green field facility is?
THE WITNESS: Greenfield is basically open area development. There's, it's not redevelopment. There really was nothing there previously, so it's a blank slate --
MS. ROBESON: Right.
THE WITNESS: -- basically.
MS. ROBESON: Okay. Now can you answer the question?
BY MR. KLINE:
Q And explain to us what the NRI tells us. What information we get that then directs us to what the next step should be.
A No, I don't do the NRI usually.
Q I understand. Generally.
A Somebody else in my office does, but you know it outlines your stream valley buffer areas you can't go into, wetlands, areas of possible erosion due to difficult soils and steep slopes. That's the basic of what you're getting out of that.
Q We're just identifying the areas of environment sensitivity that we need to work with?
A Correct.
Q Okay. Then you sit down and I guess I thought you did a water quality plan. From what you testified, you actually start doing a storm water management plan?

A You actually start with -- the first step is a preliminary water quality plan and that's already been done.
Q Okay.
A And next you go on to the final water quality plan.
Q Okay. Go just a little slower. But you do start with a preliminary water quality plan?
A Correct.
Q Okay. Tell me what's in that? What does that show and what does that tell us and what do you do with it?
A It's a very basic plan. It's basically a bubble plan showing that there is the possibility to fit what you need to fit in there for storm water management.
Q Okay.
A So you're just basically showing there's really hardly any computations that go along with. Basically you're showing MDE's guidelines on it. You're basically -- you can take your green space and divide it by what your total filter area needs and just say, okay, well, we have enough green space to meet it and here's where we're going to put it. You know, there's -- it's really not an extensive item. I know this one was a little more extensive.
Q It has both a narrative and a graphic component?
A Yes.

Q Does the graphic component show us where certain features will be located and what their function will be?
A Generally, in general.
Q Elaborate on that.
A It's open to modification, but it's very early in the design process. And to get those, the site plans do change the layout of things.
Q We know that there was a water quality plan part of the record in the original zoning case. So tell us what, if you had an exhibit, what would it have shown during that -- I'm not going to say today, but I'm saying back in 2003 when the property was original zoned?
A I designed it, so we used basically the design that actually 2007 calls for today. I used a lot of, I hate using underground facilities. It's just not the way that I ever went with things. It's a lot of, I had a lot of micro-bio-retention on there; sand filters, which I did love and they don't let you use anymore, but they do a great job; infiltration practices and they were all spread throughout the site. So, you know, basically back in 2003, we were doing it the way for this project that they're telling you to do it now.
Q In, so when you, you said you have an approved preliminary plan. So you generated a preliminary water quality plan. Who do you submit it to and what happens

then?
A DPS. I think Leo Galanko over there reviews and approves all those.
Q Is that the Department of Permitting Services?
A Yes, yes, in Montgomery County.
Q And tell me what they do and what you get out of that review.
A They review and approve it and you get a basic, general guideline of where to start.
Q And their standards for approval of what, what are they looking for?
A That you can fit what you need to fit within the design area, you know, that it's feasible, you know, for future engineering. They just want to know that it's even feasible to do.
Q Okay.
A You know, once you prove to them that it's feasible, then you move on to the next step.
Q And the next step is the storm water management plan?
A Your final water quality plan.
Q Your final water quality plan? Okay. The same thing, just more detail?
A Yes, you get into a little more detail. There's some more computations involved to prove that, okay, what

you showed me, you know, with modifications and everything else, things move, things shift, things change, a lot can happen between a preliminary and your final because then you're going into your site plan, and that the more detailed that it will work. And that's why your final water quality, you know, dovetails and goes right into your construction plans.
Q More specificity because you --
A Yes.
Q -- know more at that point in time?
A Uh-huh.
Q And when I say specificity, that would be features that you'll employ?
A Correct.
Q And the location of those features?
A Correct.
Q Okay. All right. So then where does the storm water management concept plan fit in?
A The preliminary?
Q Yes, okay.
A There isn't a concept. It's a preliminary, the preliminary water quality plan? It is just your basic first step just to prove that it's a possibility.
Q Maybe I didn't ask the question -- in the zoning process, we're typically submitting conceptual storm water

management plans. Do you have, have you done --
A That's what the preliminary is, just basically a concept.
MS. ROBESON: Are you in the, is this in the special --
THE WITNESS: Yes, it is.
MS. ROBESON: -- exception area?
THE WITNESS: And that's --
MS. ROBESON: So it doesn't have a preliminary storm water, or it uses --
THE WITNESS: It does have a concept.
MS. ROBESON: -- the water quality plan as the --
THE WITNESS: Right. So you have your preliminary, your final and your, I mean your final water quality plan and then the constructions plans. So since it's an SPA, it's a three-step process whereas what's you're talking about is your normal development which is a two-stage process. And MDE now calls for it to be a three-stage process because Montgomery County's concept is so comprehensive that, and they already require you to do your NRI where a lot of the counties do not. So they group it all into one and they'll let you do just the one concept.
BY MR. KLINE:
Q Well, again, I realize I may be a little slow about this, but do we have a storm water management plan --

A Yes.
Q -- associated with this project?
A Yes.
Q And it's more detailed or less detailed than the water quality plans? What's the distinction?
A I think you're --
Q If I'm mistaken too, that's quite possible.
A -- you're mixing processes.
Q Yes.
A Because what you have is you have a preliminary water quality plan for this project --
Q All right.
A -- okay and that's been done, it has been approved.
Q I understand.
A Okay? Then your next step is to go into a final water quality.
Q I understand.
A Now an infrastructure final water quality and final site plan was done per Montgomery County Park and Planning on this project.
MS. ROBESON: Was that just for the infrastructure?
THE WITNESS: Yes, that was so they could go in and basically build all the roads --

MS. ROBESON: Build the roads.
THE WITNESS: -- if they had to.
MS. ROBESON: Right.
THE WITNESS: Montgomery County wanted them to have that and that's not a normal step that you would do, but it was something that the Park and Planning had asked for. So that was done. So you have a site plan for the whole site technically and you have a final water quality plan for the whole site that conforms to, that started with the preliminary water quality plan.
So now from there each site plan now, because the land bays weren't done, has to come back in and do a final water quality plan that shows how all that stuff works with the land base. And then you go from your final water quality to your construction plans after that. Once you get your final water, your final water quality has to be approved with your new site plan.
BY MR. KLINE:
Q And we have a copy of the final water quality plan that's been approved in the record of the case?
A I don't know. I haven't been that involved with this. I don't know what you guys have in the record.
Q Did you happen to bring it with you today, by chance?
A No, I did not.

Q All right.
MS. ROBESON: It's my recollection we do not have the final water quality plan, although we do have the final forest conservation plan.
BY MR. KLINE:
Q Okay. Well, then I guess that kind of leads me to my next question then. Do you have an explanation for why there is not a preliminary or final quality, water quality plan included in the record of the case?
A There is a preliminary water quality plan included in the record.
Q Included in the record in this --
A I thought you said there was one in the record, a preliminary water quality plan?
MS. ROBESON: No, I said a preliminary, there's a -- no.
THE WITNESS: No?
MS. ROBESON: Unless someone can, I'm reviewing the exhibits now.
MR. HARRIS: The preliminary water quality plan is in the record of the original development plan --
MS. ROBESON: Okay.
MR. HARRIS: -- covering the entire property.
MS. ROBESON: Which is 6, Exhibit 6?
MR. HARRIS: I don't know if it's a separate

exhibit in this.
MS. ROBESON: Certified development plan for G-806?
MR. HARRIS: I don't have that handy.
MS. ROBESON: Well, let me just see if I -- okay. It must be a large --
THE WITNESS: It is.
MS. ROBESON: I think it's on the bottom. Could someone take a look at Exhibit 12 too and see what that is?
MR. HARRIS: I don't think I have those exhibits with me, Ms. Robeson, but I'll see.
MS. ROBESON: Okay. No, I meant the exhibit list.
MR. KLINE: That one --
MR. HARRIS: Oh, the exhibit list?
MR. KLINE: Yes.
MR. HARRIS: Oh, I'm sorry.
MS. ROBESON: Yes.
MR. HARRIS: Exhibit list. 12 is final forest conservation plan.
MR. KLINE: And, again --
MS. ROBESON: Can we keep going?
MR. HARRIS: No, that was, it it was 12, that was submitted a long time ago.
(Discussion off the record.)
MR. HARRIS: Certified development plan was

Exhibit 6.
MS. ROBESON: Yes, that's what I'm looking for. It's DPE.
MR. HARRIS: No, looking at the exhibit list, I'm not sure there is one in the record in this case, but --
MS. ROBESON: Well, I can't find Exhibit 6.
MR. HARRIS: -- but I also, I don't see anything in the regulations that require us to provide that. As I look at 59-D, I don't see that as s requirement.
MR. KLINE: Well, I actually, unfortunately, I have to disagree, but I'll see if we can find it first --
MR. HARRIS: Okay.
MR. KLINE: -- so I don't have to raise it if it's not necessary.
MS. ROBESON: Well, I know we have -- let me look at 6A and see if that sheds any light on it. Well, I must have --
MR. CHEN: Madam Examiner --
MS. ROBESON: Yes?
MR. CHEN: -- is it possible that Exhibit 6 is already on the easel?
MS. ROBESON: That's a possibility. For some reason I have a huge number --
(Discussion off the record.)
MR. HARRIS: If this will help you, Mr. Kline,

we've brought an exhibit list. I didn't think it would be necessary. I would be happy to make this an exhibit and have, that may answer your question. And I have smaller copies of that. Let's see what I have. This is called, it's identified as storm water management drainage area exhibit.
MS. ROBESON: Okay. Let me just -- all right. It's a gazillion copies.
MR. CHEN: This is Exhibit 6.
MS. ROBESON: Thank you.
MR. HARRIS: Oh that, I beg your pardon, Bill, I looked at that and didn't think that was Exhibit 6.
MR. CHEN: It says Exhibit 6.
MS. ROBESON: Thank you, because it's not --
MR. HARRIS: There you go.
MS. ROBESON: -- in here. Okay. So --
MR. HARRIS: That is, that is the land use plan of the development plan. It is not a --
MS. ROBESON: The full development plan?
MR. HARRIS: It is the full development plan. It's not the, it's not a preliminary water quality plan.
MS. ROBESON: Okay. Do you have anywhere in our record a preliminary water quality plan or a final water quality plan? I'm just asking right now. I'm not saying whether or not it's required. I'm just asking --

MR. HARRIS: Do not in the sub-file for this DPA, but we do in the original DPA that was submitted at that time and deemed appropriate by the Hearing Examiner.
MS. ROBESON: As to preliminary?
MR. HARRIS: As to what was necessary to get a development plan approved.
MS. ROBESON: Okay. So you don't have the final one?
MR. HARRIS: No, a final was not --
MS. ROBESON: The infrastructure one?
MR. HARRIS: -- required.
MS. ROBESON: Okay. So it's in the original file, but we have another exhibit here. What is this exhibit that I'm making as -- are we at 109?
MR. HARRIS: It's on, that's 108.
MS. ROBESON: I think that was Mr. Hughes's resume?
MR. HARRIS: Oh, it was. You are correct.
MS. ROBESON: So what do I call this exhibit that I'm marking as 109?
MR. HARRIS: It's identified on its cover, or on the bottom as storm water management drainage area.
MS. ROBESON: Drainage area? Okay. 109 will be storm water management drainage area.
(Exhibit No. 109 was marked for

identification.)
MS. ROBESON: Do you have this exhibit, Mr. Kline and Mr. Chen?
MR. KLINE: Mr. Harris kindly provided us copies of it.
MS. ROBESON: Okay. All right.
BY MR. KLINE:
Q Well, let me just make sure. So what we've brought out is Exhibit 6. It doesn't have any information on the face of it dealing with water quality plan approvals or issues, correct?
A I don't know.
Q All right. So I just want to make sure there's no water quality plan that was sort of attached to that?
A I don't believe so --
Q Okay.
A -- no.
Q Well, let me approach it this way. I'm providing you with a copy of Section 59-D-1.3(i) of the County Zoning Ordinance titled, Contents of the Development Plan. And subparagraph (i), if you could just read that?
A "If the property proposed for development lies within a special protection area, an applicant must submit water quality inventories and plans and secure required approvals in accordance with

Article 5 of Chapter 19. The development plan should demonstrate how any water quality protection facilities proposed in the preliminary water quality plan can be accommodated on the property as part of the project."
Yes.
Q So that indicates that there should be a water quality plan as part of the record today as we're going through your testimony, correct?
A I have no idea. I mean --
Q What does it, what --
A If a property --
Q -- if they file it with the application?
A Uh-huh.
MR. HARRIS: So for a development plan --
THE WITNESS: "Submit water quality inventories and plans and secure required approvals,"
does that require me to submit it today? I mean I'm not really -- I really don't know a lot about zoning, so --
MS. ROBESON: I understand your point, but he's not the attorney, so --
THE WITNESS: I don't know a lot about zoning.
MR. KLINE: Okay.
MS. ROBESON: But he does, you can do that some way else besides cross.

MR. KLINE: Well, if there isn't a water quality plan within the file, it's kind of hard for me to cross with the next question I want to ask him.
MS. ROBESON: Well, Mr. Harris, do you want to comment on that?
MR. HARRIS: Again, this pertains to a development plan. It doesn't pertain to a development plan amendment. This was reviewed and approved 10 years ago and it's in the file. It was submitted and the zoning hearing examiner at the time found that that obligation had been met and Mr. Hughes has indicated here that this development plan amendment does not affect that.
MS. ROBESON: Well, Mr. Kline, can you --
MR. KLINE: Ma'am?
MS. ROBESON: -- point me to the section that you are quoting?
MR. KLINE: Sure. If you're in the zoning ordinance, it's at the bottom of page 59-D-12. It's Section 59-D-1.3(i) at the bottom of page D-12, subsection (i).
MS. ROBESON: Okay.
MR. KLINE: And the response to Mr. Harris's comment, I guess I can't ask the witness of this, but basically (i) says do this in conformance with Chapter 19 and Chapter 19 at 65-3(a) says that for any significant amendment of the development plan, water quality plan, must

undergo a review as provided in subsection (b) below, meaning you must file it with the planning director or preliminary water quality plan as part of a complete application for a development plan and development plan. And so the amendment does trigger under Chapter 19, Section 65, subparagraph (3), the same requirements as would have been involved with a development plan. And I'm, got this available. I'm glad to make -- I only brought one copy.
MS. ROBESON: Why don't you give -- I don't know about --
MR. HARRIS: Sure. I have that. That says a significant amendment.
MS. ROBESON: Well, I don't, so could I have the copy? Sorry to interrupt. Mr. Kline --
MR. HARRIS: Jody.
MS. ROBESON: -- may I have a copy --
MR. KLINE: Yes.
MS. ROBESON: -- so I can read the section? I try not to bring the zoning ordinance, or the code --
MR. KLINE: She wants the what, she wants --
MR. HARRIS: Chapter 19.
MS. ROBESON: The 19 cross-reference. I have 59-D.
MR. KLINE: Okay. This was just an excerpt from --
MR. CHEN: Yes.

MR. HARRIS: What paragraph, Jody, did you say?
MR. KLINE: What was that?
MR. HARRIS: What paragraph in there?
MR. KLINE: It was subparagraph (3).
MR. HARRIS: Oh, yes.
MS. ROBESON: Page 16?
MR. KLINE: I don't think I even had a page.
MS. ROBESON: Okay.
MR. KLINE: It's section --
MS. ROBESON: What section?
MR. KLINE: It's 19-65(e) was what I was looking at and I think it's highlighted.
MS. ROBESON: I only see -- oh, I see. I see. Sorry. All right. Well, it says a development approval, which involves any significant alteration to a water quality plan must undergo review as described in subsection (b). Okay.
MR. HARRIS: And I think what Mr. Hughes has testified is, number one, that this is not a significant amendment. It stays within --
MR. KLINE: Objection. I don't believe he testified to that at all.
MS. ROBESON: Well --
MR. HARRIS: Okay. Well, that --
MS. ROBESON: Why don't --

MR. HARRIS: That's my opinion --
MR. KLINE: Yes.
MR. HARRIS: -- and as a lawyer --
MS. ROBESON: I know.
MR. HARRIS: -- that's not a significant amendment. Beyond --
MS. ROBESON: We're going to get to Mr. Hughes's opinion on it.
MR. HARRIS: Beyond that, as Mr. Hughes did testify, the process that has been set up for this project is that as each detailed site plan goes forward, the final water quality plan that has already been approved for the entire site is updated to reflect the actual development, the specific buildings and parking facilities that are designed at that time, but are not designed now. It's impossible to provide that kind of information at a conceptual stage here when you don't know exactly what the building footprints are going to be or the parking areas.
MS. ROBESON: Well, go ahead.
MR. KLINE: What I understood from his testimony was that when in the final water quality plan, we get into more specificity. He talked about some of the features that would be involved. Therefore, I had the impression that, in fact, they could basically identify the location and nature of the facilities and actually be in the nature of a revised

water quality plan that under the Section (i) I mentioned and Chapter 19 ought to be in the record.
THE WITNESS: That will be revised under the final water quality plan. It says water quality plan, final water quality plan will be revised.
MR. CHEN: Madam Examiner, may I just --
MS. ROBESON: Yes?
MR. CHEN: Chapter 19 has been implemented by Comcorp regulations. Comcorp Regulation 19.67.0101 entitled authority states, in accordance with the procedures authorized in Chapter 19, Article 5, which is a reference in the zoning ordinance entitled water quality review, special protection areas, Section 19-67, the following executive regulation applies to an application for approval of or significant amendment to a development plan, diagrammatic plan, schematic plan, project plan, a special exception or site plan in designated special protection areas, and then goes down on what the Comcorp requirements are.
The point in referring the Examiner to this regulation is it dovetails with the zoning ordinance requirement in that a DPA, not a development plan application in its original instance, but even an amendment to a development plan, an approved, an amendment to an approved development plan must have this information and it must be provided with the application at the time of

consideration of the amendment to the development plan.
MR. HARRIS: You left out the word significant in there. It's not any amendment. It's a significant amendment. And Mr. Unterberg previously testified that this development that's under consideration here does not change the limits of disturbance that are within the existing forest conservation plan and the water quality plans such that this is not deemed to be a significant amendment.
MR. KLINE: Objection. Never, Mr. Unterberg never used the word significant. I realize it's a debate, but he never opined on that. He opined --
MR. HARRIS: I agree, he did not.
MR. KLINE: He opined only on the forest conservation. Let me ask a series of questions. Maybe I can try and bring this to a head.
BY MR. KLINE:
Q Mr. Hughes, this is a final forest conservation plan that I think is probably, we marked again as 95 the other day and it's probably the same as some exhibit in the record which would be --
MR. CHEN: I think it's 95.
BY MR. KLINE:
Q Well, what, we were given 95, but it was originally put into the record as No. 12, agreed?
A Okay.

Q And here's my point is. This forest conservation plan, though it doesn't address storm water management issues, it does show storm water management facilities such as really the names of the ponds would be within the area of the regional outlet center. That pond --

MS. ROBESON: Do we have the exhibit with the ponds shown or was that the --

MR. KLINE: Yes, ma'am.

MR. HARRIS: That was just, that was just identified and introduced.

MR. KLINE: Right. And they're shown on --

MS. ROBESON: Oh, okay.

MR. KLINE: -- 95 as well.

MS. ROBESON: Right. That's what I remember.

MR. HARRIS: This one is probably easier to view.

MS. ROBESON: But 95 has the pond numbers, I think.

MR. HARRIS: This does as well.

MR. KLINE: So within --

MS. ROBESON: Did you put that -- can anyone put that up because I can't see it? Is there an easel there?

MR. HARRIS: Yes, there is.

MS. ROBESON: You may want to clip that cross bar, just, that has collapsed.

MR. KLINE: He's an engineer.

MS. ROBESON: There is --

MR. KLINE: He'll figure it out.

MS. ROBESON: I'm just saying. I don't know how it shows up on the tape, but okay. There you go.

MR. HARRIS: There must be a missing piece.

MS. ROBESON: Yes. Okay.

MR. KLINE: Well, I'm --

MS. ROBESON: Oh, yes. Okay. The green are the ponds. Okay. And that is exhibit, is there a number on that?

MR. CHEN: 109? I think the hand, yes. I think that's an enlargement of 109.

MR. HARRIS: That's an enlargement of --

MS. ROBESON: Of the handout which is marked as --

MR. HARRIS: 109, yes, ma'am.

MS. ROBESON: -- 109. Okay.

MR. KLINE: Mr. Hughes --

MR. HARRIS: Did you mark these?

MS. ROBESON: Please write 109 large version. Thank you, Mr. Harris. All right.

BY MR. KLINE:

Q Mr. Hughes, what storm water management ponds are within the limits of what we call the regional outlet center and the associated development that would occur, just sort of the main focus of the development plan application?

A One, 11, 12, 13 and 15, which I believe we already stated.

Q Now could you do me a favor? I don't have my glasses. Could you --

A To you want me to get up and point at them?

Q -- stand up there? Yes.

A You have one, 11, 12, 13 and 15.

Q And then what's that green dot in the middle?

A This is an existing farm pond.

Q Got you. Okay. I'm going to give you Exhibit 95 and could you find the pages in here --

A I have no idea.

Q -- which, well, that's the problem, I realize you're not the forest conservation --

A Right.

Q -- guy, but can you find a page within that 50 pages that's, say, got pond 11 or pond 12 -- let's go with 11, that seems to be --

A 11?

Q -- in the core.

A I think it's eight and nine. Well, there's pond 11 right there.

Q Okay. And we'll let the Hearing Examiner kind of settle in.

MS. ROBESON: So which page, which sheet?

THE WITNESS: Sheet 9.

MR. KLINE: Are we okay, Ms. Robeson?

MS. ROBESON: Yes.

BY MR. KLINE:

Q Okay. Could you describe for us by telling us what these colors and patterns are what is shown on page 9 of the --

A I would have to look at the key --

Q Sure.

A -- just like everyone else would have to do.

Q Sure.

A And, you know, I can't be all sure of that at this size, but you've got some upland plantings, it looks like some forest retention area, so there's some planted trees marked and some other things.

Q Okay. What on page 9 would be classified as a water quality plan feature or a storm water management feature?

A The pond and the outfall.

Q Okay. And would you for the, so the Hearing Examiner knows, what, describe on this where is the pond? Is that on the right-hand side where these topo lines are shown?

A I would say it's more towards the center right below the road.

Q Okay. So immediately to the right-hand side of the road you're saying where I'm putting my hand --
A Yes.
Q -- that's --
A Yeah.
Q -- that's the pond itself? Okay.
MS. ROBESON: Well, I can't see where you're putting your hand.
THE WITNESS: Would you want me to put my hand -- do you want me to show you?
MS. ROBESON: Well, just describe it so the record knows where it is. Is there some marking there?
THE WITNESS: You'll see, it looks like two dashed lines on the lower right-hand corner coming down next to the shaded area.
MS. ROBESON: Yes.
THE WITNESS: If you follow those back up into the development --
MS. ROBESON: Yes.
THE WITNESS: -- to the north, that is the pond, that grading in there, and there's some dotted areas to the left of that and that is the sand filter area.
MS. ROBESON: The patch lines?
THE WITNESS: Yes, if you follow the patch lines up, that's your main containment cell. And then to the left

of that --
MS. ROBESON: Now I'm not sure I know where you're talking about.
MR. KLINE: Yes, it would be best to show her because even I'm having trouble with it standing here.
MS. ROBESON: It looks topo-wise --
THE WITNESS: Yes.
MS. ROBESON: -- like it's in here.
THE WITNESS: This is your pond and then also this is your dam that runs along here. And this is your sand filter. So this is your water quality treatment.
MR. KLINE: So --
MS. ROBESON: Okay. So where --
THE WITNESS: And this is your larger volume treatment.
MS. ROBESON: Where is the pond?
THE WITNESS: This is all --
MS. ROBESON: The pond?
THE WITNESS: -- all of it, yeah. Technically all of this right here.
MS. ROBESON: Okay. So everything that is shown --
THE WITNESS: Between the roads and the stream valleys is pretty much a pond.
MS. ROBESON: Okay. Well, where is the -- is this --

THE WITNESS: Road, road, stream valley.
MS. ROBESON: Okay.
MR. KLINE: Try to speak up so that the record --
THE WITNESS: Oh.
MS. ROBESON: All right. Well, I'm going to mark it and then I, because, well, I'm going to have you mark it and this is Exhibit 95, or whatever it is, 95. You're going to mark in red -- well, let's do it, you can mark in red where the pond is.
THE WITNESS: I would say this area. So like that.
MS. ROBESON: Okay. So that's on 95, sheet 9?
THE WITNESS: Uh-huh.
MS. ROBESON: Okay. Is there any other area that you want delineated?
MR. KLINE: Well, I guess if that's 11, then I guess if you say 12 is -- you know, I'm raising more of procedural issue, so I don't think I need to have it reviewed on which one. Okay. How about doing it, this No. 11 then, is that 11 there?
THE WITNESS: That was 11.
BY MR. KLINE:
Q Okay. So can you show us where No. 12 is and No. 15 as well?
MS. ROBESON: And your procedural issue you're

raising is that there is no preliminary forest conservation plan, is that your procedural issue?
MR. KLINE: No, my question has got nothing to do with preliminary forest conservation.
MS. ROBESON: I meant -- not that.
MR. HARRIS: Water quality plan.
MS. ROBESON: Water quality. So is that your preliminary issue?
MR. KLINE: That's what I'm going to get to eventually.
MS. ROBESON: Okay. I'd like him to outline it because if anyone ever --
MR. KLINE: Yes, no, I agree.
MS. ROBESON: -- has any questions --
MR. KLINE: That's fine. No, you're right, we should have all of it.
MS. ROBESON: So what's the next pond?
MR. KLINE: 12 and 15.
THE WITNESS: Right, that one.
MS. ROBESON: That's fine.
THE WITNESS: Just to give you a general idea of where that is.
MS. ROBESON: That's fine. Okay. So what ponds have you outlined on Exhibit 95?
THE WITNESS: 11, 12 and 15.

MS. ROBESON: Okay. And 11 is on sheet 9?
THE WITNESS: Correct.
MS. ROBESON: Which sheet is 12 on?
THE WITNESS: I'm going to have to look back at the key here. 12 would be on 15.
MS. ROBESON: Okay.
THE WITNESS: And 15 would be on 44.
MS. ROBESON: Okay. All right.
MR. KLINE: Mr. Hughes, actually did we mark your copy? We should have marked your copy, right?
MS. ROBESON: Yes, he did mark my copy.
MR. KLINE: Your copy? All right.
BY MR. KLINE:
Q Mr. Hughes, understanding that the forest conservation plan that I'm using --
A Uh-huh.
Q -- that you outlined stuff is a surrogate for the water quality plan, but is it correct that water, the facilities that are shown on the pages you outlined are consistent with what will be shown in the water quality plan?
A I don't understand what your question is here.
Q Okay. Sure. I mean the pond that you showed on, outlined in red on each of those three locations, if I had a water quality plan and I looked at it, I would find a pond

in the same general location, in the same general set-up, right?
A Yes.
Q All right.
A Yes.
Q So I mean for purposes of discussion these are essentially the same as a --
A Uh-huh.
Q -- representation of what probably would be in the water quality plan?
A I don't know if it's a representation because that is not storm water --
Q I understand.
A -- and you would never build anything off of that, so you would never look at those plans to find out what storm water is. I would never use those to reference what storm --
Q Okay.
A -- water was to find out how it pertained to the site.
Q Okay. If I had the water quality plan here, what would it show me relative to what you just showed us on these plans?
A Which water quality plan are you referring to, the preliminary or the final?

Q The final.
A Now the final water quality plans were not, don't look, pond 12 was not designed, but I believe it was in the final water quality plan.
Q Does the exhibit show --
A Now there have been changes of things of that nature to some of the other ponds, so I can't say that what you're seeing in there for storm water would exactly match what's on the final design plans.
Q I understand.
A What I can say with surety is that all the buffers and everything that are shown on there are adhered to on the storm water management plan.
Q I'll ask the question this way then. For each of the three ponds you've mentioned, on the final water quality plan there are three storm water management plans?
A Yes.
Q Okay. The area in blue, does any of it have any site plan approval and, thus, is grandfathered in compliance with the new regulations?
A They have site plan approval through the infrastructure site plan and 11 and 13, well, are grandfathered. Most of 13 is built. 11 is actually constructed. So pond 11 is actually filled.
Q So 12 is not grandfathered?

A 12 is not grandfathered.
MS. ROBESON: Which one is 12 on that sheet?
THE WITNESS: 12 is this one down here in the corner which would be on sheet 15, I believe, of what you're looking at.
MR. CHEN: You can see it on Exhibit 109.
MS. ROBESON: Yes. Yes.
THE WITNESS: So, and 15 is not grandfathered either.
BY MR. KLINE:
Q Okay. When you implement the storm water management solution to the plans, you will not build those ponds as shown in the final storm water, final water quality plan --
A If you --
Q -- correct?
A -- do things per the regulations right now and you do ESD to the maximums that are practical and get your full ESD, the ponds would go away and then probably most, considered an improvement over what was designed and having these larger ponds, spreading the development and the recharge facilities and the storm water management facilities throughout the site.
Q Would you not consider the elimination of the two storm water management ponds to be replaced by even better

facilities to be a significant change in the scope of the water quality plan?
A That has not been DPS's position when we've approved them.
Q Go ahead and explain that.
A We've approached them and they know that we do not have them grandfathered and the discussions with them have all been, and this is Mark, not, yes, Mark Etheridge and Rick Brush, that they would go away and we would be required to do ESD. Rick has been on page with us all the time when we were requesting the rest of the waivers that we were not doing these and that we would have to do ESD before our final water quality plan. It never said any mention of revising the preliminary water quality plan to accommodate that and nor has it been required in the rest of the development with anything else we've done.
Q Well, I understand. We're not talking about DPS approved. We're talking about whether or not you meet the zoning ordinance requirements.
A Well, I think that dovetails in directly with DPS requirements because don't they have to follow the zoning ordinance and the regulations?
Q No.
A They don't?
Q They would not be looking at this provision of the

zoning ordinance.
A Wouldn't they?
Q They would be looking at Chapter 19.
A No, we have -- they do look at that and they will not approve my plans without the site plan approval when I do my final on the pond. They work directly with public --
MS. ROBESON: Right.
THE WITNESS: -- Park and Planning.
MS. ROBESON: They're not implementing the development --
THE WITNESS: Okay.
MS. ROBESON: -- plan amendment --
THE WITNESS: Uh-huh.
MS. ROBESON: -- statute, so keep going.
MR. HARRIS: Just again let me interject here. You know, 59-D-1.3(i), subparagraph (i), whatever, just says that the applicant has to submit water quality inventories and plans and secure required approvals in accordance with Chapter 19. What Mr. Hughes is saying is that they have determined what has to be -- they, I guess, have determined what has to be submitted in, under Chapter 19 and that we have complied with that.
THE WITNESS: DPS doesn't consider it a significant change --
MS. ROBESON: Well --

THE WITNESS: -- enough to warrant us going back and revising it.
MS. ROBESON: -- Mr. Chen is saying they have an executive regulation no matter what Mr. Brush is saying, that there is an executive regulation that a development plan amendment is a significant change. But let me go --
MR. HARRIS: I don't think it says that, ma'am.
MR. CHEN: Just for the record, the zoning ordinance does not even make that a distinction. The requirements of subsection (i) do not even qualify.
MS. ROBESON: That's true.
MR. HARRIS: What was, excuse me, what was the section that Mr. Chen quoted of the Comcorp?
MR. CHEN: It's Comcorp, do you want the zoning?
MR. HARRIS: Yes, Comcorp. I know it's 19.67.01.
MR. CHEN: 19.67.01.01.
MR. HARRIS: .01 is just the authority?
MR. CHEN: Yes.
(Discussion off the record.)
MR. HARRIS: Following an executive regulation applies to applications for approval. Okay. So it says the regulations apply. I don't see anywhere in there that it says that this is a significant amendment or that a new preliminary water quality plan has to be submitted.
MS. ROBESON: Well, I guess -- go ahead, Mr. Chen.

Do you want to respond to that?
MR. CHEN: Yes. All I'm, the point that I'm making is that when you read the zoning ordinance requirements and you read the Comcorp requirements, they're right here, that this DPA comes within the scope of these regulations. Indeed, my recollection, and I know what Mr. Harris's response is going to be, well, Mr. Unterberg expressed his opinion that they're not significant. I have yet to hear, and I could be mistaken, I could be mistaken, any evidence about earth moving areas, changes that will have to occur by virtue of this DPA that are different from the approved DP.
And Mr. Unterberg's, their opinion without any factual foundation is worthless. Quite frankly, you are quadrupling the retail on this site and in my layman's or unlearned opinion, when you are quadrupling the retail, the word significant becomes important. And as I have already said, subsection 9 does not even put that qualification on it. And I have been seeing, for what it's worth, we do know that at a minimum under the zoning ordinance what the applicant had to submit, that's had to submit is the water quality inventories and plans and secure required approvals in accordance with Article 5's Chapter 9. And then it goes on that the development plan shall demonstrate how any water quality protection facilities proposed in the preliminary

water quality plan can be accommodated on the property as part of the project. I could be saying, I think that's exactly where Mr. Kline was going.

MR. HARRIS: And that's exactly what has been done already. And as Mr. Hughes testified, this development does not change any of those conclusions.

MS. ROBESON: Well, wait a minute. That's your opinion.

MR. HARRIS: No, he testified. My question was --

MS. ROBESON: Okay.

MR. HARRIS: Okay.

MS. ROBESON: I haven't heard that.

MR. HARRIS: Okay.

MS. ROBESON: So let me -- what I want to know is, and my concern is there's an aspect of this, it's not based on limits of disturbing, it's based on impervious area. No? Yes? Maybe?

THE WITNESS: Your storm water management is based on impervious area.

MS. ROBESON: Yes.

THE WITNESS: Okay.

MS. ROBESON: So I don't have anything in front of me saying what your percentage impervious area is and how you're going to treat it --

THE WITNESS: Uh-huh.

MS. ROBESON: -- even on a preliminary basis. I know you've told me the roads can be, the roads are accommodated --

THE WITNESS: Uh-huh.

MS. ROBESON: -- the residential as it's going to site plan is accommodated, but argue, you could argue, well, I don't know. I don't have anything in front of me --

MR. HARRIS: Well --

MS. ROBESON: -- saying --

MR. KLINE: If I might just explain? I think everybody is kind of getting to where I was trying to get to and that is we're taking away features that are shown on the approved plan and we're replacing them. And as I read the last sentence of (i) in 59-D-1.3,

> "The development plan shall demonstrate how any water quality protection facilities proposed in the preliminary water quality plan can be accommodated on the property as part of the project."

And I believe that that means the applicant has the burden of saying when we change to this new set of techniques, here's what the effect is going to be and, one, we don't have anything to tell us what that's going to be and let alone not even having the plan, the old plan in the record. And the way we, or the way I read (i) is that those things

had to have been addressed at the time of the filing of the application. And if I had been smart enough, thought I was going to be involved in the case, I would have come over and said, sorry, you shouldn't accept that because this is missing.

MR. HARRIS: Perhaps --

MS. ROBESON: Mr. Chen, do you want to -- is that your position too?

MR. CHEN: Yes.

MS. ROBESON: Okay. Mr. Harris.

MR. HARRIS: Perhaps it would be useful to have Mr. Hughes explain how the water quality protection facilities can be accommodated on the property, the water quality protection facilities that are required under Chapter 19.

THE WITNESS: So, ESD facilities, how are they going to be accommodated on the property?

MS. ROBESON: Do you have --

MR. HARRIS: Yes.

MS. ROBESON: -- any idea of the impervious area?

THE WITNESS: I can't imagine it's going to be any more than what's proposed and it's probably going to be around 80 percent, 85 percent.

MS. ROBESON: Just a second.

BY MR. KLINE:

Q What's proposed means what? This proposal --

A Well, what --

Q -- or the old one?

A -- was the old proposal.

Q Right.

A Well, that was a hospital with a lot of ground parking. You know, there's not going to be a huge swing of impervious there and, honestly, you're probably going to get more green space than what you had before because you're implementing ESD.

MS. ROBESON: But isn't the parking for retail a higher ratio --

THE WITNESS: But you're --

MS. ROBESON: -- or not? I don't know.

THE WITNESS: You're going to have, whereas before when the hospital was there, it was all pavement. You really didn't have a lot of facilities. Now you're going to be breaking this up with a lot of green space facilities because you're going to need those to implement your environmental site design.

MS. ROBESON: Do you know that for sure?

THE WITNESS: Yeah.

MS. ROBESON: So for sure you know that this is going to have more impervious area?

THE WITNESS: I don't know for sure that it's

going to have more impervious area, but I would bet they're going to be roughly the same. But what I'm saying is you're going to have more green space interspersed throughout the development than you probably previously were going to. And you're also probably going to have the implementation of some kind of green roofs, which the hospital never would have done. Hospitals don't like green roofs. It's a fungal issue to worry about leaks.

BY MR. KLINE:

Q Mr. Hughes, if the, I require secure required approvals, shouldn't all that have been delivered to DPS and have them say we concur on that? Isn't that the intent of securely required approvals?

MR. HARRIS: He testified we have secured --

THE WITNESS: We have.

MR. HARRIS: -- the approvals.

MS. ROBESON: Okay.

THE WITNESS: And what --

MS. ROBESON: The argument is --

MR. KLINE: Oh, no, you don't.

MS. ROBESON: -- no, just a second. I have to agree with Mr. Kline on this one. You have a final water quality plan for the road?

MR. HARRIS: For the whole site, not just the roads. These ponds serve not just the roads.

MS. ROBESON: What do they serve?

MR. HARRIS: The whole development.

MS. ROBESON: So do they -- so how do you know when you just change this use, and I'm asking Mr. Hughes, how do you know that this same storm water, or preliminary water quality plan is going to be adequate when the facilities it shows aren't even going to be there?

THE WITNESS: Well, the preliminary water quality plan is, was done awhile ago, and we've all said that that gets, you know, gets replaced when the final water quality plan comes through. The final water quality was planned showing the ponds and a number of other facilities.

MS. ROBESON: Which aren't going to be, some of which are not going to be there anymore?

THE WITNESS: Correct. So you replace those with the ESD, which means you use the smaller drainage areas. And I've done this over a lot of developments and I did it for, and I know Mr. Kline was involved with Butz when Butz property was a lot more impervious than what it was after we got to the final design. And we actually did that and that was upwards of about probably 80 percent. That was a huge crush. And we got that done and DPS was actually using that plan to showcase how you do it. I have no doubt in my mind that I can do it and that it can be done --

MS. ROBESON: We just don't know how yet.

UNIDENTIFIED SPEAKER: Oh, I know how.

MS. ROBESON: How?

THE WITNESS: I just need to sit down with a pad of paper.

MS. ROBESON: How?

THE WITNESS: Through the implementation, you can use -- well, as I said, microbio filtration, you can use that in open space areas. They make great amenities. You go over to Wegman's, the design for Wegman's --

MS. ROBESON: Well, have you seen --

THE WITNESS: -- you'll see a lot of those.

MS. ROBESON: -- the layout in the development plan on Exhibit 127, which is there?

THE WITNESS: Is that the purple?

MS. ROBESON: Yes.

THE WITNESS: The multi-colored one? Yeah.

MS. ROBESON: Yes. And then so where would these bio-retention or bio --

THE WITNESS: Well, you've got a number of patterns.

MS. ROBESON: No, can you bring that up and put it on the board?

THE WITNESS: Oh, sure.

MR. KLINE: There should be a number on there somewhere.

THE WITNESS: 59?

MR. KLINE: Thank you.

MR. HARRIS: That's not right.

THE WITNESS: Is this that?

MR. HARRIS: Yes.

MS. ROBESON: Well, that's -- isn't there a one, yes, that is right. Okay.

THE WITNESS: There's a lot of open space in here. That's a lot of space where you can accommodate a lot of nice facilities and you can even do them, suck in the pavement a little bit, you have a nice --

MS. ROBESON: Is that open space? So how do you know that's not parking?

THE WITNESS: Because this is parking.

MS. ROBESON: Okay.

THE WITNESS: These are the parking areas.

MS. ROBESON: All right.

THE WITNESS: So all this is technically open space through here. You can see some of the road outlines, this road. So the roads lead around the outskirts of the parking and this is all interior. I can't say for sure that it's going to be green. But even if it's pavement, they can all be worked in and you just, you submerge them a little bit, you put a nice, you put a nice, little boardwalk crossings over them and make it a long, linear function down

this whole length here, split it up with baffles so that you meet your 20,000 square feet requirement to each for a half an acre, 22, whatever -- you can go up. There's some fudge factor in there because it's hard to hit the exact number.

MS. ROBESON: Have you ever done an outlet center before?

THE WITNESS: No, but I have done dense, commercial developments with this.

MS. ROBESON: Okay. All right.

MR. KLINE: May I --

THE WITNESS: So you also have a lot of the parking islands here, stuff on the sides, large areas here, here, come out of this --

MS. ROBESON: Wait, you've got to tell me where here, the --

THE WITNESS: I'm sorry.

MS. ROBESON: That's okay. The transcript doesn't know.

THE WITNESS: I'm sorry. I get excited about it. I love doing this stuff.

MS. ROBESON: Yes.

THE WITNESS: But there are large islands here and --

MR. HARRIS: And describe here.

MS. ROBESON: Here is?

THE WITNESS: Just right in the middle of the parking area.

MR. HARRIS: In area A?

THE WITNESS: A or E.

MS. ROBESON: On the north, on the --

THE WITNESS: Correct.

MS. ROBESON: -- perimeter of area A? That's the parking?

THE WITNESS: Uh-huh. And there are also, let's go through all these things.

MS. ROBESON: No.

THE WITNESS: Okay.

MS. ROBESON: Unless we really need to.

THE WITNESS: But as far as, like even through these smaller areas, and even if you weren't doing --

MS. ROBESON: Wait, the small areas are --

THE WITNESS: The smaller areas in between the buildings and they're probably --

MS. ROBESON: There are small areas in between the buildings that could be what?

THE WITNESS: They would probably -- walkways, but you could do bio-filtration planters for the rooftops there that are just like nice, little raised planting beds that are under drains that you direct the roofs down into. You could do, actually probably do some brick pavers through

here that are pervious to an under drain system. You could definitely do microbio retention areas in between there to catch all the sidewalks and raining them. And with ESD what you end up doing is integrating everything so you make a more planted, more desirable kind of area. You wouldn't, you know, ideally you wouldn't even know they were there.

MR. KLINE: Madam Hearing Examiner, I don't think -- well, let's put it this way. The reason the (i) says give us the water quality plan so that you don't have to rely on this witness to basically support the water quality, what he's going to do as a solution, here's -- when I started on this, it was because I thought all the bio-filtration measures that we're talking about would actually push out the building envelope because instead of having a big pond down at the end, now we're going to filter all these things in and that would basically mean we would need more land area. So I was thinking, okay, we need to know how that's going to work.

And what he's talking about, I think we understand the technology, but he needs to know his soil types, he needs to know whether his fills and everything else -- that's all supposed to be in a water quality plan that is supposed to have a secured approval by DPS that is supposed to be in the record and he shouldn't be testifying basically to bail himself out of something that the ordinance

requires.

THE WITNESS: I don't need soil types. I don't need cut fills, not required. Soil types only make, are required if you're doing certain types of infiltration practice. That's infiltration. If you're doing microbio retention, that's all undertone. You don't need to know soil types. You don't need to know where there's fill. It doesn't make a difference.

MR. KLINE: Thank you for the education.

THE WITNESS: If it did --

MR. KLINE: Then let me --

THE WITNESS: -- the projects would not go forward.

MR. KLINE: Let me say the ordinance --

MS. ROBESON: I guess what he's saying --

THE WITNESS: I know what he's saying.

MS. ROBESON: -- what Mr. Kline is saying is that I would have this addressed by -- and I'm not saying your testimony isn't credible, but I would have a government agency saying, yes, this can be done on this site.

THE WITNESS: Uh-huh.

MS. ROBESON: And so you've talked to Mr. Brush, I --

THE WITNESS: Uh-huh. Yes, ma'am.

MS. ROBESON: And so I guess I tend to agree that

it is, it is a requirement of the development plans that we have, amendments that we have had before.

MR. HARRIS: A preliminary water quality plan is a requirement under the regulations at the proper point in time. We have that. In order to move this along, and because Mr. Bossong isn't here, we're hamstrung a little bit. May I suggest several things?

One, we will secure a copy of the approved preliminary water quality plan and submit it into the record to check that box. I believe that, as Mr. Hughes has said today and Mr. Bossong who testified when we come back on whatever day we come back, that the approved, or that the proposed development here conforms with the approved preliminary water quality plan with the exception that the ponds go away so that a disturbed area is less than it would have been under the development plan and better solution, and that the ESD devices can be designed. But I believe he would also testify that those ESD devices are not designed at the time of a preliminary water quality plan and that the regulations here, frankly, are outdated in that respect. They were written before we had the ESD regulations.

MS. ROBESON: Well, okay, but you know I'm already supposed to throw out the master plan and now I have to throw out chapter whatever it is.

MR. HARRIS: No, no, no.

MS. ROBESON: 19.

MR. HARRIS: No, I'm not suggesting we do that. We have to comply with Chapter 19.

MS. ROBESON: Yes, and there has to be some showing. I don't have a showing.

MR. HARRIS: We believe that that --

MS. ROBESON: And he --

MR. HARRIS: I'm sorry.

MS. ROBESON: Go ahead.

MR. HARRIS: We believe that finding was already made in the original development plan and that this does not, I'll say, adversely affect that, negatively affect that. But we would do, we would bring that preliminary water quality back and let Mr. Bossong explain how that works and how this meets the requirements here.

MR. KLINE: And my position would be I'm glad to have a copy of the existing preliminary water quality plan, but my understanding of (i) in the Comcorp regulations in Chapter 19 says that there has to be an amended, preliminary or final, whichever it is, water quality plan with some representation of what the new facilities would be so DPS could conclude, yes, those will work and that Mr. Bossong's testimony is not the same as having the secured approvals of a water quality plan presumably from a public agency. So I think that's what we're missing right now.

MR. CHEN: That's where I am too.

MR. HARRIS: This says that you have to secure it. It doesn't say you have to have a secured approval in advance of this and beyond that the regulations talk about significant amendments and Mr. Hughes --

MS. ROBESON: Well, what we'd normally do, and I don't know if it means approval, but we at least have a plan showing the proposed facilities or now it can be accomplished on the site that DPS has at least reviewed.

MR. HARRIS: You do when there's storm water management ponds, but you don't when there are EDS devices because ESD devices are little, tiny things.

MS. ROBESON: Have to wait until --

MR. HARRIS: You have to wait until --

MS. ROBESON: -- site plan.

MR. HARRIS: -- site plan.

MS. ROBESON: Okay. Well --

MR. KLINE: Can I do one more step and this is sort of beyond Mr. Hughes. And how we got into this was my comment that with the ESD devices, you basically are having a proliferation of storm water management treatments. The outfalls are going to be, there's going to be a lot more of them rather than just one down to the pond. And I wanted to be sure that we knew what those were and they wouldn't conflict with the forest conservation plan. And I realize

that's not his specialty, but there is another dimension once you say the ESD works from an environmental point of view, we still need to know whether that's inconsistent with the approved preliminary forest conservation plan.

MR. HARRIS: We recognize that the forest conservation plan is applied there and I think Mr. Unterberg testified that the proposed development will conform with the forest conservation plan. So Mr. Kline's concern --

MS. ROBESON: Well, it doesn't though because not, it doesn't as far as the ponds are concerned.

MR. HARRIS: It didn't as far as the development was his testimony. The entire --

MS. ROBESON: Yes, but with his, the forest conservation is to determine what kind of forest is on there and whether you can meet your aforestation, you know, whether there's specimen or important forest and whether you can meet your aforestation requirements. So their limits of disturbance is relevant. This is different and there are many factors that go into it.

We have had, and I'm trying to think through now, we have had cases that use bio-retention, you know, where they say we're going to treat this with a green roof and, you know, bio-retention planters here and it's going to drain to here. I mean that's typically the testimony we get. So I guess my question is have you planned that out?

THE WITNESS: Do I have a plan --
MS. ROBESON: Yes.
THE WITNESS: -- for this development?
MS. ROBESON: Yes.
THE WITNESS: Not on paper. But I can tell you one thing. There will be no additional outfalls from the stream valley. Per Montgomery County, you cannot deviate from the drainage areas to a specific stream, which means they don't like you taking water from here and moving it over to the other side of the valley. It's got to come out in that drainage divide. So where the pond outfalls are now are the low points and that's where they'll stay. You'll just use ESD to pick up all the water and hold it and then it will get slowly released to that same outfall. There will -- Montgomery County does not, nor do the ESD or regulations for MDE require you to have multiple, additional outfalls to meet ESD.
MS. ROBESON: Did technical staff comment on this? I guess what I --
MR. HARRIS: They did.
MS. ROBESON: And where? They just said they have an approved plan.
MR. HARRIS: And let me see if I can find that.
MS. ROBESON: Because I've been looking for it and I can't find it.

MR. KLINE: It's pretty much on pages, I draw your attention, some on 22, which is a forest conservation issue, and then some on page 27, which used the reference grandfathering, and then some on 28 also talking about compliance with both Chapter 22 and Chapter 19. So 22 --
MS. ROBESON: Well, 22 is the forest conservation plan, right?
MR. KLINE: Right. Right. Yes, that is --
MS. ROBESON: That's not what I'm talking about.
MR. KLINE: I understand, but what I'm trying to -- they do all relate to each other though.
MR. HARRIS: Yes. Page 22, it says,
"The DPA conforms to all forest conservation plans, water quality plan and storm water management approvals which were approved for the overall development of the Cabin Branch community."
MR. CHEN: Page 28, it says,
"Any applicable requirements for forest conservation under Chapter 22 and for water resource protection under Chapter 19 also must be satisfied. And the zoning ordinance requires a part of that already be approved and supplied with the application."
MR. HARRIS: And Park and Planning Commission

staff says it does at page 22.
MR. CHEN: No.
MS. ROBESON: No, they say it's consistent with --
MR. HARRIS: It conforms to.
MS. ROBESON: -- but they don't -- it conforms to, but that doesn't mean that -- I don't know what that means, it conforms to. Does that mean, A --
MR. HARRIS: It meets the requirements.
MS. ROBESON: No.
MR. KLINE: There was nothing in front of them they could have come to that conclusion because we have just proven there is no plan.
MS. ROBESON: Yes, well, no, they would mean the one that was done in 2007, but --
MR. KLINE: Okay.
MS. ROBESON: -- I don't even have that in the record. So let's do this.
MR. HARRIS: Okay. That's why --
MS. ROBESON: Rather than argue about this more, let's get that in the record. I may refer the question to technical staff because I don't think conforms to, but I don't, haven't seen a plan. So I'm not clear on what that means.
MR. HARRIS: Okay. Well, then --
MS. ROBESON: You can -- how could it conform to

something that obviously still uses these cons? I mean that doesn't make sense to me.
MR. HARRIS: The essential element has to do with the disturbed area and because the disturbed area, the limits of disturbance is less, in fact, because the pond, whatever it was, goes away.
MS. ROBESON: But you could have the same disturbed area and, disturbed area and greater impervious area.
MR. HARRIS: The impervious area is not calculated at the time of a preliminary water quality plan, so you do not know what --
MS. ROBESON: Well, I don't want you to --
MR. HARRIS: -- that is.
MS. ROBESON: -- testify but, you know, just bring the plan back.
MR. HARRIS: I'm fine with that. That's what I suggested.
MS. ROBESON: My, I guess my concern was I did think that technical staff sort of punted on a lot of things and I think they're raising valid questions and I think that you may very well be able to show that everything is hunky dory. Well, it's better to show it now than to take the risk on appeal.
MR. HARRIS: Amen to that. So how, I have

suggested a moment ago that we adjourn the testimony of Mr. Hughes now because we don't have that preliminary water quality plan in hand now. We will secure that and submit it maybe by tomorrow, if not by Monday, well, in advance of our next hearing date and we'll bring Mr. Bossong in to show how we meet these requirements.

MR. KLINE: And our position will be short of having an approved, water quality plan approved --

MS. ROBESON: I know that's your position.

MR. KLINE: -- by DPS, we would say the record is, the application shouldn't have been accepted.

MS. ROBESON: And I understand that's your position. I haven't ruled on that issue yet.

MR. KLINE: All right. Okay.

MS. ROBESON: But my, what I am saying is I don't think there's enough in this record and I do think technical staff on some things may be more general than would have been desirable.

MR. HARRIS: Though should we, my suggestion would be that we --

MS. ROBESON: What I would like you to do at the --

MR. HARRIS: -- discontinue --

MS. ROBESON: -- next hearing, bring in the approved final water quality plan and tell me why, and it would be real -- how you're going to make it work for this

development plan amendment and, you know, it would be really nice to have something from DPS saying, hey, they can really do this.

MR. HARRIS: Fine. We will do that for you. The benefit of a distant hearing date, the only one I've found.

MR. KLINE: Yes, right, as I was going to say.

MS. ROBESON: All right. So now are there any other things that you or Mr. Chen are going to say are inadequate about this, you know, aside from the substantive disagreements, is there any piece of the application you are going to say or you continue to say is missing?

MR. CHEN: It depends on who they put on. This is their case.

MS. ROBESON: No, no, no, no, no, no. You have the application as far as it is in front of you, correct? We all have what exists as far as we have it in front of you, correct? So is there any other element that's laid out in 59-D-1 --

MR. KLINE: 3 -- the contents of the development plan.

MS. ROBESON: -- contents of the development plan that you are alleging is missing at this time?

MR. KLINE: Thank you.

MS. ROBESON: You may --

MR. KLINE: No, no, thank you. The answer --

MS. ROBESON: -- I, you may want to say --

MR. KLINE: -- is yes.

MS. ROBESON: -- you know, subject to further testimony you don't think there is?

MR. CHEN: That's where it was.

MR. KLINE: We go through the checklist.

MS. ROBESON: I just want to avoid --

MR KLINE: That's the one.

MR. CHEN: I think I've --

MS. ROBESON: -- having to delay the hearing for -- okay. So do you --

MR. KLINE: That was --

MS. ROBESON: -- have any other questions of Mr. Hughes at this time?

MR. CHEN: I thought they wanted to suspend?

MS. ROBESON: Are you asking --

MR. HARRIS: No.

MS. ROBESON: -- to suspend this?

MR. HARRIS: And proceed to, you know, Mr. Ferguson who is here and any other witnesses. We certainly don't want to waste good daylight.

MR. CHEN: He hasn't finished --

MR. KLINE: Well --

MR. CHEN: -- he's got to finish his questions.

MR. KLINE: Okay. Well, let's finish this first.

No, we don't have any more questions of Mr. Hughes.

MS. ROBESON: So are you prepared to call Mr. Ferguson?

MR. KLINE: Well, I go back to Mr. Chen's speech before about the advantage of having our land planner coming after the applicant has made his presentation because he has the benefit of hearing all that testimony.

MS. ROBESON: Well, is he a civil engineer?

MR. KLINE: No, he's not a civil engineer, but he does need to know essentially how the, as I pointed out, how basically they're going to organize those facilities in terms of how it works on the site and what its effect is going to be.

MS. ROBESON: Well, what I'm going to do is this. I'm going to give you the opportunity to recall him, but I want to proceed today.

MR. KLINE: Okay.

MS. ROBESON: So we will proceed and you may after Mr. -- you can reserve the right to bring him back after Mr. Bossong testifies.

MR. KLINE: Can we just take a break for a second then to kind of clean up and get oriented?

MS. ROBESON: I'm -- yes.

MR. KLINE: Thank you.

MS. ROBESON: Five minutes please.

MR. KLINE: All right.
(Recess.)
MS. ROBESON: Okay. We are not going to -- do I have everybody? Yes. We are not going to go past 5:00 tonight because I have a commitment that I --
MR. CHEN: You have a life.
MS. ROBESON: What?
MR. CHEN: You have a life.
MS. ROBESON: All right. So we have, I think, Mr. Kline's witness, Mr. Ferguson. Please raise your right hand.
(Witness sworn.)
MS. ROBESON: All right. Go ahead, Mr. Kline.

DIRECT EXAMINATION

BY MR. KLINE:
Q Mr. Ferguson, would you please state and spell your name for us?
A My name is Mark Ferguson, F-E-R-G-U-S-O-N.
Q Mr. Ferguson, if you could please give us your professional address?
A It's 14603 Main Street in Upper Marlboro, Maryland 20772.
MS. ROBESON: Okay. I apologize before we start. I have somebody's Chapter 19 of the Code. I don't want to get it mixed in with the rest of the stuff. I'm sorry, Mr.

Kline, go ahead.
MR. KLINE: Bear with me. I was just trying to check and find the reference to Mr. Ferguson's resume.
MS. ROBESON: In the exhibit list?
MR. KLINE: Yes, ma'am.
BY MR. KLINE:
Q Mr. Ferguson, Exhibit 76 in the record of the case is a copy of your resume. Would you please just give us a brief overview of what it tells us?
A Certainly. My education is a bachelor of architecture from the University of Maryland in 1985. I was registered as an architect in 1987. Since 1989, I've worked with one interval for the firm of RDA Engineering in Upper Marlboro as a land planner. Between 1999 and 2005, I have my own shingle out doing substantially the same. And my experience in cases where I have been accepted as an expert have been laid out at great length in my resume.
Q Do you feel your credibility will be in any way impugned by virtue of having attending high school with Mr. Robins?
A It may very well.
MS. ROBESON: I don't know. He's -
MR. ROBINS: I object.
MS. ROBESON: Go Terps! Okay. Go ahead.
MR. KLINE: Based on Mr. Ferguson's detailed,

lengthy resume, I'd like to offer him as an expert in the field of land use planning.
MS. ROBESON: Any objections, Mr. Harris or Mr. Robins?
MR. HARRIS: No, I have no objections.
MS. ROBESON: Okay. I --
MR. HARRIS: No, no.
MS. ROBESON: I will qualify you as an expert in land planning.
THE WITNESS: Thank you, Madam Examiner.
BY MR. KLINE:
Q Mr. Ferguson, would you please first tell us what you review in terms of preparing for the hearing and what you've seen and read and listened to?
A Certainly. I, of course, if review of the master plan, the Clarksburg master plan and its technical appendix. I have reviewed other master plans that were the subject of plans which have been referenced in some of the case materials as being analogous to what has been proposed. I have, of course, read the staff report of your technical staff, the Park and Planning staff. I have reviewed the applicant's statement of justification and some of his other case materials. And I have read through the transcripts of the Planning Board and the first three of the hearings before you, Madam Examiner.

MS. ROBESON: Okay.
BY MR KLINE:
Q Have you formed a conclusion of the, whether the application for the development plan amendment is in substantial conformance with the 1994 Clarksburg master plan?
A Well, I have and I would make a caveat. One of the things that I note is that the criteria for approval, which the District Council must find, is more narrow and defined than a broader master plan compliance, which is ordinarily the case. The MXPD zone, and I'm going to struggle with those letters throughout the whole hearing, is a planned unit development zone. And I'll just repeat what's in the zoning ordinance. That it's subject to a binding plan which is to say the development plan proposed by the applicant and approved by the District Council is a part of the grant of the zoning category. And so the development plan really is a part of the zoning. And the criteria for the approval of the development plan do go on, but the first one very simply in 59-D-1.61(a) is that the proposed development plan substantially complies with the use and density indicated by the master plan or sector plan.
And I note that it's a distinction, Madam Examiner, because if this were simply a case of broad master plan compliance, I would certainly feel a lot more latitude

as a planner to apply the policies and the goals of the plan towards a holistic finding of conformity or compliance. But I believe that the ordinance would straight-jacket me into more narrowly looking at the use and density requirements precisely because those are part of the grant of the zoning.

And so I really did not pay a lot of attention in my preparation for this hearing to transit orientation. I didn't pay virtually any attention to the environmental impact and some of the other components of the master plan because it was apparent to me that there was a, there was not a nexus in my opinion between the use and particularly the density recommendations in the master plan in the contents of the development plan amendment.

Q Can you go ahead and elaborate on that some more? And what were the factors you identified that led you to that conclusion?

A Well, as I mentioned briefly, but will more specifically, the MXPD zone is a planned unit development zone. And those zones, Madam Examiner, are very specifically plan implementation zones, and quoting from 59-C-750, it's the objective of this zone specifically, MXPD, to establish procedures and standards for the implementation of master or sector plan land use recommendations. And in so doing, it carries on later, it's intended that this zoning capacity be utilized to implement existing public

plans and pertinent County policies in a manner and to a degree more closely compatible with said County plans and policies to make it possible under other zoning categories.

And so it's apparent to me that the intent of the ordinance, again, requires you to pay very specific attention to those use and density recommendations because they form essentially what your permissible density would actually be allowed to be and to a degree that permissible uses and I'll expand further on why I said to a degree in a moment. But those are part of the zoning. Certainly, there are other provisions in the ordinance that provide for the development regulations and so on and so forth. But this use and density requirements are a part of the zoning and there is a particular degree of conformity that is required by the ordinance to find.

We've heard extensive testimony, or at least I have today, about the plan's requirement for, or plan's proposal for 120,000 square feet of retail amongst a total of 2,420,000 square feet of employment and retail uses and that's pretty specific. And I think, Madam Examiner, if I were asked to construct an argument for approval of this, I would have to do, as the applicant has done, and essentially contend that retail is employment. And while I applaud his creativity, I think that the uses, the use types are far enough apart that that really strains my ability to say,

yes, employment, you know, and retail are the same thing.

The characteristics of an employment use are a use where you go to it in the morning, you stay there most of the day, you go home at the end of the day and there's some degree of coming and going in between, but you're bringing in a large number of people to one location where they're employed. Whether that employment is office, whether it's manufacturing, light industrial or, indeed, there are any number of things which could fall under the employment category.

When you look at retail, Madam Examiner, essentially you have a use where there are a small number of people that are employed there all day and you have a large number of people that are coming and going at various times through the day and particularly during hours when it's not customary to go off to your employment land use to, you know, have your commercial interactions. Land use is a gradient. You know, certainly there was discussion earlier about a hotel. And a hotel has been found to be an employment use.

I would characterize a hotel as officish. You know, you're not residing there but you're not, you know, it's not a, it's not a retail destination. So I think it is valid to be able to say that that is a use that is at least sufficiently ancillary to an employment concentration that

it would be a reasonable thing to say, sure, a hotel is employment enough. Similarly, a hospital where you do have a concentration of employment activity there, retail is something different.

Madam Examiner, if you look at ordinances throughout the country, Euclidean zones are typically categorized into three broad categories, you know, industrial, residential and commercial. And industrial very often does include, you know, office uses and sometimes there, you know, well, maybe it's commercial, sometimes it's manufacturing and industrial. But retail is a fundamental category. It's not employment. And saying retail is employment is, you know, it's Orwellian, war is peace, freedom is slavery, ignorance is strength. I mean you have to really make language into something that it isn't to be able to conclude that retail use is employment. And I'm unable as a planner to do that. I look --

Q Before you leave that, have you ever run into the term retail employment as either a term in a zoning ordinance or a term in the Argo of the planning industry or --

A I have not and I was taken by the creativity of the term. So I did use, God bless the Internet, I did use Google and do a very directed search to see if that, if that came up anywhere and there were six results and all of them

had to do with discussing jobs, you know, generally as somebody employed in retail or being employed in service or being employed in, you know, government or something like that, but not in terms of a description.

Q So it has no currency in planning?

A Not in my experience.

Q I'm sorry I interrupted. Go ahead.

A No, not in my experience. Certainly, I looked through the master plan at some length and it's fairly clear that the master plan conceived the employment uses as being similar to the Comsat, you know, building which it refers to, which is to say office uses that are solely office uses or solely R&D, which is provided for on some of the land use maps in the plan, and not in what I would concede is a more modern, integrated fashion such as what the applicant is proposing. But I do have to return to the language of the master plan and this master plan conceived of employment as employment and it conceived of retail as retail in the commonly understood senses of those words. And, you know, we characterizing one into the other is certainly not what is plainly apparent that the master plan meant to do.

One of the things that applicant and staff did in their review of the project is to note, and this is basically a discussion from pages 13 through 20, roughly, of the staff report where they discuss master plan consistency

and they refer to several comparable projects including Washingtonian Center, Rock Spring Park and Park Potomac. And, of course, what I did was I looked to see not that those developments were a precedent to the subject development in form and content, but rather, Madam Examiner, terms of process.

And so when you look at Park Potomac, it's in the I-3 zone. The I-3 zone is not a plain unit development zone. It does not have a requirement for a development plan and doesn't have that same requirement for conformance to the use and density requirements. So to a degree I would contend that it's moot.

I looked at the Rock Spring Park case and found that the North Bethesda master plan very specifically recommended a mix of employment and retail, and substantial retail uses. It provided that the retail density could be increased over a base density from 150,000 to 220,000 if a commensurate amount of office space were, in fact, subtracted. And so the Rock Spring Park plan as it was most recently approved in 2011 conforms exactly to the use and density requirements of the master plan. And so regardless of the content of that development with regard to the content of the subject development, it may very well be that a planner would find that one would be an appropriate model for the other. But the MXPD zone isn't a planner

implementation zone and I don't mean to be glib. It's a planned implementation zone and so we can't substitute our judgment as planners for what the plan of record is.

And, finally, I did look at the Washingtonian Center which is an MXPD plan and the Shady Grove study area master plan of which I have the last copy, but I will need to sacrifice into the record. In its discussion of the Washingtonian Center plan, bear with me while I find it. I thought I had that written down.

MS. ROBESON: Turn on the air? You can, yes.

MR. KLINE: Yes?

THE WITNESS: Yes, on page 60 of the Shady Grove study area, which is a July 1990 amendment to the Gaithersburg plan --

MS. ROBESON: Right.

THE WITNESS: -- since it is a plan amendment. It did not actually provide any specific use or density recommendation. And so were that the case, I would certainly grant the District Council a great deal of latitude in finding what an appropriate mix of uses to be, but they didn't and, as I said, if you would like this, I'm happy to give it up.

And there has been a lot of discussion in this case about the provisions of the MXPD zone which do allow for up to 20 percent of the use volume to be retail uses.

But, again, I go right back to the very beginning, the criteria of 59-D-161(a), the MXPD zone is intended to implement the plan and that's why it says up to 20 percent. And if the master plan doesn't provide for that intensity of retail use, your uses and your intensity aren't fixed by the zoning ordinance, they're fixed by the master plan and following from that the development plan.

Now what in the end, Madam Examiner, it appears to me that the staff did and I like your phrase of punt because I believe it is just that. And in their conclusion to the master plan on page 34 of the staff report, they provided the Planning Board, and presumably gave three alternatives. And the first was approve it, go to a, go on to the next phase; two, deny it; or, three, defer action on the development plan for master plan amendment.

In my view, that would probably be the most appropriate alternative for them to have recommended if there is some desire for the plan to go forward because I don't have tremendous issue with the contents of their proposal, but process I do and process is important because, you know, Madam Examiner, there are a number of issues that have to be considered in the review of any large-scale plan and we certainly just confronted them in hearing Mr. Hughes's testimony where, well, do we have, you know, a water quality plan to actually look at and review and what

we were potentially in the position of having to do was simply to take Mr. Hughes's word for it as an expert.

In addition to the difficulties that poses for being able to evaluate things, to be able to see on paper and to see whether or not that is constant with the words that come out of his mouth and to be able to look at the relationship of what is or is not on that plan with the other things that have to be considered, there isn't the same opportunity for the public to be able to participate in, comment on and potentially to influence a development proposal in a proceeding such as this as there is in more public proceeding for a master plan amendment.

So I do think that largely it is reasonable. I do think that there are questions that would need to be asked. I think, Madam Examiner, there has been a lot of discussion about regional outlet center and what exactly that is. And what I can certainly say from my experience is that an outlet center is not a monolithic land use type in a way that a gas station or a convenience store is. There are great differences in the land use effects that depend on how it is merchanted by its operator, how it is operated.

I mean certainly there are some outlet centers that get a lot of their business by having organized bus tours bring people to that site and as they get off the bus you get a coupon and essentially all of those users are then

captive users that would not really have any opportunity to influence the commercial activity outside of that particular site. There are other outlet centers that operate essentially as another regional shopping mall, but with more of what they say in the industry is a value proposition, okay?

The kind of -- and I don't know how you can address that because is a value-oriented shoe store different than a shoe store from a zoning ordinance and land use regulation perspective? I don't know that it is. But there may be site plan considerations that attend to the kind of choices that are made in the design of an outlet center that vary substantially from an operator to operator, developer to developer.

And I think it is a reasonable thing to look at. For instance, is there going to be a food court? Typically they are, I believe. The applicant has proposed that there is. Where is that food court going to be located? Is that food court going to be out next to the residential area such that those restaurants effectively act as neighborhood or community-sized retail or in this case I would say town-scale retail or are they wholly interior to the, you know, to the proposed setter. You know, I don't know, but points like that could have a substantive impact on issues that the plan does express a great deal of concern about, mainly the

viability of retail in the town center district.

I'm not going to give you a conclusion as to whether I think that their proposal would or would not impair, you know, the success of retail in the town center district simply because I don't know enough about it. It could, but I don't know.

And there are other things that, as I said at the beginning in my statement but I didn't go through that perhaps could be studied. Is it important for a more self-contained outlet center, regionally oriented outlet center to be as transit-oriented as you might expect other parts of a development to be? Maybe there isn't. You know, so that might impact other aspects of the plan that we don't really have the same opportunity or really, you know, the liberty to take even a few months to stand back, look at it and say, well, let me consider this, let me see what you think, let's put it out to the public and so on and so forth.

So, you know, my opinion is not that the applicant's plan doesn't have merit. It may very well. My opinion, my strong opinion is that the forum for judging that isn't this one.

MS. ROBESON: Okay.

BY MR. KLINE:

Q Does the change from the hospital or office use, the office employment use, to a retail employment use change

the character or the intensity of the use as was contemplated in the plan, the '94 plan?

A It could. I mean to a certain degree I would need more information to be able to study that. I don't know what the scope of the hospital was going to be. I don't know what the trips, for instance, going in and out would have been. I don't know what the orientation of that hospital to the surrounding road network, you know, would have been and all of those factors do attend to a conclusion like that. So I don't know that I can give you an answer.

Q Okay. On page 9 of the applicant's justification statement, the following sentence is found there at page 9, applicant justification statement.

"The fashion center employment retail proposes part of the DPA will be a catalyst for the remainder of the development of the employment center. There is a proven track record to substantiate this statement."

Do you have any professional experience or familiarity with any professional opinions on the subject, whether that is a correct statement that the regional outlet center will stimulate office development?

A Again, I don't think that there is sufficient information in the record, or at least that I have been able to review that would allow me to make a definitive opinion.

It is certainly the case that some of the uses which can attend an outlet center could be complimentary to office uses. That's not necessarily the same thing as it would stimulate the development of office uses, but certainly it is very, it is becoming more and more desirable from a, in the land use, how should I say this, in the land use community and I don't mean that to sound, well, I'm floundering a little bit, but it is desirable to have complimentary uses to an office concentration that make the working environment a more positive place, a place to take clients to lunch, a place where you can go out and get a new white shirt for a meeting in the afternoon to replace the one that you spilled coffee on in the morning. You know, even entertainment such that, you know, a creative type could knock off for a couple of hours in the afternoon to refresh while they, you know, work hard on their statement of justification in the evening, you know, whatever it may be.

So there are uses which are complimentary. And some of those uses absolutely could be in that facility. At the same time, you would have to look at the inter-connection of them. So if you had, for instance, you know, a nice little restaurant and a, you know, a men's clothing store or a women's clothing store as the case may be, on the ground floor of your office building so you had to just

simply ride down the elevator and didn't need to spend the time to get into your car and drive around, park, you know, do whatever you had to do and return to the office, that would be more complimentary than something which was wholly self-contained and remote, for instance.

So I don't know that I've given you an answer except to, expect to try and explain that really the devil is in the details. Things could be complimentary depending on how they are merchanted and sited. They could, in fact, you know, really help make an office development more attractive to lessee.

Q In your opinion in the 1994 plan, the up to 120,000 square feet of retail was addressing what type of retail?

A Well, the technical appendix makes it clear that it was addressing both convenience goods and shoppers convenience. We've had a lot of discussion in this hearing about neighbor-oriented, neighborhood oriented retail and specialty retail and there's not 100 percent correspondence in between those two, but there is a substantive amount. Convenience goods, groceries, prescriptions, dry cleaning and so on are the kinds of uses that are ordinarily concentrated in neighborhood retail centers.

Shoppers' goods are things by definition for which you might go a lot farther to get to. You might go to

several other places to compare prices and quality. And specialty retail ordinarily is shopper, ordinarily are shopper's goods. They're not synonymous, but you can, I hope I've illustrated the degree of overlap.

Q The plan, did the plan recommend that there be some service retail, neighborhood-oriented use, to serve the residents of the Cabin Branch neighborhood?

A It did.

Q Okay. In kind of a worst case scenario question I asked Mr. Unterberg, I asked him if you go to the regional outlet center, it's 450,000 as set forth in the applicant's justification statement and then deduct what's been called the Gosnell property on the north side of 121 of 86,000 square feet, I asked what was left and the answer was 25,300 square feet to be located within the Cabin Branch neighborhood. In looking at the Cabin Branch diagram to the right --

A Uh-huh.

Q -- in the center, whatever --

A Uh-huh.

Q -- assuming there was no other neighborhood retail but that, would you feel that would be a critical, enough critical mass to provide the service needs of the Cabin Branch neighborhood?

A I guess I would stipulate at the outset that I am

not a market analyst. I would certainly defer to Mr. Bogorad on questions like that. I will say, however, that economic and market analyses are something that are particular interest to me in my planning practice. And I will say that -- which quantity did you ask me would be sufficient for the neighborhood --

Q The --

A -- 25,000 was what was left over?

Q Well, 25,300 was what Mr. Unterberg said.

A I would say that feels on the low side, however, I would certainly defer to a rigorous analysis that establish trade areas, give the population an income analysis and determine just how much, how much dollars there was to support various different kinds of retail. And that's evolving. You know, as time goes on, shopping patterns change. There was no Internet shopping in 1994. There were, as has been pointed out, a number of uses back then which essentially don't exist any more such as video rental places.

And the proliferation of retail throughout the region has made for many, many more opportunities for people to shop all sorts of locations, not just near where they work or where they live or in between but, you know, each of us can certainly consider our own shopping behavior and look at that for examples of how, you know, people behave. So as

I say, it feels low to me. The technical appendix, I believe, well, I'll read it, suggested that west of 270 there was 75,000 square feet of supportable retail use and that's supportable both by household demand and by demand for the employment areas.

So would 25,000 support that? That would, again, be a suggestion where you do the simple math and subtract 25,000 from 75,000 and suggest that there would be 50,000 square feet shortage. But, again, I would largely defer to a market based on that.

Q But there's nothing in the record --

MR. HARRIS: Objection.

MR. KLINE: Thank you.

MR. HARRIS: Is there.

BY MR. KLINE:

Q Is there anything in the record --

MS. ROBESON: He doesn't even have to state the basis anymore. Go ahead.

MR. KLINE: I appreciate the guidance from someone more experienced than I. Is there --

MS. ROBESON: Wait a minute. Okay, never mind. Go ahead.

MR. HARRIS: I don't accept that.

MS. ROBESON: I was going to say something and then --

MR. HARRIS: I'll object to that.

MS. ROBESON: -- I was like, no, I better not say that.

BY MR. KLINE:

Q Is there any of that technical analysis, that empirical analysis that disputes the numbers that we see very clearly in the master plan?

A Well, I have to go back and re-read Mr. Bogorad's testimony. I would, again, return to the point that regardless of that, what is in the master plan has a great deal of weight in this proceeding.

Q You indicated that you weren't getting into the competitive aspects of retailing in Cabin Branch and retailing in the town center, but does the change in the use mix in Cabin Branch have an effect, an impact on the town center in your professional opinion?

A Well, I would say, again, with the same caveats that it depends on details such as the configuration and the use mix. You know, it certainly could. Knock on laminate, the economy is improving and there will be more retail activity than there has been in the past six, you know, years or so. But certainly it's been the case that in, at least in many places one of the only uses that, and reliably able to occupy retail spaces for restaurants, okay? And if there is a concentration of restaurants in the form of a,

whether in the form of a food court or in the form of pad sites, again, I don't know about the specifics of the proposal because I don't know that it exists yet, could that have a material effect on the desirability of locating restaurants in the town center? Absolutely.

Q The applicant's justification statement on page 17 has a statement that reads, the master plan is nearly 20 years old and the master plan itself recognizes that circumstances will change over the 20-year life of the plan such that the recommendations of the plan would, quote, become less, well, I actually I shouldn't say that, maybe I put the quotes in the there, become less relevant over time. And this goes to the issue you've heard about, how much do we rely on a plan that's 19 years old? From a planner's perspective, how do you deal with a plan that circumstances have changed and how do we deal with those?

A Well, the answer, unfortunately, perhaps for the applicant, at least in my opinion, is that it really depends on the particular process that you seek to go through to implement what you want to do. I do believe that the Clarksburg master plan is in many aspects obsolete. And so many of the things that were envisioned by the plan, this plan is supposed to have a 20-year outlook and the amount of employment absorption in the Clarksburg area over that 20 years since the plan has been a great deal less than what I

am certain that the plan expected. So if I were advising a client at the beginning of a proceeding, okay, Mr. Client, perhaps you have MXPD zoning now, but I think you have a pretty decent argument for a mistake case in the Euclidean zone to say that, Euclidean rezoning to say I-3 because a number of things which the District Council relied upon in making their land use and zoning recommendations clearly are not going to pass. But this applicant didn't do that. He's resting with his existing zoning which is whatever the defects of that plan may be, it's still a plan implementation zone. And until such time as there is a new master plan or a substantive amendment to the current plan, it's still what this zone has to implement.

Q So this is a piecemeal technique and avoids the -- is this a --

MR. HARRIS: Objection.

MR. KLINE: I'm starting to anticipate that.

BY MR. KLINE:

Q So is this a piecemeal technique that avoids a more proper technique for basically addressing this issue?

A Well, I don't know that I would call it -- my proffered solution of a Euclidean I-3 rezoning would be the classic piecemeal technique. I don't have the same, you know, shudder of disgust that many people do to Euclidean rezonings. I do believe they have a purpose. But, you

know, the applicant's proposal, you know, I think he's attempting to work within what the existing zoning, you know, had him to do and I think he's simply hamstrung by the fact that the plan doesn't agree with what he wants to do. And so he's forced to say, unfortunately, or as you yourself, Madam Examiner, said a few moments ago, you know, we have to throw out the master plan. If you do throw out the master plan, then, you know, sure. You can improve it. But I don't see the use by date on the master plan. It's still the valid plan.

Q You did review it as part of your preparation of the 2011 limited master plan amendment?

A I did.

Q Did that not provide an opportunity to address some of these out-of-date aspects of the Clarksburg plan?

A Well, as a matter of process I can't really, you know, comment on that. Certainly, there was a specific request made to the District Council to get some relief on a staging aspect of the plan which was done. Whether there was an opportunity afforded to everybody else who might have an interest in the plan to add to the scope of work of that amendment, I don't know. But if there were, that would have been the right time to do it.

Q Is there anything in the text of the 2011 plan that suggests that it is stale and should be reviewed in the

foreseeable future or should be interpreted more flexibly?

A No, no, it really did just deal with that staging element.

Q And, in fact, the 2011 plan basically confirmed all the land use planning --

MR. HARRIS: Objection.

BY MR. KLINE:

Q Did not the 2011 plan confirm --

MS. ROBESON: No. No.

MR. HARRIS: That's the same.

MS. ROBESON: Okay. Well, okay. I don't want to get into -- this is an administrative proceeding, but can you ask it, what are your conclusions as to what the 2011 plan did?

THE WITNESS: And, Madam Examiner, as it was really limited to -- its only change to the plan, it's a plan amendment, it leaves what it doesn't amend intact. The only thing it really changed was its staging element to allow neighborhood retail for the grocery store to be able to proceed.

BY MR. KLINE:

Q You've reviewed the MXD plan, I'm sorry, the MXD text of the zoning ordinance?

A The MXPD, the regulations?

Q Yes. Right. Well, the zoning ordinance text

itself.

A Yes.

Q Okay.

A And I say that with not exhaustively, recently, you know, so I couldn't enumerate the entire text for you.

Q Do you view the MXPD recommendation in the 1994 plan for the Cabin Branch neighborhood as allowing a better mix of uses within the RMX TDR zone and I-3 or as an encouragement to rezone the MXPD to be able to increase retail to more than 120,000 square feet?

A Well, certainly not the latter. I mean I think the plan was pretty explicit in saying that it did want to afford the ability to obviously provide a vehicle for its own limitation. Secondly, to provide flexibility to be able to incorporate what to me the plan was pretty clear about saying, its residential uses into the employment neighborhood, something I considered weird, but it's not my plan.

MR. KLINE: I have no further questions of Mr. Ferguson.

MS. ROBESON: Mr. Chen.

MR. CHEN: I have no questions.

MS. ROBESON: Mr. Harris.

MR. HARRIS: Yes, ma'am.

CROSS-EXAMINATION

BY MR. HARRIS:

Q Let's see. I have to find where I started. You've testified about Section 59-1.6(a) within the development plan provisions of the zoning ordinance. With respect to 59-C-7.5, the MXPD zone, there is nothing in that section of the zoning ordinance that requires substantial compliance with the master plan, is there?

A No, there isn't?

Q And to the --

MS. ROBESON: Wait a minute.

THE WITNESS: Well, let me, let me --

MS. ROBESON: Okay. You can keep asking, but I see it, it's right there.

THE WITNESS: And, Madam Examiner, you are correct. It's the paragraph after (i). There is language that this loading zone may be approved.

MS. ROBESON: No, no. Never mind. You can ask him in his expert opinion, but my position is the zone speaks for itself.

THE WITNESS: And, Madam Examiner, I would only have read the contents of the zone back to you.

MS. ROBESON: Okay.

THE WITNESS: And not to disagree with your statement.

BY MR. HARRIS:

Q The zone uses the word compatible with the general plan, is that correct?
MS. ROBESON: No.
MR. CHEN: No, it doesn't.
MR. HARRIS: Turn to page --
MS. ROBESON: Are you going to -- oh,
"In a degree more closely compatible --
MR. HARRIS: Correct.
MS. ROBESON: -- to implement existing public plans and pertinent County policies in a manner and to a degree more closely compatible with said County plans and policies than may be possible under other zoning categories."
MR. HARRIS: Correct. You agree with that?
THE WITNESS: And it is what it says.
BY MR. HARRIS:
Q And nowhere in there is the word consistency with the master plan used?
A That's correct. That word does not --
MS. ROBESON: Oh, you're making a, or a -- okay. Go ahead.
BY MR. HARRIS:
Q And whereas other zones in Montgomery County, including the RMX zone, do use the word consistency with the master plan?

A I'll take your word for that.
Q Okay. Would you agree with me that the MXPD zone groups uses into three categories, residential, commercial and industrial?
A Sure.
Q And under commercial uses, it allows all permitted and special exception uses that are allowed in the C-2 and the HM, the hotel/motel zone?
A Sure.
Q And so under that use category, office uses and retail uses both fall?
A I would agree with that.
Q Are you aware, well, do you have any information with respect to the traffic impact of the proposed outlet other than the applicant's statement in this case that the traffic generation would be lower than the approved traffic generation from the project, including the hospital?
A No, I don't have anything different from that.
Q Okay. Are you -- you testified about your opinion that retail is not an employment use, do you remember that?
A I do.
Q And you are aware that in the Seneca Meadows case the Planning Board concluded that the Wegman's store was employment use?
A I did read the Seneca Meadows case, some of the

Seneca Meadows case materials. I would point out that the Seneca Meadows case is a, you know, it's a different zone. It's not the MXPD zone and as I shuffle through my notes, I'll tell you what it is.
Q We'll accept that it is a different zone. I'm aware of that.
A And not a zone that requires a development plan. It does require a project plan. The criteria for a project plan are different. The criteria for approval of a project plan are different. Certainly, in their statement, they did recognize that Wegman's has a lot of employment. And I think, Madam Examiner, this goes really to the issue that I brought out at the beginning of my testimony which is that the fact that there is a different standard is important because that zone has a more general compliance requirement than the MXPD zone, Seneca Meadows TMX-2 zone, and I do have the criteria to approve the project plan which if you believe is important, I can continue to shuffle through my notes until I find them.
MS. ROBESON: Well, I can, I can read the approval. You don't have to read it to us.
THE WITNESS: But I would point out that it is materially, it is a master plan compliance finding, but it's the more broad finding which I do believe gives the Council more latitude to apply --

MR. HARRIS: Hold on. I'm just going to take out the back side. I apologize.
THE WITNESS: -- the policies and goals --
MS. ROBESON: Somebody ran into the zoning ordinance --
MR. HARRIS: Well, the zoning ordinance --
MS. ROBESON: -- notwithstanding --
THE WITNESS: The --
MR. HARRIS: It was 20 pounds in a 25-pound box --
THE WITNESS: That's right.
MR. HARRIS: -- and it upset it.
THE WITNESS: It would give you more latitude to apply broadly the policies of the zoning to finding compliance that I don't believe the current zone affords you the opportunity to do.
BY MR. HARRIS:
Q Did the Seneca Meadows case have to go through a preliminary plan of subdivision approval?
A It did.
Q And are you aware that the subdivision regulations in Montgomery County require that a preliminary plan of subdivision substantially conform to the recommendations in a master plan?
A I am.
Q So isn't that the same standard that you're saying

applies in the MXPD zone?
A No, I believe I think I was pretty explicit in my answer to the question you just asked me that it was not the case.
Q So even though the master plan did not recommend that use, did the master plan recommend a Wegman's there?
A No, it did not.
Q Despite that, did the Planning Board find that it substantially conformed with the master plan?
A It did.
Q And wouldn't the same be true in Park Potomac where you said it was not a planned development zone without a conformity requirement, with a conformity -- it was a planned, it was not a planned development zone that had a conformity requirement?
A Correct. It did not have the same development plan requirement.
Q But they would have had to go through a preliminary --
A Preliminary.
Q -- plan of subdivision --
A Yes, they would.
Q -- that would have had to find the development substantially conforming with the master plan?
A Yes, they would.

Q And did they find that there?
A Yes, they did.
Q The Shady Grove study area plan, what was the year of that?
A 1990.
Q Do you know when the Washingtonian Center project was approved?
A Well, it had a series of approvals, one prior to this plan and one after.
Q When was the one prior to that?
A I don't recall the date.
Q And do you know whether that project was largely, the first phases of it were built before this study area plan came out?
A There were some components of it that were.
Q And so your review of this study area plan does not in any way change the testimony that Mr. Unterberg gave about the 1985 Gaithersburg plan and its recommendations with respect to the Washingtonian Center?
A Well, the Washingtonian Center that I believe was being held up is the analog to the subject development was approved in '94 or '95, subsequent to this plan.
Q I'm sorry, say that -- what, I was writing something. Would you say that again? I apologize.
A I believe that the --

MS. ROBESON: He's using big words. Go ahead.
MR. HARRIS: And speaking eloquently and fast, but, so I'm following.
THE WITNESS: I apologize.
MR. HARRIS: Yes.
THE WITNESS: The, I believe that the Washingtonian, the components of the Washingtonian Center, specific components, the entertainment and restaurant components were approved subsequent to that 1990 plan and I believe 1994 to 1995.
BY MR. HARRIS:
Q Wasn't the Rio Center with the movie theaters and restaurants built more like in 1986 or '87?
A As I say, there were some components of it. There was the substantive change to the entertainment.
Q Was the movie theater then, there before this sector plan or before this Shady Grove study area plan?
A I do not recall.
Q Okay. So if the evidence showed that it was built before this, would you agree with me that this Shady Grove study area plan did not control what was happening in those earlier stages of development there?
A Of course.
MS. ROBESON: Mr. Harris, I'm sorry, I need to interrupt. Kathy, do you have a back-up? When those lights

go like they just did, that sometimes means we lose power here. Is everything you have backed up on the computer?
THE COURT REPORTER: We should be okay.
MS. ROBESON: Okay. I just, I don't want to lose a day's worth of testimony. Okay. I am sorry, Mr. Harris.
MR. KLINE: The ultimate contingency.
MS. ROBESON: Yes.
THE COURT REPORTER: Get your flashlights ready.
MS. ROBESON: We were in the bomb shelter the other day, but I digress. Go ahead, Mr. Harris.
BY MR. HARRIS:
Q Would you agree with me that the MXPD zone is intended to be one of the more flexible zones in the County to accomplish the purposes stated there?
A I would.
Q And would you agree with me that the review of a -- never mind, strike that. You talked about how people might arrive at an outlet center in a bus as opposed to driving and I think your implication was that then they're not likely to interact with the broader community, other stores in the area, et cetera?
A In that example, that's correct.
Q Do you have any idea what percentage of the people come to an outlet center by bus?
A It would vary from center to center.

Q They typically have large parking lots, don't they?
A Typically.
Q So would you agree with me that a large number of people drive?
A Certainly.
Q And so those people would be able to interact with the rest of the community?
A Certainly.
Q You talked about the importance of addressing the uses and understanding exactly how a project would be build such as where would the food court be, et cetera, do you remember that?
A Yes.
Q And are you aware that the site plan review process in Montgomery County does exactly that?
A It does, but here you are required to have a development plan and I guess I would be interested in reviewing the contents of the development plan which do require you to provide some level of that detail at this stage. Now does your plan show a schematic development for an outlet center? It does. Would I characterize it as an isolated type of center? Generally, yes. I couldn't tell where in that plan necessarily the rest of the food courts would be and there are some other uses which are --

MS. ROBESON: Sorry. Go ahead.
THE WITNESS: That was a close one. Which are more outwardly located.
BY MR. HARRIS:
Q Wouldn't you agree with me that the criteria in a development plan do not call for that information to be submitted, that they call for the general locations of points of access and the locations and uses of buildings and structures?
A Well, I guess that depends on what your interpretation of locations and uses of buildings and structures means because if you have to show the locations and uses of the building, presumably you have to show at least in some level of detail the building. And so you can interpret that to mean what you would like it to mean.
Q Would you agree with me that the location and uses of the buildings shown on the DPA is the same, contains the same level of detail as the uses and locations of buildings shown on the approved development plan? And I can put them up if you want to see them.
A If you would? And if this was only to --
Q So on the top I have Exhibit 21(f) that is the approved development plan.
A Right.
Q And below that is Exhibit 59 that is the DPA plan.

And if you look at it, wouldn't you agree with me that the indication of buildings on here is the same level of detail as in the other one?
A Yes, I would.
Q So you're not maintaining that the original development plan was inappropriately --
A No, no, not at all.
Q -- approved?
A Not at all.
Q So that if that level of detail is shown now, that must be the acceptable level of detail?
MR. CHEN: Objection.
MS. ROBESON: Sustained.
BY MR. HARRIS:
Q You indicated that you didn't have experience in concluding the extent to which an outlet center would be a catalyst for other employment development, was that your testimony?
A I don't believe I characterized it exactly that way, but I don't think I said I didn't have experience. I don't think -- I think I didn't, I think that I said that given the information that I had before me, I couldn't characterize whether this center would or would not.
Q Okay. And were you here when Mr. Bogorad testified?

A I was not.
Q Did you review his testimony?
A I did.
Q And do you have any information to submit to us today that would indicate that Mr. Bogorad's conclusions about the catalytic effect of outlet retail on employment would be incorrect?
A No, I certainly can't rebut them from a market standpoint.
Q We, there was testimony about the effect of a master plan and the extent to which it is a mandate, if you will, do you remember that?
A Ask your question.
Q Would you agree with me that master plans are guidelines and are not mandates?
A In this --
MR. CHEN: Objection. It calls for a legal conclusion.
MR. HARRIS: He offered a lot of legal conclusions about the MXPD zone and what it means and all of that. He's clearly qualified to talk about these things.
MS. ROBESON: I'll let it in for the weight it deserves.
THE WITNESS: Thank you, Madam Examiner. I would say that the particular requirement for a substantial

compliance with the use and density requirements of the master plan in this particular case, or in the case of a development plan for MXPD or any other development for which a development plan is required actually do make that particular recommendation of the master plan rise above the mere guide.

BY MR. HARRIS:

Q Even if you take your interpretation that the development plan provisions calling for substantial compliance apply here, substantial compliance, it does not mean absolute compliance, does it?

A That's correct.

MR. CHEN: Objection.

THE WITNESS: It does -- well, from a planning standpoint it does not.

BY MR. HARRIS:

Q Okay. And I assume that you've probably handled any number of development approvals where you argued that a requirement for master plan conformity did not need to be met because the master plan was flexible?

A I can't recall that I have personally made that specific argument.

Q Have you made --

A And I don't mean to be evasive. I don't recall that I have actually ever had to make that specific

argument.

Q Do you recall a case involving a Carmax dealership in Brandywine?

A Very well.

Q Didn't the master plan in that case call for town center, neo-traditional development and a transit station and not a car dealership?

A Well, there were a number of items of dispute about that particular case. I would note for the record that that particular master plan was set aside by the court. There were disputes as to whether the, that the site of that project in particular was a part of the town center or not, or to the degree, you know, what part of the town center it would have been in and, therefore, what degree of, in this case the issue was auto orientation, would be appropriate. But certainly there were issue in that case where the applicant and the staff's opinion of what the master plan said were not the same.

Q You were the land planner in that case for the applicant?

A I was.

Q And do you recall in the opinion that it said,

"The applicant's witness, who was accepted as an expert in land use planning, opined that the application met all of the applicable provisions

of the zoning ordinance. He noted that the application does not strictly comply with the master plan's vision for properties within designated centers since these areas are earmarked for more intensive growth and associated with mass transit service,"

do you remember that?

A I'll take the Examiner Nichols's opinion as gospel.

Q And in that case wasn't the master plan a 2009 master plan?

A I believe the sub-five master plan was 2009, correct.

Q And that case was just two years later in 2011, wasn't it?

A The Carmax case?

Q Yes.

A And trickled into 2012.

Q And so that wasn't a situation where the master plan was particularly old, was it?

A No, it was not.

Q And was the -- would you agree with me that the conclusion in the approval of that where the requirement is to implement the general plan area master plans and functional plans that the County concluded the 2009 sub-

region five master plan envisioned a commercial use of the subject property and the SMA did not recommend any changes? Well, language within the plan also placed the property within a community center which does not recommend such a land-intensive use.

"It is a use permitted by the zone and it can be considered a transitional use until such time as the transit facility envisioned by the master plan comes to fruition, thus, this purpose that is compliance with the master plan is met."

A I wrote that.

Q You were very convincing in this case, I will argue.

A It was approved.

Q It did get approved and it showed the flexibility of even a very recent master plan.

A It does. I will point out that was a Euclidean zone, not a plan implementation.

Q Okay. Have you handled any other cases where you argued the same thing, that is that master plans are flexible?

A Well, as I say, I -- and perhaps I'm being overzealous in defending my particular language. I do accept that it is common to argue sometimes for a more expansive definition of what compliance with a master plan

may mean than say an opposition, you know, entity would. That being said, all of these cases that we are discussing are not cases where you have a plan implementation zone and a specific requirement where essentially the use and density requirements of the master plan become a part of the zoning through the vehicle development plan.

MS. ROBESON: So you're saying it depends on the language of the particular zone what weight to give the master plan?

THE WITNESS: It does, absolutely it does, or in this case whatever the process of approval is. So here the language is not specifically in the zone description and purposes, but rather it's in the process for the approval of the development plan which is not applicable to all zones, but it is to the MXPD.

BY MR. HARRIS:

Q Okay. Other than my reminding you of that case that you have not recalled, do you recall any other cases where you have argued that a development proposal should be approved because the master plan should be read flexibly?

A If you hand me my resume, I'm sure I could go through and get them for you.

Q Let me see that.

A I would, I would not, I would not propose for your broad contention, but yes I have, and almost certainly on

more than one occasion.

Q I'm sorry, on?

A On, or more than one occasion.

Q Okay. And wasn't one even very recent? Do you recall the Town of Riverdale Park mixed use town center development, also known as the --

A I --

Q -- Cafritz property?

A I absolutely do.

Q It made a lot of news, didn't it?

A It certainly did. I think I managed to keep my name out of most of the news, but --

Q And you were the planner for the applicant in that?

A I was. I was.

Q And in that case there was a 1994 master plan?

A Yes, there was.

Q And with that 1994 master plan, didn't the County write,

"The following comments relate specifically to the Cafritz property. While zoned R-55,"

which I think I, you would agree is a single-family residential zone --

A It is. It's analogous to the R-60 zone in Montgomery County.

Q Correct.

"While zoned R-55, the property should be considered for a residential, comprehensive design zone provided that the proposed development is compatible with surrounding residential development and continues existing design and development patterns."

That was the recommendation in the master plan?

A That's correct.

Q Correct?

A Yes, it is.

Q And your client did not apply for the CDZ zone --

A That's correct.

Q -- they applied for the mixed use town center --

A That's correct.

Q -- MUTC zone, right?

A That's correct.

Q And so where the County concluded that,

"The applicant is proposing to rezone the subject property from the R-55 to the MUTC zone. While the MUTC zone is not a CDZ, it is quite similar in that its fundamental purpose is to allow flexibility with respect to site design and review procedures. It also does not have a prescribed height setback and lot coverage

requirements and it's specifically designed to provide a regulatory mechanism for the redevelopment in more urban areas."

Isn't --

A I don't think that's actually an accurate characterization, so whoever wrote that, I would not agree with that characterization of the MUTC. And who was the case --

Q That was written by the Park and Planning staff.

A Yes, no, it was and I don't remember who had that case in particular, Susan? No, she was --

Q No.

A -- urban design. I don't remember who had zoning.

Q Yes.

A At any rate, it's not --

Q In respect --

A -- I don't agree --

Q -- isn't the --

A -- with that statement.

Q -- MUTC zone in some respects akin to the MXPD zone in that it's a broad, floating zone that allows --

A It, no, it really is not. It's a very, very unique zone that was created by the 1994 plan. I was on a committee that helped, for instance, draft the table of uses for that zone. And it is very specifically a revitalization

zone. It was intended to be applied over existing developed commercial concentrations to be able to facilitate revitalization because there's so many issues of conformance with all of these old properties with the current zoning standards when most of these areas were developed not just before the 1949 current zoning in Prince George's County, but even before the Regional District Act of '28 and '27.

Q And didn't the development plan conflict with a master plan recommendation to preserve the existing wooded image and to create a tree save area?

A It did. I mean the plan certainly did not preserve the trees over most of the site. There was a wooded buffer which was a specific recommendation of the plan to be preserved along the Route 1 frontage and that was, in fact, substantially preserved at least in the intentions.

MS. ROBESON: I was guessing this was Route 1 zone.

MR. HARRIS: Yes.

BY MR. HARRIS:

Q And through your good advocacy, didn't they approve the plan despite the fact that they concluded that it did not adhere to the requirements of the 2004 development plan for the Town of Riverdale?

A They did what now?

Q The subject application does not adhere to the requirements of the 2004 development plan? And when they use, they're referring --

A You mean --

Q -- to the Town of Riverdale.

A That makes no sense because the 2004 development plan is actually a component of the MUTC zone. You need to have a town center development plan. That is what establishes the height and setback requirements in that zone. So the statement earlier, the MUTC zone doesn't have them, every zone, every MUTC zone does have to have its own development plan which does establish all of those requirements.

MS. ROBESON: Okay. It's like New Town in Columbia, they have a final development plan that sets all the parameters. Well, never mind.

THE WITNESS: Yeah.

MS. ROBESON: We won't get into an esoteric discussion.

BY MR. HARRIS:

Q Aren't they concluding that it did not conform with that?

A What they're, what I believe that they're saying is that some of the aspects proposed by the Cafritz proposal were not in conformance with the current contents of the

2004 town center development plan which had to be amended as part of the approval to be able to expand the scope of the MUTC zoning area --

MS. ROBESON: Well, when it's --

THE WITNESS: -- and, of course, supply development regulations throughout that area.

MS. ROBESON: Was -- okay.

THE WITNESS: So I'm not sure what the import of that --

MS. ROBESON: I'm not sure if it --

THE WITNESS: When the whole thing was done, of course, it did comply with the development plan because the development plan was amended as a part of the zoning approval.

BY MR. HARRIS:

Q In any respect, you were able to get the project approved despite the fact it didn't conform with the 1994 master plan?

A Well, I would say that it did not conform with certain provisions of the master plan and I think, again, this is a repetitive theme where because of Plan A in that plan, the same date as the Clarksburg plan, you know, didn't account for some of the changes in land use and planning that have occurred in the intervening two decades. And because there wasn't a specific tie of the requirements of

the MUTC zone to density and use restrictions or requirements or standards set in the, in that master plan that, therefore, a more broader interpretation of conformance was something that was able to be argued, and as it turned out, successfully.

Q And didn't you advise the County that the recommendation for the CDZ zone had to be viewed in light of the, as you put it, the zoning tools available at the time of the 1994 master plan and, therefore, you argued that it was really a good idea to accommodate a mix of uses here irrespective of what they were thinking then?

A I do remember being particularly eloquent on that point. I don't remember the exact substance of what, of what it was that I said since certainly there were a number of substantive changes, the Purple Line, which wasn't in the, you know, in anybody's wildest dreams except for some really visionary planners at that time in '94 to having a station within a half mile of the site. Now, and so certainly some of the things which the plan wanted conceptually, but couldn't apply to that site at that time, you know, didn't allow the plan to make a recommendation that you would comply with today, but in terms of the broad principles that the plan did espouse, it did comply to. And it's that degree of flexibility that you often do have. It's often much more appropriate to argue in older zones. I

would reiterate again you have a particular constraint in this that you don't in the other cases.
Q The -- you talked about the amount, well, let me back up. Other cases --
MS. ROBESON: He's not backing.
BY MR. HARRIS:
Q Well, do you recall any other cases in which you argued that degree of flexibility should be applied in an development application?
A As I say, if -- I went through my resume case-by-case. I'm sure I can come up with one.
Q All right. We won't delve into any more. You talked about the amount of neighborhood retail that is proposed here. Are you aware that the applicant has indicated they would be producing between 50 and 100,000 square feet of neighborhood retail?
MR. KLINE: Objection. That's not a development plan provision.
BY MR. HARRIS:
Q Are you aware that they testified that they would --
MS. ROBESON: Wait.
MR. HARRIS: I'm sorry.
MS. ROBESON: What is your question? I'm not sure I understand it.

BY MR. HARRIS:
Q Are you aware that the applicant has indicated they plan to do between 50 and 100,000 square feet of neighborhood retail here?
MS. ROBESON: Well, wait. I thought -- assume that, because I'm not sure that's what the applicant --
MR. HARRIS: Okay.
MS. ROBESON: -- has said. I --
MR. HARRIS: Okay.
THE WITNESS: Thank you, Madam Examiner. I was saying that --
MS. ROBESON: -- because I don't recall that.
THE WITNESS: -- that isn't the numbers that stuck in my head either. But let me --
MR. HARRIS: Okay.
THE WITNESS: -- take that for gospel.
BY MR. HARRIS:
Q Let me try this another way. Are you aware that the Gosnell portion of this property already has approval for 8,600 square feet of retail?
A Yes, I am.
Q And that is neighborhood-serving retail?
A Yes, I am.
Q And in addition to that retail, are you aware that the Gosnell plan also includes approval for two banks?

A I don't recall that specifically.
Q If it does, would you agree that those, even if they're not classified as retail in the Montgomery County zoning ordinance, that in common parlance they would be considered retail?
A Yes, they would.
Q And are you aware that the hotel contemplates a restaurant in it in addition to the 8,600 square feet of retail?
A I didn't know that specifically, but I would expect that.
Q And if so, that too would serve the neighborhood residents?
A It could.
Q The, some of the retail services that would be within an outlet center would be used by the local residents, wouldn't they?
A I mean to the extent that everybody speaking loosely uses an outlet center at some point in their shopping experience, yes. Would they use it more preferentially? It depends on the store. They could.
Q So a Nike store there, there would be a high likelihood that people in the Cabin Branch neighborhood would go buy athletic shoes there?
A They might, sure. Sure.

Q And the same for other clothing articles there?
A Absolutely. They might.
Q And any restaurants that would be there would likely be frequented by people within the community as well.
A They likely would, yes.
Q Were you here with the debate about the grocery store and, you know, whether one should be built here or not?
A At today's? Yes, I was.
Q Yes. Okay. So isn't there evidence in the record that the developer of the town center neighborhood retail center wants to do a grocery, but is concerned about attracting a grocer if the Cabin Branch community were to proceed with or plan to build a grocery?
A I believe that is the case, yes.
Q And so if you took a grocery store out of the equation there to satisfy that objective, the estimate of demand for retail in the technical appendix would have to be reduced?
A I would presume so. I think that I don't know what the procedure was that the Planning Staff went through. It was an extraordinarily short market analysis, about half a page. So, you know, I don't know what was in their minds when they came up with this. It's not an unreasonable presumption.

Q Okay. I would agree it's a short analysis, at least as I see it. You did testify, though, that they looked at both convenience retail or neighborhood retail on the one hand and comparison retail on the other?
A Yes.
Q But the estimate for retail there is simply for the neighborhood retail?
A It appears, but it's not conclusive. What they title their table, looking over your shoulder, is on page 12 of the technical appendix, amount of square, of neighborhood shopping centers. A neighborhood shopping center, I don't know exactly what that means, but if it is a typical strip center anchored by a grocery store and a drug store, many of those uses would be convenience, retail goods that ordinarily would be strictly neighborhood-oriented. Many of them would be specialty or should I say comparison or shopper's goods, you know, retailers that may not be exclusively neighborhood-oriented. So I don't know exactly what they mean, whether the 75,000 square feet that they suggest is supported for the area west of I-270, you know, is only their convenience goods or if it's also their comparison or shopper's goods.
Q So if it did include comparison shopping, would you agree with me that the same table says 130,000 square feet of retail in the town center?

A It does.
Q So if it includes comparison retail and doesn't provide for any on the west side, then it doesn't provide for any on the east side either, does it?
A Well, I don't believe that I said that. The question is whether it is an aggregate demand from the area both for convenience goods and for comparison goods or only for neighborhood-oriented, which is primarily convenience goods.
Q You --
A I don't know whether or not it broke it down either way, that's all I'm saying.
Q You counsel and the other opposition counsel has been arguing in this case that the recommendations in the land use plan for the town center provided for up to 300,000 square feet, including the possibility of comparison retail.
A And I do agree with that.
Q So wouldn't you agree with me that this number here must only then be neighborhood retail services?
A I would speculate that that number is the amount of retail -- and this is what it says, is the amount of square feet of center supported by the household or employment in that area. Now there might be areas outside of the master plan study area, Boyds for instance, which could have been included in the trade area for that. I

don't know.
Q Isn't Boyds west of I-270?
A It is. But whether or not that's part of the Clarksburg, you know, market area, again, I don't know. Maybe Mr. Bogorad could opine on that.
Q In any respect, through your review of the master plan, the 1994 Clarksburg master plan and the technical appendix, you don't see any calculation as far as the amount of comparison retail that could be supportable in Clarksburg?
A I don't see a calculation.
Q And there is no recommendation anywhere in the master plan specifically to include or not to include comparison retail?
A No, there isn't.
Q Mr. Bogorad, if the record shows that Mr. Bogorad indicated that restaurants that would be part of the outlet center would likely be different than the restaurants that would be included in the neighborhood retail center in the town center, you don't have any other information to contradict that, do you?
A That would surprise me, but I don't.
MR. HARRIS: I'm going to have introduced as an exhibit a document here identified -- oh, I'm sorry, you need another one for your review. Here, Jody.

MR. KLINE: Thank you.
MS. ROBESON: I'll mark this as 110, I think, we are on.
BY MR. HARRIS:
Q Would you identify what this document is?
A I don't know.
MR. CHEN: Objection.
BY MR. HARRIS:
Q Well, would you agree with me that this is a copy of the Loudoun newsletter from September 6, 2013?
MS. ROBESON: Well, it's only marked at the moment.
MR. HARRIS: Okay.
MS. ROBESON: So do you have an objection to the exhibit, Mr. Chen?
MR. CHEN: I object to the question that was posited to this witness.
MS. ROBESON: Okay. And --
MR. HARRIS: The question was could he identify it?
MR. CHEN: No, you didn't ask that.
MR. HARRIS: That was my first question.
MR. CHEN: No, it wasn't.
MR. HARRIS: Okay. Then I'll ask that as my first question.

MS. ROBESON: Okay.
MR. HARRIS: I apologize.
BY MR. HARRIS:
Q Can you identify this document?
A Well, it is titled, The Loudoun Newsletter, covering real estate, land use and economic development since 1984, and this is apparently all or part of Volume 28, No. 16, dated September the 6th, last week.
Q And would you read from --
MS. ROBESON: And do you have personal familiarity with this?
THE WITNESS: I have never seen the Loudoun Newsletter before, but I don't do a great deal of work in Virginia.
BY MR. HARRIS:
Q Would you read for me the first three lines of the --
MS. ROBESON: Well, wait. What's -- I'm going to stop you. What's the relevance of this and --
MR. HARRIS: The relevance --
MS. ROBESON: -- to his testimony?
MR. HARRIS: The relevance to his testimony is that he talked about the impact or lack thereof of comparison retail to the development of an employment center. And this goes directly to that point.

MS. ROBESON: Well, I think this would be more appropriate since he just said he doesn't know anything about Loudoun County, doesn't know much about it, and I think if you're going to use it in rebuttal, it's more appropriate that you use it in rebuttal.
MR. HARRIS: Well, if the rebuttal testimony shows that your client --
MS. ROBESON: How does --
MR. HARRIS: -- the Peterson Company, wants to build comparison retail as a part of an employment center and is arguing that that comparison retail will have a catalytic effect on other employment, you don't have any other information here today to suggest anything to the contrary?
MR. CHEN: Is that a question or is it --
MS. ROBESON: I --
MR. HARRIS: He talked about the issue of the relationship. I'm just trying to find out --
MS. ROBESON: Yes, but he said it wasn't, he wasn't doing it as far as market demand. He said they could be complimentary, but he wasn't an expert on whether it would or would not from a market standpoint. I just see --
MR. HARRIS: That's fine. That's fine.
MR. CHEN: It goes way beyond direct exam.
MS. ROBESON: I just see no point in asking him

about a document that --
MR. HARRIS: We'll deal with it, in fact, when do our rebuttal phase.
MR. KLINE: We did not, it was not made an exhibit?
MS. ROBESON: No. So we're still on --
MR. HARRIS: Okay.
MS. ROBESON: -- 110. Now you can feel free if Mr. Bogorad wants to --
MR. HARRIS: Yes. Thank you. I don't think I have any further questions.
MS. ROBESON: Okay. Thank you. Redirect?
REDIRECT EXAMINATION
BY MR. KLINE:
Q You read Mr. Bogorad's transcript?
A I did.
Q What did --
A If you're going to ask me something very particular about it, I'm probably going to have to refresh my memory.
Q What did Mr. Bogorad say about the premise of a regional outlet center being a catalyst for employment or office use?
MS. ROBESON: Is this something you want to ask him to look up now or is this an argument you want to make

later, because I know what he said.
MR. KLINE: Okay. Then --
MS. ROBESON: But if you want to ask --
MR. KLINE: Sure.
MS. ROBESON: -- him if there's a reason --
MR. KLINE: Here's where I am. I don't know. My recollection of Mr. Bogorad's testimony was not nearly as posited as the question was asked, suggested. So I wanted him to go see if he could find it and that may be more difficult.
BY MR. KLINE:
Q Do you recall if, do you recall if Mr. Bogorad stated that the premise that a regional outlet center would be a catalyst for office use was an unproven premise?
A Well, that's exactly -- he said untested was the exact word he used --
Q Thank you.
A -- on page --
MS. ROBESON: I think it's on 121 and 122.
MR. KLINE: Thank you. I stand --
THE WITNESS: 53 is my transcript and I don't know if that's the same.
MS. ROBESON: But, you know what, I guess we're not crossing -- how, where are you going with this?
MR. KLINE: I just wanted to have basically that

point made because as I said --
MS. ROBESON: And you made it?
MR. KLINE: Actually he made it, we didn't.
MS. ROBESON: He made it.
MR. KLINE: Right.
BY MR. KLINE:
Q And did he not also say that office use in Clarksburg was many years off?
A He did.
Q And didn't he say that any retail that might lure office to this space would be helpful?
A He did.
Q Okay. I think you were going to say something about the Carmax Brandywine case, as to why it was distinguishable from the development plan under the 13-02, but did not do so.
A I thought I --
Q Why is it that --
A -- did get, I thought I did get it out, in that the Carmax was in the CSC zone, which is a Euclidian zone.
Q And --
A And, yes, it was not, you know, when the SMA in that case was applied and they --
Q SMA?
A Sectional map amendment, the comprehensive

rezoning following the master plan adoption, while they did talk about town center ultimately occurring in that area, they did not rezone that property to a zone which would be a town center implementation zone. They left it in the CSC zone.
Q And in the Cafritz case, wasn't the R-55 zoning a holding zone in anticipation of future development?
A Certainly that had been, you know, my contention. I don't believe the master plan ever called it a holding zone.
Q I put up a copy of what has been marked as Exhibit 92. I've got my finger on what's known was the Gosnell property. Do you know what is proposed to be developed on the 8,600 square feet?
A Retail and a couple of banks.
Q If I told you that it included a gas station, a car wash and a convenience store, would that, do you know if that's correct or not?
A I did not pick that up or I do not recall that from my perusal of the testimony earlier. So thank you.
Q Given its location on 121, those uses, would you not consider that to be a highway-oriented land use?
A It could be.
Q Would it also be serving people traveling on 121 and the interstate?

A Certainly on, certainly on 121, potentially on the interstate.
Q And given its location and the pedestrian network, is it readily accessible for pedestrian use to facilitate neighborhood orientation?
A I would say that it is a little bit remote to expect it to be activated by pedestrian trips.
Q In your opinion, is it treated as neighborhood retail for counting purposes rather than necessarily functioning primarily as neighborhood retail?
A It certainly does.
Q And if you took the grocery store out of the math or the amount of neighborhood retail in the Cabin Branch neighborhood, whatever that number is, are you, aren't you still making the Cabin Branch application further out of conformance with that --
MR. HARRIS: Objection.
MR. KLINE: Okay.
BY MR. KLINE:
Q Does the removal of the grocery store from the, failure to provide a grocery store in the Cabin Branch neighborhood make the application not in conformance with the literal language in the plan recommending a grocery store?
A Certainly the plan seeks a grocery store in each

of its neighborhood activity centers.
Q Thank you.
MR. KLINE: No further questions.
MS. ROBESON: All right. Mr. Chen.
MR. CHEN: No questions.
MS. ROBESON: Any recross, Mr. Harris?
RECROSS EXAMINATION
BY MR. HARRIS:
Q The plan doesn't require a grocery store in any of the neighborhoods, does it?
A I don't believe it does.
Q As far as the gas station and the banks, isn't it likely that if you lived in the Cabin Branch community, on your way to work, on your way home from work or otherwise that you would use the gas station?
A Absolutely.
Q And the banks?
A Absolutely.
Q So don't they serve this neighborhood pretty well?
A Certainly contribute to the neighborhood retail.
Q The, in the Carmax site, doesn't the combination of the zoning ordinance and the subdivision regulations in Prince George's County require substantial consistency with the master plan?
A I don't recall the exact, the exact language,

whether it's substantial consistency or, you know, that we not impair it. The zoning ordinance does not require conformance to the master plan as a general, you know, as a condition of site plan or, you know, an ordinary development approval. The subdivision ordinance does. Carmax had been subdivided previously. The use proposed was a special exception use. The special exception criteria is that it not impair the master plan and that was what was being sought in the case you've referenced.

Q So even though it was a Euclidian zone, there was still an analysis of the relationship to the master plan?

A Yes, there was.

Q And in that case you found, you convinced them that even though the master plan hadn't anticipated it, it was a good use to be there and, therefore, they should find it consistent with the master plan?

A In substance, yes.

MR. HARRIS: No other questions.

MS. ROBESON: Well, now I have a question. So I'll give you all a chance to ask questions based on my question. Can you turn to page 28 of the master plan, Policy 7?

THE WITNESS: Eventually, Madam Examiner. Thank you for your patience.

MR. HARRIS: Here, I've got it here if you want

it.

THE WITNESS: Thank you. Policy 7, okay.

MS. ROBESON: Okay. Just following up on Mr. Kline's question, that the Gosnell property north of, northwest of 121, Policy 7 under the mix of uses, it says,

"Establish a mix of uses in each neighborhood to encourage pedestrian travel and reduce dependency on the automobile.''

THE WITNESS: Uh-huh.

MS. ROBESON: So I guess my question is is that retail there going to reduce dependency on the automobile?

THE WITNESS: Oh, no, the Gosnell retail?

MS. ROBESON: Yes.

THE WITNESS: No, not at all.

MS. ROBESON: I just want to make sure I understood that. Okay. Questions based on my questions, Mr. Chen or Mr. Kline?

MR. CHEN: No.

MR. KLINE: Not from me.

MS. ROBESON: Mr. Harris?

MR. HARRIS: Just one question.

BY MR. HARRIS:

Q Even if you assume your conclusion that it does not encourage, reduce dependency on the automobile, you would agree with me that the County approved that use as

being consistent with the master plan?

MR. CHEN: Objection. He didn't know that, there isn't any foundation for that.

MS. ROBESON: Are you familiar with that land use approval?

THE WITNESS: I'm not specifically.

BY MR. HARRIS:

Q Are you familiar with the MXPD zone?

A I am.

Q And the development plan requirement of 59-D that you said requires substantial conformity with the master plan?

A To the use and density requirements of the master plan.

Q So if that site is zoned MXPD and it's been approved, someone would have had to make that finding, wouldn't they?

A Yes, yes, they would.

Q Thank you.

MS. ROBESON: Okay. All right. So as far as the next hearing, I know, Mr. Ferguson, you couldn't be here, so --

MR. FERGUSON: On the 7th.

MS. ROBESON: On the 7th? Correct.

MR. FERGUSON: Am I not done?

MS. ROBESON: Yes, you're done. I was just -- no, I was --

MR. HARRIS: You don't need to put it on your calendar.

MS. ROBESON: I was trying to --

MR. KLINE: Could you release the rest of us to --

MS. ROBESON: -- refresh my memory as to who was unavailable. Then Mr., was Mr. Bogorad the other one that --

MR. BOGORAD: I am not available until the 10th.

MR. HARRIS: He's not available.

MR. BOGORAD: For that week, that week.

MS. ROBESON: Okay. So is there -- do you have anyone -- I guess it would be -- when is Mr. Bossong available?

MR. HARRIS: That's a good question. We don't know his schedule. He's still out of town. But I would assume he could make himself available then.

MS. ROBESON: Well, I don't want to assume --

MR. UNTERBERG: Yes, we can --

MR. HARRIS: Okay.

MS. ROBESON: -- and have to convene a hearing.

MR. UNTERBERG: I could make a quick phone call.

MR. HARRIS: Okay. Why don't you --

MR. UNTERBERG: I can see what his schedule is.

MR. HARRIS: Okay.
MS. ROBESON: Okay. Why don't, okay, why don't you do that. We'll go off the record while he's out of the room.
(Recess.)
THE COURT REPORTER: I'm sorry. Could you just repeat that?
MS. ROBESON: Sure. Sure. I surprised you. In 59-C-7.50 --
MR. CHEN: 7.5?
MS. ROBESON: Yes, 0, 7.50. Mr. Harris, you've suggested in a number of places that there's no master plan consistency requirement, but I read that very first paragraph. It says provides a flexible approach in design and development. It doesn't say land use or density. And it's similar to language in the PD zone which we have interpreted to mean, listen, we can accomplish what the master plan says in a better way. But the flexibility isn't to ignore the master plan. The flexibility is, you know, we're not going to have all the bulk regulations of a Euclidian zone.
So that's how I read that, not as saying there is a mandate that the master plan be read flexibly. I read it more that we're going to hold you to a higher level as far as the master plan goes and we're going to give you more

flexibility in layout and design so you can achieve those goals better. So if you can -- and I'm just telling you this in advance in case you want to address it in your case. You don't have to address it now. I would prefer that you don't address it now because I want to get a hearing.
MR. HARRIS: Okay.
MS. ROBESON: No, it's just that I want to get a hearing date set.
MR. HARRIS: I do as well. Thank you.
MS. ROBESON: And I do have to leave at 5:00 and this way you'll have an opportunity to really tell me how wrong I am.
MR. HARRIS: Mr. Bossong is available on the 7th.
MR. UNTERBERG: The 10th.
MR. HARRIS: The 10th, I'm sorry, that's what we were talking about. Okay.
MS. ROBESON: The 10th? Okay. So what I'm going to do is I'm going to, with the parties agreement, I'm going to continue this case to 9:30 on September 10th. Is everyone in agreement with that?
MR. CHEN: October 10th?
MS. ROBESON: October --
MR. HARRIS: October 10th, yes.
MS. ROBESON: And as far as I know at this point, it will be in this room. And then if we need the 15th, I

ask you not to schedule anything on the 15th. If we need the 15th, we will use that for whatever reason we need to, all right?
MR. HARRIS: Yes, ma'am.
MR. CHEN: That would be on the 15th at 9:30 you also said, I think.
MS. ROBESON: Also, yes.
MR. CHEN: All right. Are you -- what you said earlier today was that would be an oral argument date?
MS. ROBESON: Well, I don't know yet. How many rebuttal witnesses have, do, I know you didn't finish hearing all the expert testimony. Do you anticipate how many rebuttal witnesses you'll have?
MR. HARRIS: We do anticipate three. I will say, however, that rebuttal testimony should be short. I've been poor at predicting the length of cross-examination, so --
MS. ROBESON: I think what we're going -- I'm not going to restrict the 15th to -- I think I'm not in a position right now to restrict the 15th to argument.
MR. CHEN: I'm just bad the week of the 21st and this --
MS. ROBESON: Well, then --
MR. HARRIS: I'm sorry. I was going to say even if we have to carry over with testimony from the 10th to the 15th, we should be able to have time on the 15th for oral

argument as well. I think that was what Mr. Chen was --
MR. CHEN: Yes.
MR. HARRIS: -- suggesting.
MS. ROBESON: Yes, and I have more flexibility on the 15th to go late if we need to. No, Mr. Kline is --
MR. KLINE: Well, no, I'm just, I think what Mr. Harris is saying is we should be able to get finished on the 10th and I'd like to say come in on the 15th and have oral argument or do a little bit of testimony, wrap up in the morning and then come back in the afternoon.
MS. ROBESON: We will hopefully --
MR. KLINE: I'd just like a break.
MS. ROBESON: We will hopefully do that, but time will tell.
MR. KLINE: Okay.
MS. ROBESON: All right.
MR. CHEN: I'm just repeating our whole week of the 21st.
MS. ROBESON: I understand. That's why I'm saying I don't want to restrict the 15th to oral argument. We are going to use every minute of hearing time that we need to. And then I'll give you an option if you'd prefer to do a written closing, but I think that's something we'll play by ear.
MR. CHEN: Do you want to set in a third date just

as a possibility that week, the 16th, or --
MS. ROBESON: Well, I can't at -- I can't at the, oh wait. I do have Friday as a potential date, Friday the 18th. But the other dates, the Board of Appeals is in -- I would have to see if I could get another room on the 16th.
MR. CHEN: How about the 17th?
MS. ROBESON: I have to see if I can get another room. We have Costco.
MR. CHEN: The only issue I have on the 18th is I could cancel something, and I will cancel something if I have to, but that's a filing deadline in that case I'm involved with, it's the deadline.
MS. ROBESON: Well, the best I can tell you, I can try for the 16th and 17th, but I can't tell you at the moment because I don't know if we have another room available.
MR. CHEN: Would you just check though?
MS. ROBESON: Yes, I will.
MR. CHEN: Thank you.
MS. ROBESON: But I can't check at the moment.
MR. CHEN: I understand.
MS. ROBESON: Yes.
MR. CHEN: Would you just e-mail us --
MS. ROBESON: Yes.
MR. CHEN: -- and let us know?

MS. ROBESON: I will do that. Anything else? Yes, sir?
MR. HARRIS: The debate about the, what was it, I don't even remember --
MS. ROBESON: There's so many.
MR. HARRIS: -- the binding elements, have you resolved that or do you just intend to resolve that when you decide the case?
MS. ROBESON: I am going to resolve it when I decide the case, but I will tell you right now that your arguments are not persuading me. So it's likely that I will not grant it, but I promised myself, you know, in the midst of hearings sometimes there's so many issues you're kind of percolating. So I am going to re-read your arguments.
MR. KLINE: Well, thank you. I think Ms. Scala-Demby's response will be very meaningful in terms of what --
MS. ROBESON: Well, I didn't ask her to respond on the binding element issue. I asked her only on whether the -- there's two binding element --
MR. HARRIS: Whether it could be enforced?
MR. KLINE: Yes, right.
MS. ROBESON: -- issues.
MR. HARRIS: Right. Right.
MR. KLINE: I only mean the implementation, the enforcement.

MS. ROBESON: Okay.
MR. KLINE: That's all I have on that one.
MS. ROBESON: Well, I await her response. So anything else?
MR. HARRIS: No, ma'am.
MS. ROBESON: Okay. With that, this hearing is continued to, let me get the month right, October 10th at 9:30 in this room, the second floor hearing room. All right. Thank you.
MR. CHEN: Thank you.
MR. KLINE: We'll do the same thing and take everything over to your staff so they don't have to worry about it.
MS. ROBESON: No, you don't have to do that --
MR. KLINE: They'll do it?
MS. ROBESON: -- in this room. You know, we'll --
(Whereupon, at 4:46 p.m., the hearing was adjourned.)

C E R T I F I C A T E

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

Petition of Adventist Healthcare and Cabin Branch Commons
DPA 13-02

By:

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Tracy Hahn, Transcriber

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OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

FOR MONTGOMERY COUNTY

APPLICATION OF ADVENTIST HEALTHCARE & CABIN BRANCH COMMONS	**DPA 13-02**

A hearing in the above-entitled matter was held on September 6, 2013, commencing at 8:51 a.m., at the Office of Zoning and Administrative Hearings, 100 Maryland Avenue, Rita Davidson Memorial Hearing Room, Rockville, Maryland 20850 before:

Lynn A. Robeson

Hearing Examiner

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C O N T E N T S

Witnesses:	Direct	Cross	Redirect	Recross
Gary Unterberg				
By Mr. Chen:		8		163
By Mr. Harris:			61	
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E X H I B I T S

Exhibit No.		Marked/Received
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94	Memorandum dated 11/2/05 from Bob Harris to Michael Ma	21
96	Copy of the Planning Board opinion approving the Cabin Branch preliminary plan	132
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P R O C E E D I N G S

MS. ROBESON: This is a continuation of the public hearing in the application of Adventist Healthcare, Inc., and Cabin Branch Commons, Inc., requesting an amendment to the development plan approved by the District Council on September 9, 2003, in LMA G-806 for property consisting of 283.5 acres east of Clarksburg Road, west of I-270 and north of West Old Baltimore Road in Clarksville, Maryland.

All right. As a preliminary matter, Mr. Harris, do you -- I did speak briefly with Mr. Carter yesterday about his availability. Is there -- and he can be here at 1:00. I guess my question is what I've been trying to avoid, I agree with Mr. Chen that if he comes, he needs to come before the opponent's case. Is there a finite -- what I was hoping to avoid is a free-floating, this is what the Council did and why it did it, and this is my version of why the Council did something. Is there a finite or specific topic that you are proposing he testify on?

MR. HARRIS: There seem to be two different views on the recommendation for 120,000 square feet of neighborhood retail.

MS. ROBESON: Okay.

MR. HARRIS: And I do believe Mr. Carter clarified that in his staff report and that the Planning Board did, but given that there continues to be disagreement from the

opposition about that topic, my thinking was that perhaps he could clear that up.
MS. ROBESON: Well, I'm not sure the -- I understand your arguments. I'm not sure you're going to get the opposition to agree with you on it.
MR. HARRIS: I think that's a fair statement.
MS. ROBESON: So given that, is there a necessity to have him -- you've made the argument about the, with the technical appendix and the ability, you know, in the RMX Zone to have additional retail without the need to specify it in the master plan. I did understand that argument. So is there a need to have him here?
MR. HARRIS: To be honest, at this point in time I'm more interested in completing the hearing. I think the evidence that has come out so far, and we're not finished yet, in my opinion, you know, supports our case pretty strongly without Mr. Carter and I, you know, don't want to delay the hearing, so --
MS. ROBESON: Okay.
MR. HARRIS: -- I'm inclined to relieve him. Now the, I mean we do have the right to a rebuttal case --
MS. ROBESON: That's true.
MR. HARRIS: -- and so, you know, but I think it would be extraordinary to need him even then.
MS. ROBESON: Okay. All right. Then so you are

not requesting him to appear at this time, but possibly reserving your right?
MR. HARRIS: Yes. Yes, ma'am.
MS. ROBESON: All right. That is fine. So we left off -- are there any, I apologize, are there any other preliminary matters?
MR. HARRIS: For the first day of the hearing, I don't have any.
MS. ROBESON: Okay. I believe we left off with Mr. Chen's cross-examination of Mr. Unterberg. Mr. Unterberg, do you have the exhibits that you need now?
MR. UNTERBERG: Yes, I believe they're all here and we'll see which ones I need, but --
MS. ROBESON: Okay. All right. Mr. Chen, do you want to continue?
MR. CHEN: Thank you very much, Madam Hearing Examiner. As I said at the last hearing, Mr. Kline covered a lot of what I had and if I'm a little bit disjointed, it's trying to avoid --
MS. ROBESON: I understand.
MR. CHEN: -- unnecessary duplication and I probably will run over some duplication, but I'm trying to cut it down as much as possible.
MS. ROBESON: I appreciate that. Thank you.
CROSS-EXAMINATION

BY MR. CHEN:
Q Mr. Unterberg, as I recollect your testimony from the last hearing, you explained to me that the Northern District area would, essentially as I recall, and please I don't want to mischaracterize your testimony, but that the northern area would contain the specialty retail area and, I guess, neighborhood retail, is that correct, sir?
A That is correct.
Q When you say specialty retail, do I understand you to say that that is the outlet area, the outlet stores area?
A We are applying the specialty retail return to the outlet area, yes.
Q Is there a difference between the terminology between specialty retail and retail?
A I think retail in a sense is a broader term and in this case specialty retail we're applying to the outlets.
Q Okay. So I take it specialty retail would be within the definition of retail?
A Yes, it would.
Q Under this DPA, sir, what is the maximum amount of retail or specialty retail square footage that would be possible in the Northern District?
A Under this DPA, which -- I don't know if I need the pointer yet, but I'll get it out -- it's primarily located in Area A and Area A retail is a range from zero to

450,000 square feet.
Q Okay. So as I understand what you just pointed out for us, you said Area A, but I'm, am I correct in referring to that area also as the Northern or the North District?
A The North District includes Area A and Area B, and then in Area B, retail is arranged again from zero to 150,000 square feet.
MS. ROBESON: What was the range in A?
THE WITNESS: A is zero to 450,000 square feet.
MR. HARRIS: Well, also --
MS. ROBESON: Oh, yes.
MR. HARRIS: -- can you see the board, or there are some lights that aren't, actually aren't on it. I don't know if we've turned them all on or not.
MS. ROBESON: Okay. And what exhibit are you referring to? Is that one --
THE WITNESS: This is Exhibit 59.
MS. ROBESON: 59? Okay.
THE WITNESS: -- which is the development plan.
MR. ROBINS: No, that turned it on. You turned that on, yes.
(Discussion off the record.)
MS. ROBESON: Go ahead, Mr. Chen. Are you able to see it?

MR. CHEN: I can see it when I get this close.
MS. ROBESON: Okay.
BY MR. CHEN:
Q Okay. So as I understand it, sir, Area A will have a maximum of 450,00 square feet and Area B would have a maximum of 150,000 square feet?
A There's a range but, again, those are all capped by the maximum rear table, so they have to work within the maximum and the range.
Q Right. Now am I correct in understanding that Area A would be the specialty retail?
A Primarily. It does overlap. We talked about Golden Eye, which is the road between the two, and it does overlap between the A and the --
Q Okay. But as I understand your testimony, Area A is to be primarily the outlets?
A Primarily, yes.
Q Okay. And Area B then would be the neighborhood retail?
A Primarily.
Q Yes, primarily.
A Yes. Right. Yes.
Q Okay. Where is the other neighborhood retail located?
A Some of it is also in Area B, but north of 121.

Q Is that the Gosnell development?
A The Gosnell or SMPM.
Q Okay.
A Also Area B in the mixed use designation. There's, you know, south along Cabin Branch Avenue in Area C in the central location and the cross street is Skimmer.
Q Okay. Now down in Area C, that is, as I recollect your testimony, tended to be neighborhood retail, is that right?
A Yes.
Q What is arranged there?
A Area C has retail zero to 30,000 square feet is the range.
Q As I understand it, the -- by the way, the technical name of the master plan that we're dealing with in this case is Clarksburg Master Plan and Hyattstown Special Area, Special Study Area, is that correct, sir?
A For the '94 plan, yes.
Q Yes. So I think we've been calling it Clarksburg Plan. That's how I'll follow that nomenclature, okay?
A Okay.
Q As I understand it, that plan states that the Cabin Branch neighborhood will have a neighborhood core, do you recall that, sir?
A Yes, I do.

Q Where would be the neighborhood core under the DPA?
A Primarily in Area B, this mixed use designation, and we have prior testimony in coordination with Well Spring Avenue and Cabin Branch, which is this mixed use area.
Q Okay. That retail area down in Area C, how would you characterize that?
A It's another mixed use area, but also it's primarily a neighborhood retail in Area C.
Q And as I understand your testimony in the application documents, there is no grocery store in this DPA?
A The full-size grocery store, yes. There is no full-size grocery store proposed.
Q Alternative to the full-size grocery store, what would be in the DPA?
A There's wide ranges of uses. Are you speaking to grocery-related or --
Q Yes.
A It could be a food store, smaller in size. There's a variety of uses that are allowed under the MXPD Zone.
Q When you say smaller in size, sir, what is the range that you're talking about?
A It's undetermined right now, but it's generally

with the proposed binding element there's a 50,000 square feet limit and it's going to range anywhere small or larger within that parameter. So it could be a 5,000 square foot store, a 10,000 square foot store, a series of stores, smaller, larger.
Q Up to a maximum of 50,000 square feet?
A Per the binding element, yes.
Q Okay. Now we certainly know from your range of square footage in Area C that there's not going to be, there's not going to be a grocery store in that location, correct?
A The larger, full-service grocery, well, say that again please?
Q Yes. I think you and I are on the same page. In Area C there's not going to be a full, a full-service grocery store?
A In Area C, correct.
Q Okay. So that if there's going to be a full-service grocery -- strike that. If there's, since there's not going to be a full-service grocery store in the DPA, and we're talking about a food store which is smaller in size, that type of food store would be, I guess, depending upon its size, either in Area C or Area B?
A Correct, within the mixed use designation.
Q Yes. To a maximum of 50,000 square feet?

A Yes, per that, per the binding element.
Q Do you have the 2011 Master Plan Amendment?
A The full one that was passed out yesterday?
Q The last hearing.
A Or I mean Wednesday? The days are blurring together.
Q Yes.
MS. ROBESON: What was the, what was the range in Area C up to?
MR. CHEN: Well, the maximum square footage in that area would be 30,000 for any --
MS. ROBESON: That's what I thought.
THE WITNESS: Zero to 30,000.
MS. ROBESON: So the limitation in C is not 50, it's 30, right?
THE WITNESS: Correct. Correct.
MS. ROBESON: Okay. Go ahead. I'm sorry, Mr. Chen.
THE WITNESS: Since the binding element does, yes, that would be correct.
BY MR. CHEN:
Q I was directing you to the 2011 Master Plan Amendment, sir.
A Okay.
Q If you would go to page 9? Do you see that?

A I'm at page 9.
Q Okay. Do you see the bullets on that page?
A Are there bullets on page 9 or which --
Q I've got --
A Is the one --
MS. ROBESON: I think, are you referring to page 10 of Exhibit 86?
MR. ROBINS: I think Mr. Chen is looking at the resolution.
MR. HARRIS: Yes.
MR. CHEN: Yes.
MS. ROBESON: Oh.
MR. CHEN: No, no, no, no, no, guys. I apologize. Let me just --
MR. ROBINS: That's --
MR. HARRIS: That's what we have out.
MR. CHEN: Yes. I'm looking at the same thing.
MR. HARRIS: But not page 9. You're on another page, I think.
(Discussion off the record.)
MR. CHEN: Did Mr. Kline's copy trip me on exhibits?
MR. HARRIS: Yes, something is different. Exhibit 86, page 9, has no bullets.
MS. ROBESON: Do you want to look at the official

copy?
MR. CHEN: Yes, may I?
MR. HARRIS: Analysis. You're looking at page 10 there, Mr. Chen, in Exhibit 86.
MR. CHEN: Well --
(Discussion off the record.)
MR. CHEN: Isn't it on page 10, Mr. Harris?
MR. HARRIS: Yes. The bullets start on page 10. There's one on the bottom of that and then they carry over to 11.
BY MR. CHEN:
Q Okay. Mr. Unterberg --
(Discussion off the record.)
MR. CHEN: Thank you, Mr. Harris.
MR. HARRIS: Okay.
BY MR. CHEN:
Q Directing your attention to page 10, do you see it, sir, and do you see the bullets about the middle up on the page?
A I do.
Q And it discusses a grocery store, is that correct?
A Are you referring to all the bullets or any?
Q Well, several. One, two, three, four, four of the five.
A Okay.

Q Five of the bullets talk about the grocery store or the planning area, is that right?
A I see those bullets, yes.
Q Okay. Did you draw any conclusions from that?
A As far as these particular bullets?
Q Yes.
A It does mention a grocery store. I will note in the paragraph above this it does say a limited amendment for '94 Clarksburg Master Plan is for the sole purpose of considering whether the amendment, whether to amend its retail staging provisions.
Q Right.
A And that --
Q Right.
A -- discusses grocery stores.
Q Right. But aside from -- and I appreciate that, so that's correct there, the amendment did have a specific purpose. My question, however, is do you draw any conclusions from the fact that there is a discussion in five out of the six bullets about a grocery store in the Cabin Branch community? And that's all I'm asking, what, you know, do you -- you may not. I mean I just want to know if you draw any conclusions.
A Not offhand. It seems like most of these are regarding the Town Center.

Q Okay. That's an answer.
MR. CHEN: I'll try, as I'm saying, I'm trying not to be duplicative of Mr. Kline, but I've got to ask maybe one question involving --
MS. ROBESON: I'm going to let you have some leeway because it's been difficult jumping back and forth, so --
MR. CHEN: Thank you.
MS. ROBESON: -- go ahead.
MR. CHEN: But I think I can do it pretty easy. Mr. Kline really covered it pretty well.
BY MR. CHEN:
Q But, Mr. Unterberg, with regard to the 120,000 square foot retail component that is in the master plan for the Cabin Branch community, that's a numeric provision in the master plan for retail in this community, isn't that right, sir?
A I believe it's a numeric for a neighborhood retail.
Q I understand, but you do recognize that the plan does not say neighborhood retail, it says retail, isn't that right, sir?
A I think the plan says both. It says neighborhood retail on the map and then page 67 it says retail, 120,000 square feet.

Q Well, let's go to page 67. Up at the top, sir, what is the heading on that page?
A It says plan objectives.
Q Okay. And do you see below that the uses that are proposed for the Cabin Branch community?
A Yes.
Q What were, what are they?
A They read residential, 1,950 dwelling units; employment, 2 million to 2,300,000 square feet; retail, 120,000 square feet; public uses; places of worship; childcare; community building; park and elementary school.
Q Okay. Now when I ask you about a numeric provision for retail uses, this is, the part of the plan that I'm referring to. Do you see any qualification in that listing as to retail use?
A Well, it says retail, 120,000 square feet.
Q Yes. And as I understand your testimony a little bit ago, retail, retail is a broad term that includes within it specialty retail, isn't that right?
A That's correct.
Q As I understand it, Mr. Harris, excuse me, Mr. Unterberg, Mr. Harris had a proposal for development in the Cabin Branch community back in 2005, isn't that right?
A Say that again please.
Q Yes. Back in 2005, I believe that Mr. Harris

actually had a client that was proposing a preliminary plan for the Cabin Branch community, isn't that right?
A I --
Q And it is his project.
A Are you speaking to the preliminary plan?
Q Well, let me back up for a minute.
MR. CHEN: What's our next number?
MS. ROBESON: Our next number is --
MR. HARRIS: 94. 94.
MS. ROBESON: Okay. Hold on one second please. All right.
MR. ROBINS: Do you need the exhibit list?
MS. ROBESON: I do.
MR. ROBINS: Okay. Did you say you need one?
MS. ROBESON: I do. I do.
MR. ROBINS: Oh, okay, that's what I thought.
MS. ROBESON: Thank you.
(Discussion off the record.)
MS. ROBESON: Okay. Mr. Harris is correct, it is 94. And what are you proposing, Mr. Chen?
MR. CHEN: I apologize. I'm going to use this, this response. It's a document. I only have one. Let me show it to counsel.
MR. HARRIS: It's a multi-page document. I can't read through the whole thing that quickly. It's five pages,

single-spaced. Can you make us a copy of that?
MR. CHEN: Yes. Do you want it right now or --
MR. HARRIS: Well, go ahead and ask your question, but I'd like a copy so I can --
MR. CHEN: Yes. I'll give it to you.
MR. HARRIS: Okay.
BY MR. CHEN:
Q Mr. Unterberg, take a look at Exhibit No. 94 for a second.
MS. ROBESON: What is Exhibit 94? How would you label it?
MR. CHEN: I apologize. I would label it memorandum dates November 2, 2005, from Bob Harris to Michael Ma.
MS. ROBESON: Spell Ma, can you --
MR. CHEN: M-A.
MS. ROBESON: Thank you.
(Exhibit No. 94 was marked for identification.)
MR. CHEN: I apologize. I didn't think I was going to be using this.
MS. ROBESON: That's fine.
BY MR. CHEN:
Q Sir, would you please take a minute, and as much time as you want actually, to skim through Exhibit 94? And

just so you know where I'm coming from, you'll see on the first page there's a reference to Cabin Branch team and my simple question is going to be are you part of that Cabin Branch team that's referenced in Exhibit No. 94?

A Offhand, I do not know if I was copied on this or not.

Q Were you retained as part of your service for this DPA for 2005, November of 2005?

MR. HARRIS: Excuse me. What DPA in 2005?

MR. CHEN: This, the DPA that, the pending DPA.

MR. HARRIS: There was no pending DPA in 2005.

MR. CHEN: No. I was asking was he a member of the team for this DPA in 2005. In other words, it may not have been filed yet, but was he a member of the team for this DPA in 2005?

MR. HARRIS: Was he a member --

MS. ROBESON: Okay.

MR. HARRIS: -- of the Cabin Branch team --

MR. CHEN: Yes.

MR. HARRIS: -- in 2005 might be a more appropriate question.

MR. CHEN: I --

MS. ROBESON: Yes, that's, that I think that's where I was going. Were you working on the Cabin Branch project in 2005 in one format or another?

THE WITNESS: In one format or another, we worked on Cabin Branch in 2005. My recollection, I don't know if I have seen this before or not.

MR. CHEN: Okay.

THE WITNESS: Just give me one second, though.

MR. CHEN: Go right ahead. Take as much time as you want.

MR. HARRIS: Do you need that? Were you going to ask another question on that?

MR. ROBINS: Do you need this or not?

MR. CHEN: No, I'm done.

MR. HARRIS: Okay. Well, then let us, let him read it while you move on.

MR. ROBINS: Are you done?

MR. CHEN: Okay. As I understand Mr. Unterberg's testimony, is that he doesn't recognize the document.

MR. HARRIS: Correct.

BY MR. CHEN:

Q Is that right, Mr. Unterberg?

MS. ROBESON: Is that right, Mr. Unterberg?

THE WITNESS: That is correct.

MR. CHEN: Okay.

MS. ROBESON: And then I need it.

MR. ROBINS: Yes, I just want to see what it is. I don't think I'm holding up his line of questioning.

MR. CHEN: Okay. I think I can tread on Mr. Kline lightly.

BY MR. CHEN:

Q What was the zoning classification on the subject property prior to MXPD?

A Prior to MXPD in 2003?

Q Yes.

A It is a combination of RU-1, RMX-1 PDR and I-3.

Q Okay. Do you recall -- Mr. Unterberg, is there a preliminary forest conservation plan for the proposed development in, that is presented in the DPA?

A There is and there's a preliminary forest conservation plan that was presented in 2003. It was subsequently updated when the preliminary plan was approved in 2004. And then I believe in 2007, which supersedes the preliminary forest conservation plan, there is a final forest conservation plan that was approved for the whole property, the 535 acres, and that was subsequently revised a number of times from 2007 through as current, the current approved final forest conservation plan for the whole site was most recently approved as amended in May 2, 2013. So there is a final forest conservation plan that supersedes the preliminary from a number of years ago.

Q Is that an exhibit in the record?

A I don't believe it is. I have an 11 by 17 copy.

MR. HARRIS: No, we don't -- if he wants an exhibit, he can make an exhibit.

MR. CHEN: Well, I think it's a required exhibit.

MS. ROBESON: Yes, I was going to say I think we need it in the record.

MR. HARRIS: Okay.

MS. ROBESON: Does it cover this --

MR. HARRIS: We'll make a copy at break.

MS. ROBESON: -- development?

MR. HARRIS: It's multiple pages and it's large-scale.

THE WITNESS: It's 60 to 70 pages. It covers the whole site, the 535 acres, which includes the MXPD area.

MS. ROBESON: Okay. Does it incorporate, does it incorporate this project?

THE WITNESS: Yes.

MS. ROBESON: Then I think it does need to be --

MR. HARRIS: Okay.

MS. ROBESON: We can handle the --

MR. HARRIS: We'll make a copy at the break.

MS. ROBESON: We have many files, file folders.

MR. CHEN: I have an issue then.

MS. ROBESON: Yes, Mr. Chen?

MR. CHEN: On the last day of hearing at about 9:30, we're now getting a required filing for this DP

application and none of the opposition witnesses, including their experts had an opportunity to look at this thing.
MS. ROBESON: I'm not sure the final is required. I think a preliminary is required. But I will be happy to leave the record open.
MR. HARRIS: The preliminary is in the original MXPD zoning file. So it's already in your files. That's all that needed to be submitted.
MS. ROBESON: That, but the thing is that file isn't incorporated into the record of this case. So it's an official document, but it's not incorporated into the record of this case. A preliminary forest conservation plan is an element of what you need to submit. If you want to incorporate the preliminary and the final, we should do so and I can leave the record open for a period of time for additional comments.
MR. CHEN: How do you want them, in writing or --
MS. ROBESON: Right.
MR. CHEN: Okay.
MS. ROBESON: And let's finish this.
MR. KLINE: May I have a question then?
MS. ROBESON: Okay.
MR. KLINE: Because I'm, Mr. Chen is raising an issue I hadn't thought of before. I'll ask a question then. Is the plan that will be submitted a plan that respects

changes that reflect the proposed development or is it merely the preliminary forest conservation plan that was approved back when we felt we were going to have a hospital on the property?
THE WITNESS: I believe the latter --
MS. ROBESON: Well, I --
THE WITNESS: -- is what's, or the former --
MS. ROBESON: Yes, I'll let Mr. Unterberg -- I think Mr. Unterberg is saying the final reflects these changes for the outlet center which the final is coming into the record, correct?
THE WITNESS: The final reflects the developable area that is reflected on this development plan.
MS. ROBESON: And so the final would reflect the development in this amendment?
THE WITNESS: It does not yet reflect the actual layout of this development and the final has been updated as site plans at proceeding. So the -- as this project goes forward --
MS. ROBESON: Okay. So does the --
THE WITNESS: -- the development --
MS. ROBESON: -- preliminary reflect the --
MR. CHEN: The development proposed by the DPA.
MS. ROBESON: Yes.
THE WITNESS: The preliminary reflects the 2003

development plan and has not been updated since. That's superseded by the final approved or forest conservation plan.
MS. ROBESON: Well, can you address then -- the requirements do, I mean the -- hold on one second and I'll get my --
MR. CHEN: It's in --
MS. ROBESON: -- 59 D. I think it's in 59 D.
MR. CHEN: It's G7.
MS. ROBESON: 59 D?
MR. CHEN: D, yes, I'm sorry. It's 59 D 1.3G7. Wait a minute, did I get that? No. I read that wrong. I get lost in this.
MS. ROBESON: I think it's in the contents.
MR. CHEN: Yes, it's --
MS. ROBESON: And I'm just looking for that.
MR. CHEN: -- C7, I believe, Madam Examiner.
MS. ROBESON: Yes, it is, 1.3C7. Now if you can present testimony that the 2003 plan can accommodate this development, you know, the preliminary forest conservation plan can accommodate this development, you know, we can use the 2003 preliminary forest conservation plan. But is a requirement.
MR. HARRIS: But Mr. Unterberg can probably answer that question.

MR. CHEN: Well, with, if I may, I, respectfully, I object.
MR. HARRIS: You object to the Hearing Examiner asking him a question?
MS. ROBESON: Wait. Just a second. Let me, let -- let me hear your objection.
MR. CHEN: I respectfully, I think that oral testimony orally modifying a preliminary forest conservation plan that is not for this development does not satisfy the requirements of the zoning ordinance. Respectfully, I think that, and I thought you were on, going around on the right road, because as I read the ordinance, one of the obligations that the applicant must have and submit is a preliminary forest conservation plan in accordance with Chapter 22A for the development proposed in the DPA and I haven't seen it. And that's why I ask the question.
MS. ROBESON: Well, I don't --
MR. CHEN: And I'm not, and --
MS. ROBESON: -- think that --
MR. CHEN: -- where I am is I think you --
MS. ROBESON: Yes, I understand your objection. I don't think that means that he has to generate an entirely new plan. I think what, I think what that means is he has to have a preliminary forest conservation plan that reflects this development prepared in accordance with Chapter 22A.

So I guess what I'm saying is Mr. Harris needs to submit something that is prepared in accordance with Chapter 22A that reflects how the requirements for this development can be met. I don't know if that means a reduplication of what was submitted in 2003, but I agree with you that it needs to be in the record.

MR. CHEN: From what you just said, I agree with what you just said.

MS. ROBESON: Okay.

MR. HARRIS: I would like to approach.

MS. ROBESON: Wow, can we -- is that going to be recorded? Go ahead.

MR. HARRIS: The provision that Mr. Chen cites at sub-paragraph 7 talks about a development plan. This is not a development plan. This is a development plan amendment. Nothing in the code that I find says that you have to submit a new preliminary forest conservation plan for a development plan amendment if the development plan amendment does not affect provisions with respect to forest conservation. And it's --

MS. ROBESON: Well, I'm not requiring a new one.

MR. HARRIS: Okay.

MS. ROBESON: What I'm requiring --

MR. HARRIS: Well, but --

MS. ROBESON: -- is testimony or evidence --

MR. HARRIS: Yes.

MS. ROBESON: -- of some kind that the old one, that this development can be accommodated on the existing preliminary forest conservation plan. And I do think you have the ability and I don't frankly remember if your civil engineer has testified, I'm not sure Mr. Unterberg is qualified to testify to that, but I do think you have to put in some evidence about that. It's very similar to what I said about the long-term maintenance that's also required in the approval criteria. I think you have to submit some evidence that your long-term maintenance that you submitted 10 years ago is still going to be applicable, whatever your proposal was is still applicable to this project.

MR. CHEN: Yes.

MR. HARRIS: Mr. Unterberg can answer that, but I'll point to page 31 of the staff report. This is not a surprise to Mr. Chen. In that provision, the staff talks that the plans comply with the forest conservation law because there's an existing, approved forest conservation plan for the entire Cabin Branch development all spent and that this, this project conforms with that.

MR. CHEN: May I --

MS. ROBESON: Well, okay. Okay. Hold on. Just hold on. Mr. Chen --

MR. CHEN: Yes, ma'am? Yes, Your Honor?

MS. ROBESON: You can call me that. Go ahead.

MR. CHEN: A couple things. First of all, I'm not bound by what the technical staff may have said in their report. I am before the Hearing Examiner on, in a quasi-judicial proceeding. Madam Examiner, I refer you to Section 59 D-1.74(a). Mr. Harris says he's not required to provide this information that is required for a regular development plan. The last sentence of Section 59 D-1.74(a) in parentheses says that among the filing requirements are, quote, the contents of a development plan amendment application must include a copy of the certified, approved development plan, as well as all relevant information required in Section 59 D-1.3.

MS. ROBESON: You're correct.

MR. HARRIS: I agree. It says relevant. It doesn't say --

MS. ROBESON: No, no.

MR. HARRIS: -- all the information.

MS. ROBESON: Okay. No. Mr. Harris --

MR. HARRIS: Why would it have the word relevant in there?

MS. ROBESON: I am not going to argue about it.

MR. HARRIS: Okay.

MS. ROBESON: I think it's far easier --

MR. HARRIS: We can submit the final forest

conservation plan because it supersedes a preliminary forest conservation plan. There will never be another preliminary --

MS. ROBESON: That -- okay --

MR. HARRIS: -- forest conservation plan once there is a final forest conservation plan. Final forest conservation plans can --

MS. ROBESON: I understand.

MR. HARRIS: Okay.

MS. ROBESON: I know the process.

MR. HARRIS: We can submit that, but I don't --

MS. ROBESON: Stop.

MR. HARRIS: I won't want --

MS. ROBESON: Stop talking. Okay? What I need from you, you can submit it as a preliminary, you can submit it as a final. The link I need is that this development can be accommodated under whatever, either a preliminary or a final forest conservation plan.

MR. HARRIS: Yes, ma'am.

MS. ROBESON: And I need a copy of that in the file and I need testimony saying it can be. And I would recommend that we get the, we first get the copy in the file and then we get the testimony. And it doesn't --

MR. HARRIS: I'm going to see if I can get a copy made now.

(Discussion off the record.)
MS. ROBESON: I see money changing hands.
MR. ROBINS: Not in the hearing room I hope.
MS. ROBESON: Yes, I know.
MR. ROBINS: Please clarify what you're referring to, for the copies.
MS. ROBESON: All right. So we are addressing Mr. Chen's concern --
MR. CHEN: And I think they've been -- at least to the best we can at this point, I think they've been dealt with. I defer to you --
MS. ROBESON: Once we get it --
MR. CHEN: -- Ms. --
MS. ROBESON: -- if Mr. Unterberg is qualified, he can testify that this -- what I'm -- I've been trying for the phrasing all morning, that this development can be built under the final forest conservation plan --
MR. CHEN: Right.
MS. ROBESON: -- that's been approved.
MR. HARRIS: He could answer --
MS. ROBESON: Okay?
MR. HARRIS: -- that question for you now if you'll let him.
MS. ROBESON: No, let's get the exhibit --
MR. HARRIS: Okay.

MS. ROBESON: -- in the record --
MR. HARRIS: Okay.
MS. ROBESON: -- and so the cross-examination has something to work with, all right? And as Mr. Chen said, it's a requirement, are you also planning to put the proposed maintenance in the record as well which is, I'll go back, I think that's in the approval criteria.
MR. HARRIS: 59 D-1.61(e) --
MS. ROBESON: Yes.
MR. HARRIS: -- calls for documents showing ownership and method of assuring perpetual maintenance of areas intended to be used for recreational or other common or quasi-public purposes.
MS. ROBESON: Right.
MR. HARRIS: The, in this case, in the original development plan back in 2003, the zoning hearing examiner at page 76 of that report notes that note 13 on the development plan satisfies that requirement and that any necessary -- and note 13, Gary could read for you, she notes that, it was Francoise Carrier --
MS. ROBESON: Yes.
MR. HARRIS: -- notes that that satisfies the requirement and that any necessary additional documents would be included in the applicable site plan approval documents. And so there is no change --

MS. ROBESON: Okay.
MR. HARRIS: -- to any of that.
MS. ROBESON: Okay. So she took -- and that note is unchanged from the prior development plan?
MR. HARRIS: Yes, ma'am. That note is unchanged.
MS. ROBESON: Okay. All right. Thank you, Mr. Chen.
MR. CHEN: I'm just going to see if we have any evidence that people need to look at.
BY MR. CHEN:
Q Mr. Unterberg, could you pull the land use plan and put it up on the easel?
A The development plan are you speaking to or --
Q The land use plan for the DPA.
A That is Exhibit 9 at the bottom of the easel.
Q That's it? Okay. Thank you.
A But just tie the land use plan on the plan.
Q Okay. I --
MR. CHEN: May I approach the easel, Madam Examiner?
MS. ROBESON: Yes.
BY MR. CHEN:
Q It looks like it could have --
A That was 59. Thank you.
Q Right. Okay. Mr. Unterberg, could you please

point out on the land use plan the buildings and structures that there will be and their uses and locations?
A What I'd like to do to start with, this is the color version that we discussed several days ago.
MS. ROBESON: And that is exhibit --
THE WITNESS: This is Exhibit 21F. And --
MR. CHEN: May I approach?
MS. ROBESON: Yes.
THE WITNESS: -- this is the format that was used showing building uses and the legend that was set up that helps explain the colors and the asymology in 21F. We have used that as our base and brought that forward.
BY MR. CHEN:
Q Are you saying that Exhibit 21F identifies all buildings, structures and their locations and uses?
A It does.
Q And could you put it back up for a minute?
A And this is the color version of the approved land use development plan.
Q On Exhibit 21, what is the square footage, the total square footage of the Area C buildings?
A Area C, we go to the chart.
Q I apologize. Let's go -- okay. No, you're with me. I follow you. On Area B, what is the total square footage shown for the buildings on the exhibit?

A On Area B --
Q Yes, sir.
A -- which is titled mixed use, includes retail, employment, senior facilities, public and residential uses up to 6-story height, approximately 47 acres. And then there's a chart and in particular the uses under residential are detached.
Q I didn't ask that. I thought I asked for Area A, describe residential retail.
A Oh. Sorry, I thought you asked for B. So you want --
Q Well, I'm going to go to B, but I already want to go with --
A So we're going to start with A?
Q And it's the retail. I don't, I'm not asking about residential.
A Okay. Area A retail is zero to 10,000 square feet.
Q You're showing a grand total of 10,000 square feet of retail in Area A on this exhibit?
A On the approved, on the approved plan, yes.
MS. ROBESON: Wait. Which --
MR. CHEN: Yes.
THE WITNESS: This is 21F, which is the color version of the signed --

MS. ROBESON: The approved plan --
THE WITNESS: -- approved, which is --
MS. ROBESON: -- not the amendment?
THE WITNESS: Correct. This is the approved plan which the black and white signed version is Exhibit 6.
MS. ROBESON: Okay.
BY MR. CHEN:
Q Mr. Unterberg, my questions are directed to the DPA land use plan.
A Well, then we can go to Exhibit 59 in the chart on the proposed.
Q Okay. Now on the DPA, on the land use plan, I need to know the locations and uses of all buildings and structures.
A And what we've done is we have a chart for A, uses and range of square footages or square feet.
Q Excuse me. The zoning ordinance, sir, says buildings and structures. Sir, buildings and structures and their locations and uses on the land use plan. Now it's not a chart. Now if you could have on the chart, I agree, if you're also showing the buildings and the buildings then correlate to the chart, so I'm not saying you can't have a chart, I just want to know on the land use plan where all the buildings and structures and their uses and locations?
A The buildings, the locations are shown in each

area in the light line work.
Q Okay.
A And each area, A, B, C, et cetera, shows the buildings.
Q And do you have a calculation of all parking spaces there too?
A The parking correlates with the range and is in the charts with A, B and C. And there's a column for parking and associated with the range of --
Q Okay.
A -- uses.
Q Okay. Am I correct then, and maybe your attorney is the better person to answer this, but as I understand it, Section 59 D-1.3(c) requires a land use plan, several requirements for what must be shown on the plan. Am I correct in understanding Exhibit 59 is the document to satisfy that ordinance requirement?
MR. HARRIS: That's how it's identified, yes.
MR. CHEN: That's --
MR. HARRIS: It's just the same as the existing development plan --
THE WITNESS: Right.
MR. HARRIS: -- that he just wanted to show you.
BY MR. CHEN:
Q And moving right along, Mr. Unterberg, is there a

diagram showing the general building and height of the principle buildings and their relationship to each other?
A As per the approved plan, the buildings are shown --
Q No, I'm talking about -- I'm not talking about the true plan. I'm talking about the DPA.
A This is the 59 that DPA proposed. The buildings are shown. And for each area, as in Area A, a height is noted in A in particular, up to 12 stories if the height that is noted.
Q Okay. And what are you looking at?
A Exhibit 59.
Q Okay. And you also have the gross floor area for the buildings with their use?
A There is on Exhibit 59, the lower center of the page under, oh, I take that back, the lower right-hand --
MS. ROBESON: Lower right?
THE WITNESS: -- lower right under notes continued, note 5 talks about the FAR and the maximum of .75. And then there's a chart with the FAR noted for A, B, C and D, and then also for the total.
MR. CHEN: That's all I've got.
MS. ROBESON: All right. Before you get into redirect, I just have a question. Is there anything mandated that Area B have neighborhood retail, because

you've identified that if -- in a number of places, and I was looking at this last night, in a number of places and even in page 10 of the 2011 amendment it talks about designated retail neighborhood village centers or core areas. And so I guess my question is where do, how are you going to mandate that that Area B develop with the neighborhood retail that you envision?

THE WITNESS: The plan itself speaks to retail and not specific to neighborhood.

MS. ROBESON: I think one thing the plan didn't want, and I'm not, again, I'm throwing this out there, I'm not taking one side or the other, I just have questions. I really do think at one point or another the plan envisions core neighborhood retail. So I guess my question is, and maybe you can maybe address it on rebuttal, I don't know, but how are you, how do I know that this is because the specialty retail, I've heard what you said, has overlapping uses. So Area B with 150,000 could have, you know, quite a few chain restaurants, but not the childcare or the this. So what is there in this plan so we know that those neighborhood, that neighborhood services in core is going to be provided? Now you're on redirect and I've introduced a new issue. Your redirect is limited to the scope of the cross. So it may be something you want to address on rebuttal. But I am throwing that out there. I understand

the gathering place, which is supposed to be that area, you know, in A.

MR. HARRIS: We would be happy to address that either on redirect or on --

MS. ROBESON: Well, I think it's more --

MR. HARRIS: -- or on rebuttal, but I would have to say I don't think that's a relevant topic. The approved development plan does not require neighborhood retail anywhere. There is no requirement in the zoning --

MS. ROBESON: Yes, but you only had 120,000 square feet, so that's what you were going to get. You weren't going to get --

MR. HARRIS: No.

MS. ROBESON: -- a Walmart.

MR. HARRIS: It could have been a Walmart.

MS. ROBESON: Well, you know what, I don't care what the original development plan said.

MR. HARRIS: Okay. But beyond that, there's nothing in the zoning ordinance or the master --

MS. ROBESON: I am asking you to show me it, whether you think it's relevant or not.

MR. HARRIS: Okay.

MS. ROBESON: You're welcome to make that argument. You are free to make that argument.

MR. HARRIS: Okay. I --

MS. ROBESON: And it may not be relevant at the end of the day, but I would like to know where the neighborhood retail is going to go.

MR. HARRIS: I --

MS. ROBESON: And how you know it's going to be in there.

MR. HARRIS: Ma'am, we don't know --

MS. ROBESON: And I don't want to argue about it now. I'm not asking you to address it now. And you can tell me it's not relevant, but just because it wasn't an issue in the first plan, it was not an issue in the first plan, you didn't have a competing regional retail use. So it may have been beyond everybody's contemplation. So just because it wasn't restricted in the first plan to me is not definitive, all right?

MR. HARRIS: Okay. I accept that and with due respect I'm trying to explain this issue because I find nothing in the zoning ordinance or in the master plan that mandates neighborhood retail, okay? In fact --

MS. ROBESON: Well --

MR. HARRIS: -- if you see, the town center --

MS. ROBESON: Look at page 10.

MR. HARRIS: -- and the Clarksburg Village were both substantially built. The town center area is almost built out and there is zero neighborhood retail, even though

the master plan makes it even more clear in that situation that it was an important use.

MS. ROBESON: Is a grocery store a neighborhood retail use?

MR. HARRIS: It is one of --

MS. ROBESON: Yes.

MR. HARRIS: It's one potential neighborhood retail use --

MS. ROBESON: Yes.

MR. HARRIS: Yes.

MS. ROBESON: Yes. So can I certainly argue that when it mandated a grocery, or it recommended --

MR. HARRIS: Yes. Yes.

MS. ROBESON: -- a grocery store here that it was contemplating a neighborhood retail use? And I refer you back to Policy 7. And I don't want to argue the case.

MR. HARRIS: Okay.

MS. ROBESON: I am asking -- you can say to me now it's not relevant.

MR. HARRIS: We'll leave it at that and then we will address the issue.

MS. ROBESON: And if you feel that at the end of the day, if you still feel, I leave it to you. I'm just --

MR. HARRIS: Okay.

MS. ROBESON: -- expressing a concern.

MR. HARRIS: Okay.
MS. ROBESON: And I also direct your attention to Policy 7 of the original master plan which is reaffirmed, which is reaffirmed in the, explicitly in the 2011 amendment.
MR. HARRIS: Okay.
MS. ROBESON: Because they didn't want people traveling to other villages to go to the drycleaners. I'm putting that --
MR. HARRIS: Okay.
MS. ROBESON: -- colloquially.
MR. HARRIS: I understand.
MS. ROBESON: So I posit that out there that is one of my concerns. You're free to argue that my concern is irrelevant, unwarranted and speculative.
MR. HARRIS: I will.
MS. ROBESON: All right.
MR. CHEN: If I may? I thought today we were going to have he Powerpoint.
MR. HARRIS: It's here.
MR. CHEN: Is it set up?
MR. HARRIS: Yes.
MR. KLINE: That's probably -- may I? Yes. I had asked or I was reserved some time to ask some more questions about the North District. I'll do it now or I'll do it

after you redirect.
MS. ROBESON: Why don't we do it now and then we can catch everything --
MR. KLINE: That's fine.
MS. ROBESON: -- in redirect.
MR. KLINE: I agree.
BY MR. KLINE:
Q Could you please provide the Powerpoint presentation for us, Mr. Unterberg?
A It is -- does the screen come down or --
MR. HARRIS: It does, but I don't --
MS. ROBESON: You're asking the wrong --
THE WITNESS: -- do we know how to get it down?
MS. ROBESON: -- person. I do not know.
THE WITNESS: I can use the back of the board like we did last time, but --
MS. ROBESON: Let's do that. And I can't even, the speaker system doesn't work, so I can't even get my office without walking, physically walking down there.
MR. HARRIS: I actually think it's in this room.
MS. ROBESON: Well, the back --
MR. HARRIS: The back room?
MS. ROBESON: Will the back of that do?
THE WITNESS: This is what we used.
MS. ROBESON: Okay. Let's use that.

THE WITNESS: I may have to adjust a few things.
MS. ROBESON: Is that clear enough for everyone?
MR. HARRIS: I'll be happy to swap seats if you want, see that from here.
MS. ROBESON: Okay. Mr. Kline, do you have questions on this exhibit?
BY MR. KLINE:
Q When you're ready, Mr. Unterberg.
A How is that?
Q Mr. Unterberg, would you please first of all just describe what you have, you're showing on the screen right now?
A This is the Powerpoint that was presented, I believe, the first day of hearing, which was July 29th.
MS. ROBESON: That's Exhibit 45.
THE WITNESS: Exhibit --
MS. ROBESON: The hard copy is Exhibit 45.
THE WITNESS: Exhibit 45 and this is one of the slides and it's titled North District.
BY MR. KLINE:
Q Okay. Looking at page 68 of the master plan, we have the phrase neighborhood core. Looking at the applicant's justification statement, we have the phrase, neighborhood square. Are they the same thing?
A They could be the same thing. They could not be

the same thing.
Q Well, and what -- I'm sorry. Go ahead.
A This is the concept and I think we also discussed the final design will be at site plan at a later date, so it would be subject to change. Do you have another question or --
Q Well, the North District exhibit that you've explained to us is what representation of the applicant's proposal?
A Say that again.
Q Yes. What is the North District exhibit intended to show?
A This is intended to show one possible build-out scenario within the parameters of the development plan.
Q Looking at the applicant's justification statement, what is the neighborhood square?
A A neighborhood square, we spoke about Well Spring for reference that travels from west to east. There's a possibility for a number of squares and, for example, there is a linear green way along Well Spring that provides mew sheds to the Stream Valley to the south. All these are intended to be gathering places. Square is one term that could overlap with that. As we, the buildings that face the road, Well Spring, they are transit-oriented. They line building space and line the road, when we get to corners,

there's opportunities for gathering places. And the corner of, this is Golden Eye and Well Spring, there's an opportunity for a square. As we continue north and east, there's another opportunity for a square and gathering place. And as we develop the plan further, there may be more or less.

Q The Exhibit 20, the justification statement, has a sentence that says, the central square of the food court will serve as the neighborhood square. So you, are you modifying the justification statement by expanding that beyond the food court area?

A Well, it's my understanding the justification statement does not get approved with the development plan and that we are subject to site plan approval as we go forward because things will change.

Q So the statement I just read, the justification statement, again, is just a potential form of development?

A It's one scenario, yes.

Q All right. So I won't harp on the justification statement, let me just use the term then neighborhood core. And I'm going to just kind of ask you to repeat what you said about what you considered to be the neighborhood core.

A The neighborhood core is primarily one block which is also shown as a mixed use on the development plan which is Exhibit 59. It's bordered by Well Spring to the south,

Golden Eye to the west, 121 to the north and Cabin Branch Avenue to the west. Golden Eye is to the east. This is a mix of uses which includes all uses or all mixes which includes retail, office, employment, public uses, gathering spaces and so forth. And that's the general area of the core. Some of those uses and core components can continue further east into a development plan and overlap with what is Area A. And then I'm primarily speaking of the mixed use area that's in Area B on Exhibit 59.

Q Page 70 talks about create a strong neighborhood focal point. So within the area you just described, what is the focal point?

A I believe the focal point is the Well Spring green way and it's more of a corridor which interconnects through the project and then the, will focus on the uses in the neighborhood scale, pedestrian access along Well Spring as the primary focal point or focal linear corridor.

Q Well, I guess I'm going to have to retract what I said because when I read the justification statement, this central square at the food court will be the neighborhood square which suggests to me that was intended, at least in this statement, to be the focal point.

A Again, that's one scenario. That is along the Well Spring greenway. As you continue further east, which is the northern part of the Stream Valley, there is a

gathering place which is a focal point that's adjacent to the food court and the specialty retail or outlets. And that is a link to the, that corridor.

Q Just so I'm not hung up on the phrase focal point, your description of focal point doesn't have an epicenter, it's sort of specific place, it's much larger than any of them?

A Can you say that again?

Q I guess my question is what's the epicenter or is there an epicenter within the area you described as the neighborhood core? Sort of the hot spot, the place where all the activity is going to occur.

A Well, it's going to be a series of places and the, as you're saying epicenter, it's going to be a series of places and experiences within those two blocks. And, again, this is a concept and as the plan develops, a site plan, that would be more fine-tuned.

Q Well, then doesn't the dispersion of the focal point cut against the suggestion on page 70 that there be a concentration of uses in the central area of the street and in the neighborhood center concept? Haven't you spread, I'm sorry, hasn't the DPA spread that out so that you don't have that bang for the buck, I may be mistaken, we thought the plan intended?

A Well, I don't agree with that. The concentration

of uses is within two blocks and I think you're making the assumption it all has to be in once place which I don't agree with that.

Q Well, then how do you define the term concentration as used in the master plan?

A I believe, as I said, it's within this two-block area which is the mixed use in A and overlap, I mean mixed use in B and overlaps to A.

Q Okay. On the exhibit we're talking about, the North District, can you point to examples of where neighborhood retail services would be located?

MR. HARRIS: I think we've asked that a number of times.

MS. ROBESON: Yes, I guess --

MR. KLINE: Well, let me tell you why I'm asking the question, and maybe I'm just getting hung up on the colors, but if red is retail and there's supposed to be some retail on the road that's leading up to the outlet center, I don't see any red, so I'm asking how can there be any convenience retail other than the two restaurants that I do understand. I just don't see the suggestion on this plan and is it just simply because of the legend or is it intended to preempt any retail in that area?

MS. ROBESON: What's the blue?

THE WITNESS: The office employment, although we

do intend to have mixed use buildings where, for example, there could be or we would encourage the neighborhood services, ground floor mixed with the uses with other uses above that there be neighborhood retail. So the red isn't exclusively retail. There can be retail within the blue buildings.

MR. KLINE: Mr. Harris is actually doing me a favor. Could -- Mr. Harris, could you please bring over the board and just have the one that I think says Cabin Branch?

MR. HARRIS: This one?

MR. KLINE: Yes. Thanks. And just, yes, stick it -- go ahead and stick it up over there, well --

MR. HARRIS: Well --

MR. KLINE: -- I guess it doesn't work that way.

MR. HARRIS: -- you're not going to be able to see it with the light.

BY MR. KLINE:

Q Mr. Unterberg, could you remove the North District?

MR. HARRIS: Are you finished with that?

MR. KLINE: Oh, yes, that's right. Yes, I'm finished with this. Thank you.

BY MR. KLINE:

Q The plan on page, I guess I should ask this question before I left, on page 68 we're talking about the

neighborhood core being transit-oriented and maybe you can use the Cabin Branch board you've got there, but is there bus service that will be running through that, I'm sorry, I don't remember the names of the streets, but I'll say the main intersection out in front of the regional outlet center?

A There's a possibility. The larger diagram of the bus service was addressed in the technical staff report and the concept with the master plan is that the west side of 270 would be served by buses to get to the east side transit.

Q On page 68, there's language that says, locate the core within one-quarter mile of as many residential units as possible near the center of the higher density residential area. As I look at the Cabin Branch exhibit you've got up there, isn't the red that's down in the central node, in the center of that drawing, better able to satisfy the language I've just read in the master plan than is the neighborhood retail ostensibly or proposed for the northern area?

A Not necessarily.

Q Yes? Go ahead and explain.

A As far as number of units, there is more units with multi-family town homes in proximity to the Northern District. As you go further south, you're primarily single family. So the higher densities are not only along Cabin

Branch, but higher densities are north versus south.

Q So what I'll say is, the yellow is single-family detached presumably?

A Primarily.

Q Looking at the Cabin Branch exhibit?

MS. ROBESON: Which exhibit is that?

MR. HARRIS: That's No. 4, that's --

MR. KLINE: That's No. 92.

THE WITNESS: 92.

BY MR. KLINE:

Q Okay. So just for the purpose of looking at the transcript, everything on the west side of, what's this street called?

A That's Broadway.

Q Okay. And everything that's in yellow is single-family detached. So the next tier of development, which I'll call mid-green --

A A darker, a darker yellow.

MS. ROBESON: Sage.

THE WITNESS: Sage.

MS. ROBESON: No, go ahead.

BY MR. KLINE:

Q Good selection. So the sage band is all attached or a multi-family development?

A It's a mix. It's primarily attached, but there

are some single-families within that and some multi, although primarily multi-family is in this location.

Q Okay. When you say this location, you just highlighted?

A Which is south of Well Spring and south of Well Spring on Cabin Branch, east of Cabin Branch.

Q Presumably overlooking the Stream Valley so you can take advantage of those views?

A Correct.

Q And it's your testimony that the Sage area close to the urban core has got more density than the Sage area close to Central Node retail area?

A Primarily, yes.

Q Primarily yes? I realize this may be tough. Is there any way you could quantify what's shown on the Sage from what I'm marking on my fingers that I have no landmark that I can identify?

MS. ROBESON: Can you just pinpoint the streets, Mr. Unterberg, where his fingers are so --

THE WITNESS: I think he's, this is Tribute Parkway.

MS. ROBESON: On the top?

THE WITNESS: On the north and to the south is Seneca Park, Little Seneca Parkway, formerly known as New Cut.

BY MR. KLINE:
Q And do you have any sense of how many dwelling units are located in there?
A Offhand I do not.
Q The same would be true, presumably, on the north from Tribute all the way up to 120?
A Very specific numbers I don't know.
Q And this you have indicated would be, I'm sorry I said this, the commercial node in the central, I'm sorry, the commercial --
MS. ROBESON: Area C.
THE WITNESS: Area C.
MR. KLINE: Area C.
THE WITNESS: The cross street is Skimmer.
BY MR. KLINE:
Q You've testified between 25 and 50,000 square feet of neighborhood-oriented retail?
A Mixed use.
Q Mixed use?
MS. ROBESON: I thought that was only up to 30?
MR. CHEN: 30.
THE WITNESS: The retail is up to 30, but with the neighborhood mixed use, with banks, offices, other services --
MS. ROBESON: I see.

THE WITNESS: -- other than retail --
MS. ROBESON: Okay.
THE WITNESS: -- we would have at that location.
BY MR. KLINE:
Q Okay. So if I looked at the range for retail on the development plan, it would say --
A Area C is zero to 30,000 square feet in Area C.
Q Okay. And so if it's zero, then you would agree that the Hearing Examiner would have to assess the application on the potential there would be absolutely no neighborhood retail in that location in the central node because the range says that's a possibility?
A I would not agree with that and that's exactly what it is. It may be zero to 30,000 square feet. As we go forward, we want to have retail there.
Q Well, as the Hearing Examiner reviews the application in consistency with the master plan, if the range says it could be as little as zero, does she not have to compare that with the language of the plan that does suggest that there be neighborhood-oriented retail in close proximity to a large number of residential units?
A That would be up to the Hearing Examiner.
Q Thank you.
MR. KLINE: No further questions.
MS. ROBESON: Mr. Chen?

MR. CHEN: I have no further questions.
MS. ROBESON: All right. Redirect, Mr. --
MR. HARRIS: Mr. Unterberg, would you begin by, if the easel will hold it, I guess it won't, putting up both the current development plan --
MS. ROBESON: I think there's another easel.
THE WITNESS: I see an easel.
MR. HARRIS: Okay. Thank you.
MS. ROBESON: While he's -- I have to go let Mr. Carter know he's not needed. So we can take a five minute break.
MR. HARRIS: That would be good.
MS. ROBESON: And you can set the easel up.
(Recess.)
MS. ROBESON: The parties ready? We're back on the record. Mr. Unterberg, you were getting, I see you have gotten the, both exhibits up. Which exhibits are we looking at again?
THE WITNESS: The left-hand side, this is Exhibit 59 of the proposed development plan.
MS. ROBESON: Right. And the other one?
THE WITNESS: And this is the color version of the approved development plan which is Exhibit 21F.
MS. ROBESON: Okay.
REDIRECT EXAMINATION

BY MR. HARRIS:
Q Now, Mr. Unterberg, you were asked a series of questions by Mr. Chen about whether the land use plan of the development plan reflects buildings, square footage, height, parking issues, et cetera, do you remember that question?
A I do.
Q And did you answer whether it did or did not include those elements?
A I believe I did, that includes all those elements.
Q And how does the reflection of those elements compare with the currently approved development methodology for reflecting them?
A Is the same graphic, same methodology moving forward with the, from the approved development plan.
Q Do you have an opinion as to whether the way in which it's reflected in both the approved development plan and the proposed development plan amendment conform with the requirements for those elements in the zoning ordinance?
A In my opinion, it conforms with the zoning ordinance.
Q Madam Examiner, I did get copies made of this --
MR. CHEN: Just for the record, that's for the Examiner, but --
MS. ROBESON: It calls for a legal conclusion, but that's fine.

MR. CHEN: I'm just trying to keep it going.
MS. ROBESON: I'll note an objection.
MR. CHEN: I'm just trying to get it moving. He --
MS. ROBESON: No, I understand and your objections, I do listen to them.
MR. CHEN: Thank you.
MS. ROBESON: Okay. So you are giving me -- what are you giving me?
MR. HARRIS: It is identified as a final forest conservation plan.
MS. ROBESON: So this would be 95?
MR. HARRIS: Yes.
MS. ROBESON: And it would be for -- is this for all of Cabin Branch?
MR. HARRIS: Yes, ma'am.
(Discussion off the record.)
MS. ROBESON: Cabin Branch final forest conservation plan. Okay.
BY MR. HARRIS:
Q Mr. Unterberg, first of all, was a preliminary forest conservation plan submitted at the time of the original development plan approval?
A A preliminary forest conservation was submitted with the original submission.

Q And was that -- subsequent to that was a final forest conservation plan approved?
A A final was approved and has been amended a number of times as the project has proceeded.
Q Do you know whether a final forest conservation plan supersedes a preliminary forest conservation plan?
A Final forest does supersede the preliminary forest conservation plan.
Q And if a final forest conservation plan is submitted and approved for a property, does the property owner ever do a preliminary forest conservation plan?
A They do not. The final is the document that goes forward.
Q Do you have an opinion as to whether the proposed DPA conforms with the final forest conservation plan Exhibit 95?
MR. CHEN: Objection. He's not qualified for that. In fact, if anything, there were witnesses, I think, disclosed in the prehearing statement for that subject matter, but this gentleman has expertise, but he does not have expertise that goes to whether a final forest conservation plan relates or how it relates to a preliminary forest conservation plan or any conservation plan.
MR. HARRIS: It does.
MS. ROBESON: Is he a landscape architect?

MR. ROBINS: Yes, and he's been qualified as an expert in landscape architecture before.
MS. ROBESON: Okay.
MR. ROBINS: You can ask him about that if you want.
MS. ROBESON: Well, I think what we will do is right now he's qualified as a land planner. His resume is Exhibit --
MR. CHEN: 58, left side.
MR. HARRIS: Yes, correct. Thank you, Mr. Chen
MR. CHEN: Not this one.
MS. ROBESON: Okay. So let me just take a look at, take a minute and let me review that. Okay. I do see he's a registered landscape architect in Maryland. I assume that registration is still current?
THE WITNESS: It is current.
MS. ROBESON: And have you qualified as an expert in landscape architecture?
THE WITNESS: I have.
MS. ROBESON: Before this body or in a court or --
THE WITNESS: I believe before Montgomery County, the Hearing Office.
MS. ROBESON: Okay.
MR. KLINE: May I ask how recently?
MS. ROBESON: Well, you can. Do you want to --

you can ask it, how recently were you qualified as an expert?
THE WITNESS: It would be a number of years ago for landscape architecture.
MS. ROBESON: Okay.
THE WITNESS: I don't have the specific date.
MS. ROBESON: Okay. Any other questions? Do I hear any objections to qualify him as an expert in landscape architecture? Hearing none, I --
MR. KLINE: I'm sorry, yes, I do have an objection.
MS. ROBESON: Yes?
MR. KLINE: And I put it in this context, that, I had to go get the prehearing submission, but I see that two other parties were listed as being prepared to testify in issues relating to forest conservation and Mr. Unterberg was not one of those. Therefore, that tells me that, that tells me that there are other people who are better-qualified to testify on that subject with, against his expertise on the subject as is stale, I prefer to use that term.
MS. ROBESON: Well --
MR. CHEN: He wasn't being offered in this proceeding for that area.
MS. ROBESON: Well, the test for an expert is whether they can offer more expertise. It's a low-level

test, more expertise than a layman. Now -- and you have to forgive me because we've jumped around in so many witnesses in this case, I don't recall -- have you put your forest conservation or have you put a civil engineer on yet?

MR. HARRIS: We have not. There have not been any civil engineer issues.

MS. ROBESON: Well, I guess you listed people in your --

MR. HARRIS: That's potential witnesses if issues were to come up. They have not come up.

MS. ROBESON: Well, they're here.

MR. HARRIS: Mr. Unterberg's resume indicates that his professional experience includes environmental analysis. His areas of expertise include landscape architecture, forest conservation. And if you go through the multitude of projects on which he's worked, you see a number of them, Covenant Life Church, grading and landscape plan.

MS. ROBESON: What is your prejudice if I qualify him as an expert in landscape architecture?

MR. KLINE: My answer is going to be, go to a larger topic subject.

MS. ROBESON: Because I think clearly he has the credentials that we would, I have, you know, it's not just when you testify.

MR. KLINE: Sure.

MS. ROBESON: Clearly he has the credentials.

MR. KLINE: Well, if you'll indulge me and I think I heard Mr. Harris say something different than what I thought. Let me tell you why I made my objection, was because I expected that Mr. Rude and Mr. Bassong (phonetic sp.), a civil engineer on the latter and an environmental scientist on the former, would both be testifying about storm water management issues. And since they were listed as the expert on forest conservation, I thought I'd just take care of it at that point in time.

I now have maybe the suggestion that they were not going to be called and that that surprises me because we had anticipated having testimony about storm water management. When someone may say this is a development plan amendment and all the engineering is done, so don't worry about it, but storm water management was an issue in this special protection area and the first case probably is three or four pages in the original hearing examiner's report. Mr. Unterberg and I had a recent case, 881, where, for a development plan where we got so specific on the storm water management we were, we basically have a condition about where we can put our houses to allow for certain, the size of certain ponds. So I expected there was going to be testimony about storm water management.

And the reason I say that is the staff report

tells us that everything on the east side of whatever that main street is does not have site plan approval and site plan approval would have incorporated basically water quality plans and storm water management plans. So that area of the property east of Main Street is not grandfathered under the storm water management law, so they, all the documents, all the storm water management features you see on this plan will not be constructed. They will be replaced by something else.

MS. ROBESON: Well, you know, that's something that you can bring up. You can't dictate what he's going to put on in his case. It's his risk if he -- just a second. It's the applicant's risk if he doesn't prove his case. If you raise the storm water management in your direct case, then he may put somebody on. But right now I can't force him to proffer a witness.

MR. KLINE: I understand. Let me just explain why I brought it up now. You know, my instructions are have a fair fight and whatever happens happens. We could have waited until the case, they have finished their presentation or until we completed the whole case, and then move to dismiss the whole thing because there's not mandatory evidence in front of you.

I'm saying in the sense of sportsmanship, like Mr. Chen did the other day and say, I'm going to be asking

questions. I'm just saying I thought somebody was going to be testifying about storm water management and if they're not going to be here, then we're going to raise a major objection at the end of the presentation. So it's thinking that there was going to be a storm water management expert who could address forest conservation, just put them together and do it at that time.

MS. ROBESON: So you're saying he hasn't met his prima facie burden of proof?

MR. KLINE: And --

MR. CHEN: It's ordinance required.

MR. KLINE: I'm not sure that --

MS. ROBESON: Well, there's the technical staff report. He does have the technical staff report that he's incorporated --

MR. KLINE: Yes.

MS. ROBESON: -- in his findings.

MR. KLINE: I agree and I looked at one, I looked at the exhibit list. There is no storm water management plan. I looked at the staff report and there are very indirect references to storm water management, but always in the context of they will be addressed in subsequent amendments to the plan. So there is nothing in the staff report that they could incorporate as was done in some of the other testimony. There is nothing in this record about

the storm, compliance with the current storm water management requirements under Maryland law.
MS. ROBESON: But I have nothing in the, well, you do have the staff report.
MR. KLINE: Yes, but the staff report doesn't address it.
MR. HARRIS: Yes, it does.
MR. KLINE: It does not.
MR. HARRIS: Page 31.
MS. ROBESON: Okay. Can you not talk to each other? Can you talk to me so we don't --
MR. KLINE: I'm just trying to get this on the table.
MS. ROBESON: I know, Mr. Chen, I appreciate it. I'm just trying to keep some --
MR. KLINE: I'm just trying to raise this as --
MS. ROBESON: -- control --
MR. KLINE: -- an issue --
MS. ROBESON: -- so we get through this.
MR. KLINE: Yes. Fine. I am trying to raise that as an issue if, and I thought it was in a matter of efficiency to do the two together. If you want to have a debate right now about whether there needs to be any expert to talk about storm water management, I can do it now or we can do it after they rest their case and we claim that they

haven't met their statutory burden --
MS. ROBESON: Well, I don't want to have that debate right now.
MR. KLINE: -- that's why I brought it up.
MS. ROBESON: I guess the only issue with qualifying him that gives me concern is that he was not identified on the witness -- which exhibit is your prehearing statement where the witnesses were identified? Is that different from the statement of justification?
MR. KLINE: Yes.
MR. CHEN: I believe it's, look at 23A, page 2.
MR. HARRIS: I don't know what the exhibit is, Madam Examiner, but 23B, the prehearing statement, says that he'll be, testify as an expert witness in the field of land planning or testify as to probably his compatibility with the surrounding area plats with the MXPD development standards, one of which is submission of a forest conservation plan. Consistency with the --
MS. ROBESON: Wait. Where does it, where does the MXPD say that?
MR. HARRIS: The --
MS. ROBESON: That's 59 D-3, correct?
MR. HARRIS: Well, the MXPD Zone requires compliance with the 59 D requirements.
MS. ROBESON: Thank you. For some reason I'm not

finding it --
MR. HARRIS: As well as satisfaction of the requirements --
MS. ROBESON: Oh, here it is.
MR. HARRIS: -- governing approval --
MS. ROBESON: Mr. Chen, I just found it.
MR. HARRIS: -- of a development plan.
MS. ROBESON: Thank you.
MR. HARRIS: Satisfaction of requirements --
MS. ROBESON: Now show me where --
MR. HARRIS: That's on the --
MS. ROBESON: No, no, I got that.
MR. HARRIS: Okay.
MS. ROBESON: Show me where in the MXPD Zone.
MR. HARRIS: Well, set that aside for a moment because it says he will testify as to satisfaction of the requirements governing approval of the development plan. Now I think we're saying, you're saying that the preliminary forest conservation plan is a requirement of that. I don't believe it is. For a development plan we had that discussion before. But to the extent it is --
MS. ROBESON: I --
MR. HARRIS: -- to the extent it is, this says that he will testify as an expert in that.
MR. CHEN: Well, then I guess you wouldn't need

Mr. Bassong or Mr. Turnbull.
MS. ROBESON: Bassong.
MR. CHEN: Pardon me.
MS. ROBESON: Well, he's listed them as potential and that is a fairly broad qualification. So I'm going to let him testify to that. If you have issues with storm water management, you can raise them in your case-in-chief and then maybe we will see Mr. Bassong or not. Okay. So I'm going to qualify him as an expert in landscape architecture and he can -- you can continue.
BY MR. HARRIS:
Q And, Mr. Unterberg, have you submitted forest conservation plans before?
A I have.
Q Does your firm regularly prepare forest conservation plans?
A We do.
Q Have you signed forest conservation plan submissions before?
A I have signed plans in the past.
Q And are you familiar with the forest conservation plan for Cabin Branch?
A Yes, I am.
Q And have you been involved in the amendments to that forest conservation plan about which you spoke?

A I have and it's been a key component with the site plan approvals and also the water quality plan approvals with the Planning Board.
Q And have you been involved in those components?
A Yes, I have.
Q And do you know whether, well, you've already testified this forest conservation plan was approved, I believe. I think I started to ask you whether you believe that, or in your opinion does the development plan amendment conform with the approved final forest conservation plan?
MR. CHEN: Objection.
MS. ROBESON: Basis?
MR. CHEN: The ordinance. The ordinance requires a preliminary forest conservation plan to a DPA. Exhibit No. 95 ain't it. In fact, this is a final forest conservation plan for a hospital. Now I was going to wait and cross and ask of these multiple pages here, whatever number it is, where is a page that shows development reflecting the DPA?
Now what I would anticipate they might say, well, this pond here may be okay or this pond may be fine, that type of thing, but when you go through this whole document, I've just been leafing through it, I see nothing reflecting a development that we've been hearing about for the last three hearing days.

MS. ROBESON: Well, I'm going to let him continue and you can ask him that on cross-examination.
BY MR. HARRIS:
Q Mr. Unterberg, Mr. Chen was referring to ponds. Is there a difference between a forest conservation plan and a storm water management plan?
A There is a difference.
Q And does a forest conservation plan address storm water management ponds?
A The storm water management ponds are shown on a forest conservation plan and they are addressed and the ponds are, basically the forest conservation plan shows what can be developed, grading and that what trees are protected and then what trees are planted.
Q Does a forest conservation plan have to show the specific use of development that's going to occur on the property?
A The, it generally does show the use of the development on the property, but it also shows an overall disturbed area or developable area.
Q Is the forest conservation requirement measured based on developed area or on the use of the property?
A It's primarily based on not use, but what is disturbed, what's the limits of disturbance and it goes on from there what trees are removed, what trees are replaced

and so forth, but it's primarily based on what is disturbed and showing any developable area.
Q And I think you may have answered this, but let me ask again in case you didn't, because Mr. Chen is hung up about not having a preliminary forest conservation plan. Do you have an opinion as to whether a preliminary forest conservation plan needs to be submitted under the County's regulations in order to proceed with development of this development plan amendment?
A The, well, the preliminary forest conservation which dates back to 2003, 2002, was submitted and that, that has not changed from over 10 years ago.
Q And does the final approved forest conservation plan now replace that?
A The final plan does supersede the preliminary with much more detail than the preliminary forest conservation plan.
Q Did the technical staff at Park and Planning review the forest conservation plan for this property?
A They did and I believe it's noted in the --
MR. CHEN: Objection.
THE WITNESS: -- staff report.
BY MR. HARRIS:
Q Did the Montgomery County Department of Permitting Services and/or the Department of Environmental Protection

review the forest conservation plan?
A They technically do not review it, but proceed with grading plans and so forth. You need an approved final forest conservation plan to get a permit.
Q And does this approved final forest conservation plan have all of the signatures and approvals necessary for its implementation?
A It does and the, I believe the exhibit was approved May 2, 2013.
Q And has development at Cabin Branch been proceeding under that approved forest conservation plan?
A It is proceeding for that approved plan.
MS. ROBESON: Well, I guess it's not whether it's preliminary or final that matters to me, it's whether this use when -- I've seen forest conservation plans both preliminary and final and they actually go tree by tree, you know, through the property with the layout of the site and they do the critical root zone, circumference and see what trees are going to be impacted and my question, and I don't think it's preliminary versus final, but has that analysis been done, will the layout, has that analysis been done for this?
THE WITNESS: It has and it's been done for the whole site.
MS. ROBESON: No, no, no, no, for the outlets?

THE WITNESS: For --
MS. ROBESON: Have they looked --
THE WITNESS: They're on that, on the plan there is a developable area, primarily A, B --
MS. ROBESON: In your bubble, yes.
THE WITNESS: -- C and D, and this plan can be built within those disturbed areas show on the --
MS. ROBESON: Okay. That was my question.
THE WITNESS: -- approved forest conservation plan.
MS. ROBESON: Okay. So -- okay. Keep going, Mr. Harris.
BY MR. HARRIS:
Q Okay. Let's try to get back on track here. There are some other things that I had thought about asking you. Mr. Kline asked you about page 65 of the master plan, and this was the day before yesterday, about the black dot on that page not clearly indicating the Cabin Branch retail as, quote, neighborhood retail. Does the fold-out map that is part of the Clarksburg Master Plan --
MS. ROBESON: Wait. I've got to go back to this preliminary forest conservation --
MR. HARRIS: Oh, sure.
MS. ROBESON: -- plan. Okay. Show me where in the detailed pages the, this site, the proposed North

District is?
MR. CHEN: This is on Exhibit 95?
MS. ROBESON: Yes.
THE WITNESS: I gave it to be copied, so --
MR. CHEN: Oh, yes.
(Discussion off the record.)
MS. ROBESON: Are these sheets numbered anywhere?
THE WITNESS: They are in the lower, and this is the reduced version, it's the lower, right-hand corner.
MS. ROBESON: I see it, sheet 35 of 63. Okay. So where is --
THE WITNESS: If you go to sheet 3 of 63 --
MS. ROBESON: Okay.
THE WITNESS: -- and, well, there's a number of sheets and they -- I'll just list the number of them and this is the Northern District and there are sheets 5, 6, 7, 8, 9, 14, 15, 11, 10, they overlap into the residential with the MXPD 12, 17, 16, all those sheets overlap the Northern District. In general, the white area showed development areas and then there's a legend on this sheet that shows, lower right-hand corner, and the cross-hatch or honeycomb forest planting and, unfortunately, at this scale both of them are black, but there is forest to be removed and forest to be saved.
MS. ROBESON: So does your forest planting for

this development, that's going to change, right?
THE WITNESS: The --
MS. ROBESON: Because I see forest planting in sheet 7, correct?
THE WITNESS: 57?
MS. ROBESON: Unfortunately, you're right. Forest to be removed and forest to be --
THE WITNESS: Yes, this scale, it's --
MS. ROBESON: -- saved, I can't tell the difference. But I do see forest planting on 57.
MR. CHEN: Page 57?
MS. ROBESON: No, I'm looking at page, sheet 3.
MR. CHEN: Oh, okay.
MS. ROBESON: The sheet --
MR. HARRIS: Okay. That's better.
MS. ROBESON: Oh, I'm sorry. I'm looking on sheet 3 and I was assuming that these numbers correlate to sheets, but I guess they --
THE WITNESS: They do. This is the key map and then the --
MS. ROBESON: Okay.
THE WITNESS: -- the larger sheet if you go --
MS. ROBESON: So I see forest planting on sheet 57, sheet 56 and 48 and 55, a line of it on 52, so is that going to be the same or not?

THE WITNESS: Yes, and the way this is worked is it had been tracked and as site plans go forward and are approved, this is updated and reconciled with the individual site plan, but then the overall with the forest planting and the easements and the save areas, that all has to work as plans go forward. Now with the approvals, we talked about that at one of the other -- the primary, the western half of the site is already approved --
MS. ROBESON: Right. West of --
THE WITNESS: -- with site --
MS. ROBESON: -- Broadway?
THE WITNESS: West of Broadway, actually west of Cabin Branch was site plan approval.
MS. ROBESON: Okay.
THE WITNESS: Okay? All the forest, save, planting, limited disturbance, that's all been reconciled and locked in. Also, since we were working with the full, the Little Seneca Stream Valley, which is along 270, that's identified on this plan and with the honeycomb and cross-hatching, there's planting areas and also there's been a number of easements recorded also, primarily in the northern area that were per this plan so the development, grading and construction that's going on at the site right now can go forward.
So this plan, to put a number on it, is 99 percent

done. And as site plans go forward for A, B, C and D, if there's any perimeter updates that the Planning Board would approve, the overall number would have to be reconciled. So if you add something in the additional forest in one location or if you subtract forest in one location, it would have to be reconciled with this plan and that would happen at site planning. But the majority of the forest has been approved and implemented for this plan.

MS. ROBESON: The majority of the forest --

THE WITNESS: Forest conservation --

MS. ROBESON: -- in terms of overall site area or a majority of the forest, of the forest that's required to be there? Do you follow what I'm saying?

THE WITNESS: I believe it's both. It's the whole area, the 535 acres --

MS. ROBESON: Right.

THE WITNESS: -- and then with the tree removal and the tree save, that's been reconciled on this plan. So that -- and then the developable areas, excuse me, have also been identified on this plan.

MS. ROBESON: Okay. But what hasn't been identified is the replanting areas?

THE WITNESS: The planting areas are on this also.

MS. ROBESON: But they may not stay the same?

THE WITNESS: The majority of them will stay the

same and the majority are per this plan. The only thing that may --

MS. ROBESON: So -- go ahead.

THE WITNESS: For instance, if Area C, if there's an area within, inside Area C, there's additional planting that could add, whether it could meet the requirement or to exceed the requirement, there could be forest planting within this area or also which there is a street tree credit, so street trees could be with the final site plan, that's all accounted for.

MS. ROBESON: Okay. I see that planting is within the Stream Valley buffer, correct?

THE WITNESS: Correct and the majority is in the Stream Valley.

MS. ROBESON: Okay. That's my questions. I'm sure you're going to get questions, more questions. Mr. Harris, I promise I will try not to interrupt again.

MR. HARRIS: It's more important for you to understand his answers than for me.

BY MR. HARRIS:

Q Mr. Unterberg, again, just to make it perfectly clear, do you have an opinion as to whether the development plan in this DPA conforms with the final forest conservation plan?

A This development plan does conform with the final

forest conservation plan and can be built in the parameters of the final, approved final forest conservation plan.

Q You mentioned some fine-tuning that could occur. Has that happened in the past in Area E and/or Area B with respect to site plans approved there?

A It has and if you look at the cover sheet, I believe the original approval was in 2007, but there's a number of notations for MNCPPC site plan and then the specific number, and there's a list of them. And as each site plan goes forward, if there's anything to reconcile or update, this overall plan is updated.

Q And is that the prescribed methodology for Cabin Branch as a whole to go forward?

A That is the methodology for going forward as a whole at Cabin Branch.

Q And it has been done a number of times in the past?

A Yes.

Q And did the staff, Park and Planning staff, conclude that the existing development can proceed within that approved forest conservation plan?

A Yes, they did and that was noted in the staff report I believe.

Q Thank you. All right. Now then let's go back. Mr. Kline asked you about page 65 of the master plan the

black dot there not indicating to him that the retail in Cabin Branch was neighborhood retail. Did you explain how the color map, the fold-out map of the master plan, clarifies that?

A Yes. The color map shows the dot to be red in the legend. It corresponds to the neighborhood retail designation.

Q And does the dot have a label attached to it on the fold-out plan?

A In the legend, I believe it does.

Q And what is that terminology that's used there?

A Neighborhood retail.

Q Mr. Kline asked you as well whether the master plan contemplated all of the retail within one location and I believe you said if it remained RMX. Can you explain that further for us?

A If it remained RMX, the RMX requires a specific numeric recommendation and a location. So I've testified that if it remained RMX, the 120,000 square feet would be in one location within that number.

Q And what if part of the property as it was were rezoned MXPD?

A That is not a requirement of MXPD and actually MXPD encourages a mix of uses and distribution of uses.

Q Does that allow for the retail to be in more than

one place?
A It does and that's how the original development plan was approved with multiple places for retail.
Q If you would go to the original development plan, and I keep forgetting the number of that exhibit, I apologize.
A 21F.
Q 21F. It's become fixed in your mind. 21F. Would you point out where the existing approved development plan identifies retail?
A It specifically identifies retail in three places, but also within the core of the mixed use area, the Gosnell property to the north, within Area B, also within Area C which is now Skimmer and Cabin Branch, then also there is some retail in Area D to the south of New Cut, which is now Little Seneca, and Broadway.
Q And the retail in Area C, how does that compare with the location of the proposed retail mixed use in the development plan amendment for Area C? Is it in the same location?
A It's generally the same location as again at, as far as Cabin Branch and the cross street is Skimmer within the mixed use areas.
Q And subsequent to the approval of the original development plan, did the Planning Board approve a

preliminary plan for retail uses?
A They have and the preliminary plan was approved in 2004 and then subsequently updated or amended in 2008, and the 2008 approval approved all the density for Cabin Branch.
Q Do you recall the amount of retail space reflected on that preliminary plan in each of the four areas you spoke about a moment ago?
MR. CHEN: Objection. This goes beyond cross-examination, but I also -- what is the relevancy of what was approved under the original DP? The issue before the District Council of this proceeding is going to be the retail proposed by this DPA.
MS. ROBESON: Well, I think that it is relevant. Do you want to address that?
MR. HARRIS: Mr. Kline asked numerous questions about, you know, retail being at one location or multiple locations, et cetera, and I simply want to show that that question has been asked and answered, that the approved development plan has it at multiple locations, ironically, virtually the same as the locations that we're talking about here.
MS. ROBESON: Well, what I hear you saying is the master plan, the original one, had to conform to the master plan and so originally the master plan was interpreted to permit retail at three locations. Is that the relevance?

MR. HARRIS: Actually at four locations, yes, that the master plan was interpreted at the time --
MS. ROBESON: I only got --
MR. HARRIS: -- of the development --
MS. ROBESON: -- three.
MR. HARRIS: -- plan.
MS. ROBESON: Gosnell, Area D and Area C. Mr. Unterberg?
MR. HARRIS: And Area D.
MS. ROBESON: I said that.
THE WITNESS: There's two --
MR. HARRIS: Oh.
THE WITNESS: -- two locations in Area B. One is the Gosnell and one is the --
MS. ROBESON: Oh.
THE WITNESS: -- well, it's right where on the old plan, 21F, it's right where the B is.
MS. ROBESON: Okay. So based on that, I'm going to overrule your objection, Mr. Chen. Mr. Harris, continue.
MR. HARRIS: Okay.
BY MR. HARRIS:
Q So did the preliminary plan identify the amount of retail at those four locations and, if so, can you, do you recall the numbers?
A Yeah. And I'll start from the bottom and go --

the retail in Area D was 4,500 square feet. The retail in Area C was 19,500. The Gosnell, or north of 121 --
MS. ROBESON: I'm sorry, what was C?
THE WITNESS: 19,500 square feet.
MS. ROBESON: Okay.
THE WITNESS: The Gosnell property, and then it was subsequently approved with the site plan, is 8,600, 8,600 square feet. And then that would leave within the mixed use area in B 87,400 square feet. It's on the preliminary plan and that totals up to 120,000 square feet.
BY MR. HARRIS:
Q And did the preliminary plan approval then make a finding that those locations of retail substantially complied with the master plan recommendations?
A Yes, it did.
Q Is there anywhere in the master plan that says the retail has to be at one location?
A Not that I'm aware of but, again, for the RMX there is a location on the diagrams we've discussed. For MXPD, there is not a requirement.
Q Okay. I want to ask you a question. I'm trying to figure out how to phrase it.
MS. ROBESON: Although on the approved development plan, the bulk of the retail would have been approximately in the location shown in B, right?

THE WITNESS: In B on the old and also on the new.
MS. ROBESON: Right.
THE WITNESS: Yes.
MS. ROBESON: It would have been on the location shown roughly on the master plan, correct, if I recall the master plan?
THE WITNESS: Roughly it's in that northern area, yes.
MS. ROBESON: Yes. Okay.
BY MR. HARRIS:
Q Can you go to either one of those exhibits and point to and describe where the retail was shown on the master plan?
A The retail, and particularly page 66, the retail is generally west of Broadway on the exhibit, to the north, northern portion of the site west of Broadway.
Q Generally or entirely?
A Per the map, entirely.
Q And, okay, do you have an opinion with respect to proceeding with outlet or specialty retail here as opposed to exclusively neighborhood retail and how that would relate to the timing of development? In other words, well, let me ask it differently. Do you have an opinion as to whether specialty or outlet retail could proceed sooner at this site than could exclusively neighborhood retail?

MR. CHEN: Objection.
MS. ROBESON: Basis?
MR. CHEN: This is Mr. Bogorad's area and certainly not this witness's.
MS. ROBESON: Well, if he, if, do you have the expertise to answer that?
THE WITNESS: The economic expertise? I have an opinion about it. I do not have the economic expertise.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q So what is your observation?
MR. KLINE: Objection.
MS. ROBESON: We'll let Mr. Bogorad answer it.
MR. HARRIS: Okay. By that token then, am I to assume that Mr. Noonan and Mr. Ferguson will not be able to testify as to market issues with respect to retail?
MS. ROBESON: Well, I don't, I don't know what the parameters of that are. He just said he didn't have the expertise.
MR. HARRIS: Okay.
MS. ROBESON: You can recall --
MR. HARRIS: Okay.
MS. ROBESON: I mean Bogorad --
MR. HARRIS: Okay.
MS. ROBESON: Mr. Bogorad is returning at some

point I'm sure.
MR. HARRIS: Yes, he's hanging out. Okay. Fine.
BY MR. HARRIS:
Q You were asked about the decor of the project again multiple times. Do you have an opinion with respect to how this development plan amendment responds to goals of having some time of a core in Cabin Branch?
A Yes, I believe I testified that there is a core and it's a concentration of the uses in Area B. And we do meet the master plan.
Q And does that core area include part of Area A as well?
A It does overlap with Area A.
Q And will there be a diverse mix of uses in that area?
A There will be a diverse mix of uses.
MR. CHEN: I'm going to object. He doesn't -- he was saying before he doesn't know who, what's going to be in here.
MS. ROBESON: Well, you can ask that on cross-examination. It's not a basis --
MR. CHEN: I thought this was redirect?
MS. ROBESON: -- for -- well, you get recross.
BY MR. HARRIS:
Q Do you have an opinion as to whether the location

of the primary core at the Northern District there serves to better accommodate development on the Pulte property across 121 than it would if it were further south into the property?
MR. CHEN: Objection. He's going beyond -- this is getting, again --
MS. ROBESON: Is this a land use question?
MR. HARRIS: Yes, ma'am. It's a land planning question of first order, I think.
MS. ROBESON: Well, I'll let him answer and you can cross-examine if it's a land planning issue.
THE WITNESS: I believe the question was the Northern District at the core and the Pulte property which is on the west of 121, that would be available and also service that future development.
BY MR. HARRIS:
Q And is it closer to that development or further than if the retail were located down in Area C where Mr. Kline was suggesting the nucleus might be?
MR. CHEN: The same objection.
MS. ROBESON: I'm going to let it in to get this hearing moving for the weight it deserves.
THE WITNESS: Area B is definitely closer to the Pulte properties than Area C.
MS. ROBESON: And the Pulte properties are to the

northwest across 121?
THE WITNESS: Northwest across from west of 121.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q Mr. Unterberg, you were asked repeatedly in a variety of ways about the intent of the recommendation for 120,000 square feet. Just to be perfectly clear, would you explain your justification with respect to the RMX zone?
A The RMX requires the specific density numeric and location if this was to proceed in RMX.
Q And do you have an opinion as to whether the recommendation for retail, 120,000 square feet of retail, pertains to neighborhood retail?
A As discussed that pertains --
MS. ROBESON: Wait. What -- the master plan recommendation?
MR. HARRIS: The master plan recommendation, yes.
MR. CHEN: Object.
MS. ROBESON: You can note an objection.
MR. CHEN: The document speaks for itself.
MS. ROBESON: Well, I think I've had cross-examination questions about sub-specialties of retail and whether they're, you know, this language is qualified, so I'm going to let him answer.
MR. CHEN: Well, just for the record, I don't

remember on cross-examination that that came up. I know all I asked was there a difference. That's all I asked.
MS. ROBESON: No, I think you asked whether it was qualified in the master plan, their type of retail was qualified in the master plan. But I am going to let it in for the weight it deserves and then when we read the transcript, we can all decide what weight to give it.
MR. HARRIS: Mr. Unterberg --
MS. ROBESON: So go ahead.
MR. HARRIS: I'm sorry.
BY MR. HARRIS:
Q Mr. Unterberg, do you have the technical appendix handy? I think it's Exhibit 60B as in boy.
MR. CHEN: Can we make that part -- is that in the record?
MR. HARRIS: It is.
MS. ROBESON: Yes. It's 60B. And, by the way, I did mark, there's a large, fold-out land use map. I gave that an exhibit number of 60C because it kept falling out of the master plan. So -- okay, go ahead, Mr. --
MR. HARRIS: Actually to clarify that just for your record, several times early on I noticed people, including myself and you, were calling that map Exhibit 60B as in boy.
MS. ROBESON: It is -- that's correct.

MR. HARRIS: But, so it --
MS. ROBESON: It's 60C.
MR. HARRIS: So it should be 60C.
MS. ROBESON: The technical appendage is 60B. Okay.
MR. HARRIS: Correct.
MS. ROBESON: Continue, Mr. Harris.
MR. HARRIS: Oh, I see you've corrected it in the --
MS. ROBESON: I did.
MR. HARRIS: I just want to make a note. You're ahead of things. Thank you.
BY MR. HARRIS:
Q Turn to page 12 of Exhibit 60B, the technical appendix.
A Okay.
Q And the box down at the bottom, can you read for us what the heading of that box is?
A The box is Table 6, amount of square foot of neighborhood shopping center supportable in three Clarksburg market areas.
Q And the, under retail uses, does the, the heading retail uses, does that paragraph distinguish between neighborhood or convenience retail and comparison retail?
A I believe, no, it just talks to neighborhood

markets.
Q Would you look at the second sentence under the heading retail uses above neighborhood retail centers? In this paragraph.
A Oh, this paragraph. Okay. The retail uses, Planning Department staff has evaluated future retail space needs in Clarksburg based on future population. Two types of retail needs were considered, neighborhood or convenience retail, and comparison retail.
Q And so do you have an opinion as to whether they were separating the two for purposes of calculations?
A I believe they did.
Q And the next heading there, what is the name of that heading?
A Neighborhood retail center.
Q And based on that heading and your prior identification of the heading for the box, do you have an opinion as to whether those calculations of supportable retail pertain to neighborhood retail only?
A For this table it would be for neighborhood retail.
Q And there is no identification of how much comparison retail might be appropriate?
A I believe that's correct.
Q At page -- would you turn to page 105 of the

master plan? Mr. Chen questioned you about this and does that, for the Cabin Branch neighborhood, does that identify the key land use recommendations?

A It does at the top of the page, No. 4, the Cabin Branch neighborhood and there's a heading, key land use recommendations.

Q And the provision and amount of retail are not identified as key land use recommendations there, are they?

A That is correct.

Q Is it your understanding that staff assumed a grocery store could be supported at this property when it did the master plan back in 1994?

MR. CHEN: Objection.

MS. ROBESON: Yes, that is -- he can't speak for staff.

MR. HARRIS: Okay. Does the master plan suggest that a grocery store could be supported at that time?

MR. CHEN: Objection. The document speaks for itself.

MS. ROBESON: Well, we've been arguing about what it means regardless of whether it speaks for itself. So I'm going to let him answer and give it the weight it deserves. Now where, what page are you?

MR. HARRIS: Page --

MS. ROBESON: 64 did you say?

MR. HARRIS: No, I didn't say a page, I don't believe. Pages 67 through 70.

MS. ROBESON: On the Cabin Branch neighborhood? Okay. Go ahead.

THE WITNESS: Well, page 68, there's a guideline to locate a grocery store within the core.

BY MR. HARRIS:

Q Now how does that guideline language compare to the language with respect to a grocery store for the town center area at page 46? And I would direct your attention to the fifth paragraph.

A Yeah.

Q This plan.

A This plan --

MR. CHEN: What page are you on?

MR. HARRIS: 4-6.

THE WITNESS: Yeah, the grocery store is particularly important --

MR. HARRIS: Okay.

MR. HARRIS: -- to the town center.

BY MR. HARRIS:

Q That language is not found in the provisions for Cabin Branch, is it?

A Correct, that language is not in the Cabin Branch.

Q Now based on your experience working on the Cabin

Branch project, do you have an opinion as to whether circumstances have changed with respect to the demand for grocery services in the Clarksburg area and, if so, what --

MS. ROBESON: I know -- go, stop. I have an objection. Mr. Chen, go ahead.

MR. CHEN: He's not qualified. He's going back -- he's not an economist. He's now asking today do you think there is a demand for this at this location. This witness is not qualified to answer that.

MS. ROBESON: I think you're on Mr. Bogorad's testimony that there is not a demand and he is more -- unless you're an expert in the supermarket business. Are you an expert in the supermarket business?

THE WITNESS: I am not an expert in the supermarket business.

MS. ROBESON: So --

MR. HARRIS: That's fine. That's fine.

BY MR. HARRIS:

Q Has it been your observation -- well, strike that. If you were to subtract a grocery store from the recommended 120,000 square feet of retail in the RMX area, approximately how much retail would that leave for Cabin Branch?

A If a grocery store generally is 60,000 square feet, subtracting from 120,000 square feet we used, plus or minus 60,000 square feet.

Q And would that be an estimate then of neighborhood retail demand?

A Yes, it would.

MR. CHEN: Objection.

MR. HARRIS: The --

MR. CHEN: Excuse me. I apologize. I'm slow at objecting to strike. That's going, again, at this area of Mr. Bogorad's expertise, not this witness.

MR. HARRIS: The --

MS. ROBESON: Well, I think the master plan in this case did attempt to address demand, so if you're testifying, you know, 120 minus 60 leaves whatever it leaves right now, 60, you know, and they had that for -- you know, the question is still you can consider a neighborhood, a grocery store neighborhood retail. So, anyway, you can continue. I understand your --

MR. HARRIS: Yes.

MS. ROBESON: -- arguments, truly.

MR. HARRIS: Okay.

BY MR. HARRIS:

Q And so the contemplation of having between 50 and 100,000 square feet of neighborhood retail services at Cabin Branch under the development plan amendment, does that then meet -- without a grocery, without a full-size grocery -- does that then -- is that consistent then with that demand

estimate?
MR. CHEN: Objection. The same reason.
MS. ROBESON: Well, no, I'm going to overrule it. I'm going to let it in. Go ahead.
THE WITNESS: That would be consistent with the objectives, that range of retail would be a demand for the neighborhood.
BY MR. HARRIS:
Q The, turning again to the recommendation for 120,000 square feet of retail, was that amount proposed in the original development plan?
A It was and we've, I've testified to that.
Q Was there a limit at that time to the amount of retail that the development plan could have sought in the MXPD area?
A In the MXPD area, the limit would have been the 20 percent, which was allowed per the zone.
Q And based on the --
MR. CHEN: Objection. Move to strike. We're getting back to this, repeating this analysis we've covered a million times already, but I can't help but emphasize the document is not qualified. The language is clear in the document. It says 120,000 square feet.
MS. ROBESON: I understand that. I understand that. I'm going to let him continue. To some extent, we

are kind of repeating his testimony and direct, but I'm going to give you some latitude to do that.
MR. HARRIS: Thank you.
MS. ROBESON: Okay?
MR. HARRIS: There is some overlap and I'm trying to --
MS. ROBESON: It's hard to separate the two out.
MR. HARRIS: I understand. You -- I'm trying to address a question that you raised on Wednesday.
MS. ROBESON: I remember that.
MR. HARRIS: Okay.
MS. ROBESON: So go ahead.
MR. HARRIS: Okay.
BY MR. HARRIS:
Q So with respect to the approved, the current development plan, I think you finished your comment that there was no limit -- that at that time the applicant could have sought more than 120,000 square feet in the MXPD area, was that your testimony?
A Yes, that's correct.
Q Okay.
MR. CHEN: You've got my objection on the record, right?
MR. HARRIS: Obviously they did --
MS. ROBESON: Yes.

MR. HARRIS: -- they did not, but what did they propose in Areas A and B instead?
THE WITNESS: The, from the plan that's approved?
MR. HARRIS: Yes, correct.
THE WITNESS: You mean the old plan? They proposed a neighborhood retail and, again, the retail was spread out between a couple locations in B, one location in C and one location in D of the 120,000 square feet. And then also the primary use was going to be a hospital for Clarksburg with Adventist and that was not approved.
BY MR. HARRIS:
Q And were there other uses related to the hospital proposed in Area A?
A Yes, there would have been other support, nursing care facilities, medical offices and so forth.
Q So was there any room there at that time for specialty retail?
A There was not.
Q You asked again a series of questions about the 2011 Clarksburg Master Plan Amendment, including some today, I think. Would you pull out Exhibit 86 please and, first of all, tell us generally what is your understanding of the purpose of that limited amendment?
A I think in, well, part of it is the title, it says limited amendment to '94 Clarksburg master plan, Hyattstown

special study area to allow an exception to the staging, or to the retail staging provisions. And then at the top of page 10 toward the, counsel directed toward the first paragraph, somewhat to the middle, it says, limited amendment to the '94 Clarksburg master plan for the sole purpose of considering whether to amend the retail staging provisions.
Q And do you have a recollection as to what triggered that limited amendment for the sole purpose of considering whether to amend the retail staging provisions?
A That, it's my recollection that a grocery store wanted to move forward in the New Cut or Clarksburg Village and based on the master plan it could not because a grocery store had not been built yet in the town center neighborhood.
Q And did that master plan study focus on any issues or study any issue other than retail staging?
A I don't believe it did.
Q And ultimately how many words were changed in the Clarksburg master plan as a result of that?
A I think it was five if I count correctly.
Q Now Mr. Kline was attempting to suggest that the --
MR. KLINE: Excuse me.
MR. HARRIS: Okay.

BY MR. HARRIS:
Q Did Mr. Kline attempt to suggest that the --
MS. ROBESON: Just -- okay, go ahead.
BY MR. HARRIS:
Q Was the 2011 amendment a reaffirmation of the entire Clarksburg master plan?
A It was not.
MR. CHEN: Objection. The document speaks for itself.
MS. ROBESON: I'm going to agree on that.
MR. HARRIS: Okay.
BY MR. HARRIS:
Q Does -- never mind. Strike that. Is the terminology of, quote, substantial consistency, or, I don't know, now I've got to go back -- compliance, yes, different terms in the subdivision I realized, beg your pardon, substantial compliance with the master plan in the 59 D, do you believe that's a flexible standard?
MR. CHEN: Objection. It's a law.
MS. ROBESON: Calls for a legal conclusion.
MR. CHEN: Yes.
MS. ROBESON: I understand.
BY MR. HARRIS:
Q Did the Cabin --
MS. ROBESON: Mr. Harris, I'm not sure you need

that because --
MR. HARRIS: Okay.
MS. ROBESON: -- he's already testified as to the language of the master plan that it's flexible --
MR. HARRIS: All right.
MS. ROBESON: -- and I think that covers where you're going.
MR. HARRIS: Can I ask him whether he has examples of how that has been applied in the Cabin, the flexibility has been recognized in the Cabin Branch project?
MS. ROBESON: Factual examples?
MR. HARRIS: Yes.
MS. ROBESON: Yes.
MR. HARRIS: Okay.
BY MR. HARRIS:
Q Mr. Unterberg, do you have any examples --
MS. ROBESON: Subject to objection when we hear the specific question.
BY MR. HARRIS:
Q And examples of how the specific recommendations in the Clarksburg master plan with respect to the Cabin Branch project were not adhered to?
A Yes. And if we go back to, I guess, page 66, there's, and particularly New Cut Road, which is to the bottom of the property or the south portion of the property

and parallels West Old Baltimore Road, that was recommended to come all the way through the property. Upon the review with Planning Staff and development of the plan, that, that was changed. Also we spoke about the location of the retail which is generally west of Broadway and it was moved and approved in Area B primarily with other locations.
Also, the elementary school was approximately right, west of Broadway, but right in the middle of the site. That was moved north and to the edge of the property along 121. And also the local park which was southwest of the property roughly where the B is on the development plan, that local park was also moved north with the plan that was developed. So pieces have changed and that has worked with the flexibility of the master plan while still being substantially compliant with the master plan.
Q What about the, what we were referring to as the Gosnell properties, were they recommended for MXPD views in the master plan?
A Generally the area north of 121, the SMTM or Gosnell properties, that was zoned RE-1, which was a rural, residential zoning. It was not recommended to be MXPD in the master plan, but was included to accomplish the goals of the master plan.
Q You were asked a number of questions as well about the retail in the town center. Do -- and particularly page

46, I believe, of the master plan was used for a number of questions. Do you have an opinion as to whether that places a cap on retail in the town center and, if so, what is that cap?
MR. CHEN: Objection. The document speaks for itself.
MS. ROBESON: I'm going to let him answer, give it the weight it deserves. Is this 146?
MR. HARRIS: Page 46, I'm sorry.
MS. ROBESON: I mean --
BY MR. HARRIS:
Q And I will direct your attention to the second bullet from the bottom.
A The second bullet states a maximum square footage of the retail center as proposed up to approximately 150,000 square feet.
Q Okay.
A Which it says maximum, which I see as a cap.
Q Do you know whether the Clarksburg Town Center subsequently obtained project plan and preliminary plan approval for 150,000 square feet of retail?
MR. KLINE: Objection. He already testified when I asked that question he didn't know the answer to that.
MR. HARRIS: Okay.
BY MR. HARRIS:

Q Do you know whether -- are you familiar with a plan of compliance for Clarksburg that grew out of the litigation in whatever it was, 2006?
A I understand there's a plan of compliance.
Q And --
MS. ROBESON: What litigation? The --
MR. HARRIS: The height and the conformance with the preliminary plan and site plan.
MS. ROBESON: Okay. We'll go with that.
MR. HARRIS: Strike that.
BY MR. HARRIS:
Q Are you aware of a plan now being considered for Clarksburg Town Center proposed by Elm Street Development?
A I understand there is a plan that they have been showing the community, yes.
Q And do you know what amount of retail that plan is proposing?
A I'm not specifically sure, but I think it's in the 130 --
MR. CHEN: Objection if --
THE WITNESS: -- to 140,000 square feet.
MS. ROBESON: Your objection is based on what, speculative?
MR. CHEN: Yes, that's one.
MS. ROBESON: Okay.

MR. CHEN: You know, town center, I mean what does it have to do with this area? The document, you have in front of you the document, the planning guide for the town center.
MS. ROBESON: Well, I think the answer, the question -- well, Mr. Harris, do you want to --
MR. HARRIS: Yes. Mr. Kline was attempting to imply that Cabin Branch Specialty Retail was going to preclude that retail at town center and was going to adversely impact that and I'm trying to show that that is not --
MR. KLINE: Objection.
MR. HARRIS: -- realistic.
MR. KLINE: I don't think that's a fair characterization of my question and I'm not --
MS. ROBESON: Well --
MR. HARRIS: Okay.
MS. ROBESON: Okay. Repeat your question.
BY MR. HARRIS:
Q Do you know what amount of retail is being proposed in the town center by Elm Street Development and Mr. Flanagan, the third try of the LLC?
MS. ROBESON: I'm going to let him answer that.
THE WITNESS: I believe it's in the range of 130 to 140,000 square feet.

MS. ROBESON: Do you know that for sure?
THE WITNESS: I know it from looking in the past at, they have a, online they have a proposal --
MS. ROBESON: Okay.
THE WITNESS: -- and that's my recollection.
MS. ROBESON: Go ahead.
BY MR. HARRIS:
Q And does that proposal include outlet retail?
A It does not.
Q Is it a grocery-anchored retail center?
A It's a grocery-anchored neighborhood center.
Q You were asked about the master plan desire for a high technology corridor along I-270. Do you remember Mr. Bogorad's and Mr. Kaplan's testimony about that and how, what their observations were?
MS. ROBESON: Well, he doesn't have to repeat their testimony.
BY MR. HARRIS:
Q Do you, from, as a land planner, do you have an opinion as to whether the construction of specialty retail here will help to serve the attraction of other employers, including possibly high technology employers?
MR. CHEN: I thought this was Bogorad that --
MS. ROBESON: Well, do you have an opinion as a land planner?

THE WITNESS: I do. As a land planner, it's based on, frankly, Mr. Bogorad, Mr. Kaplan and --
MS. ROBESON: Well, that's their testimony.
THE WITNESS: -- and the technical staff analysis that the outlet malls or specialty retail will attract and provide --
MS. ROBESON: So you're --
THE WITNESS: -- a stimulus to those properties.
MS. ROBESON: Okay. But you're just repeating other's opinions right now?
THE WITNESS: Yes.
MS. ROBESON: Okay. Go ahead.
BY MR. HARRIS:
Q And was the Miles Coppolla, or sometimes referred to as the Peterson property, proposed for high technology type employment uses?
A It's proposed to be MXPD for the 270 technology corridor, yes.
Q Pardon me one second.
(Discussion off the record.)
BY MR. HARRIS:
Q As a land planner, do you believe the inclusion of specialty retail at Cabin Branch would compliment the other non-residential and the residential uses there?
A I believe --

MS. ROBESON: Where?
MR. HARRIS: At Cabin Branch.
MS. ROBESON: Oh.
THE WITNESS: Yes, I believe it does and particularly with the goals of MXPD to create a more diverse mix and provide opportunities to and encourages that mix which also supports the restaurants, the shopping and so forth and supports and interacts with the other uses.
BY MR. HARRIS:
Q You were asked a number of questions as well by Mr. Kline about the RMX Zone and that chart that's there, bear with me a little, I'm going to -- my papers have gotten disheveled. The RMX --
MR. ROBINS: Oh, the actual fax?
MR. HARRIS: Yes.
BY MR. HARRIS:
Q Do you remember that testimony, Mr. Unterberg?
A I do. And --
Q I actually was looking at a chart that was at 59, I want to say 10.3.5.
A Yes.
Q Okay. And we had some talk then. Does Section 10.3.4 just above that provide a limitation to retail space exclusive of what's recommended in 10.3.5 and, if so, how did the two relate to one another?

A Subsection C, the density of development approved by the Planning Board must not exceed the density shown on the approved and adopted master or sector plan. The chart, which is 3.5, is for maximum gross leasehold, has different numbers. But the 10.3.4, subsection C, the controlling directive is that the number must not exceed the density shown on the approved and adopted master or sector plan.
Q And is that limitation reflected in another section of the RMX Zone as well?
A I believe 59 C-10.2.2, the first statement refers to provision. Under the actual method, it states that in, RMX Zone is provided for the user in accordance with the provisions of Section 59 C-10.3, as well as the density and numerical limitation other guidelines contain in the applicable master plan approved by the District Council.
Q And does the MXPD Zone differ in that respect?
A It does. It does not have that language.
MS. ROBESON: He said it doesn't have the language, but I'll note your continuing legal conclusion objection.
MR. CHEN: Thank you.
MS. ROBESON: Or document speaks for itself objection I guess it would really be.
MR. CHEN: I think it's the law.
MS. ROBESON: Yes.

BY MR. HARRIS:
Q I have some notes here about page 101. Bear with me a minute. Oh, yes. Mr. Chen asked you a series of questions regarding the first paragraph there asking you for some legal conclusions, I think, about what it said. But does that paragraph in your mind prohibit retail uses in Cabin Branch --
MR. CHEN: Objection.
MR. HARRIS: -- in the RMX?
MR. CHEN: Excuse me, objection. I didn't ask for any legal opinions. I asked him to read the paragraph and I asked him what the reference was these uses. That was what the question was, I remember very clearly.
MS. ROBESON: So what -- okay.
MR. HARRIS: So, irrespective --
MS. ROBESON: So what's your question?
MR. HARRIS: -- I withdraw the premise.
BY MR. HARRIS:
Q Does that paragraph prohibit retail uses at Cabin Branch?
MR. CHEN: Objection. Well, go ahead.
MS. ROBESON: Yes.
THE WITNESS: It does not prohibit retail uses.
BY MR. HARRIS:
Q And does it recommend MXPD zoning?

A It does.
Q And does the MXPD zone allow a comprehensive mix of uses?
A It does. It specifies that particularly.
Q And did the original development plan include retail uses in the MXPD area?
A It did.
Q Are you familiar with the approval of the Wegman's store down in Seneca Meadows?
A I am.
Q In that case, did the Planning Board conclude that Wegman's grocery store is an employment use?
MR. CHEN: Objection. I don't know where this is going, but certainly if there is to be evidence offered in this regard, it does not come from this witness. We've had this issue come up most recently when this witness is equating the word retail with the word commercial. We went through this with this witness and had it open to what the actual document said. And if we're going to go and ask for a change or a meaning of words used by a regulatory agency, the document from the agency and the agency's position on that should be before the Court.
MS. ROBESON: Was Great Seneca, was there an approval for Great Seneca -- I remember you came back with several documented approvals, but --

MR. KLINE: It was included within that group.
MS. ROBESON: I'm sorry?
MR. KLINE: What the question refers to, the material that was testified about before and is in the applicant's justification statement.
(Discussion off the record.)
MR. ROBINS: Bear with us just one second.
MS. ROBESON: I remember something from Great Seneca coming in.
(Discussion off the record.)
MR. KLINE: If the document is in evidence, then the document speaks for itself.
(Discussion off the record.)
MS. ROBESON: So --
MR. HARRIS: Resolution 10-156? Yes. Okay.
MS. ROBESON: The Planning Board resolution.
MR. ROBINS: Exhibit 82.
MR. CHEN: Fine.
MS. ROBESON: So what is your question about that resolution?
MR. HARRIS: Whether that resolution reflects a Planning Board conclusion that the Wegman's is considered employment use.
MR. CHEN: Objection. He's interpreting now.
MS. ROBESON: Yes, I guess why don't I, why don't

you limit your question to is there a Wegman's? Does that letter mention --
MR. CHEN: It hasn't been asked --
MS. ROBESON: -- a Wegman's?
MR. HARRIS: How about if I direct your attention to page 4 of that resolution, 10-156, exhibit --
MS. ROBESON: Okay. You've got to give me the exhibit number again.
MR. ROBINS: 82.
MR. HARRIS: It's Exhibit 82.
(Discussion off the record.)
THE WITNESS: Page 4 of 10-156 from the Planning Board?
MR. HARRIS: Right. Okay.
MS. ROBESON: Okay. Now page 4? Okay. So what is your question on this?
BY MR. HARRIS:
Q I turn your attention to the second to the last sentence in the full paragraph there --
MS. ROBESON: The first full paragraph --
MR. HARRIS: The first full paragraph beginning, the application proposes.
MS. ROBESON: Okay. All right.
BY MR. HARRIS:
Q Would you read for us the second to the last

sentence?
A That, the one that starts, is also important?
Q No. The one that starts with Wegman's.
MS. ROBESON: I see, what, okay. I don't think he needs to read it. I mean you can point this out in closing argument.
MR. HARRIS: Okay.
MS. ROBESON: I can see it specifically mentions Wegman's.
MR. HARRIS: As an employment use?
MS. ROBESON: Yes, I did see that too.
MR. HARRIS: That's fine.
BY MR. HARRIS:
Q The existing development plan approval for 120,000 square feet of retail, do you have an opinion as to whether that 120,000 square feet of retail could be a Walmart?
MR. CHEN: Objection. I'm not sure -- does he mean the whole 120,000 be, sell merchant? I mean if --
BY MR. HARRIS:
Q Is there any --
MS. ROBESON: Just a second.
MR. HARRIS: Is --
MS. ROBESON: Where are you going?
MR. HARRIS: I simply want to know if there is any restriction in the development plan that prohibits --

MS. ROBESON: In the original --
MR. HARRIS: -- or defines the type of retail use.
MS. ROBESON: In 21F?
MR. HARRIS: Correct.
MS. ROBESON: Okay.
THE WITNESS: I think the only restriction is the ranges. There are areas shown for retail and mixed use and there are ranges within the different areas. And those are the limits that were --
MS. ROBESON: I think the question is is there any requirement that it be a specific type of retail?
THE WITNESS: There is not a requirement for that.
BY MR. HARRIS:
Q And, therefore, is there any requirement that it be neighborhood retail?
A On the approved plan there is not.
Q The, you were asked today about the epicenter and hot spots. Are there, is there more than one hot spot under the proposed DPA?
A There can be more than one and I believe I testified to that.
Q In addition to the ones you testified to, would the amphitheater qualify as such a focal point or an epicenter?
A It could and we want more gathering places, more

places for people to interact within the development.
Q Does the current development plan have a concentration of uses in the Northern District?
A It does and I've testified to that.
MS. ROBESON: Well, each area has a concentration of uses, it's just different uses, you know what I'm saying?
BY MR. HARRIS:
Q Will the -- is the amount of development in square footage in the proposed development plan amendment comparable to the amount of total development in Area A under the approved development plan?
MR. CHEN: Objection.
MS. ROBESON: Basis?
MR. CHEN: The testimony, what he's now asking is comparability of testimony in the record. The testimony in the record already is, is that under the approved plan it's 120,000. The testimony this morning is that the area will have up to 450,000. Now what he's --
MS. ROBESON: Well, yes.
MR. CHEN: -- asking is 120,000 comparable to 450,000.
MS. ROBESON: Well, he can answer that and you can express your skepticism on cross-examination --
MR. HARRIS: Or save it for closing.
MS. ROBESON: -- or save it for closing, correct.

MR. CHEN: We will have an --
BY MR. HARRIS:
Q Mr. Unterberg, Mr. Chen misunderstood --
MS. ROBESON: Yes.
MR. HARRIS: -- my question. I asked you about the total amount of development. I didn't ask you about retail. So, again, I'll ask you the total amount of development in Area A, how does that compare between the two plans?
THE WITNESS: The 21F, the total employment, which includes office retail, is 1,210,000. The total on Exhibit 59 proposed, which is Area A again, is 1,150,000, a little bit less than the approved plan.
MR. HARRIS: I don't have any further questions. Thank you for bearing with me.
MS. ROBESON: All right. Recross, Mr. Kline.
MR. CHEN: If I may ask --
MS. ROBESON: Yes. Whoever --
MR. CHEN: -- we're --
MS. ROBESON: -- is ready first.
MR. KLINE: Yes. Thank you.
MR. CHEN: No, no. I just wanted to ask a question of the Examiner.
MS. ROBESON: Yes.
MR. CHEN: We're coming up on 12:00 and we've been

going since 8:45. Are you, do you plan for a luncheon break?
MS. ROBESON: Yes, but I would really like to finish this -- his redirect was pretty limited, so I would really like to get through Mr. Unterberg. And your questions are limited to redirect, what he discussed on redirect.
MR. KLINE: I'm coming off your sheet.
RECROSS EXAMINATION
BY MR. KLINE:
Q Mr. Unterberg, thanks for bringing up the question of the RMX zone again because I appear to be the only person in the room who is still having difficulty --
MR. CHEN: No, you're not.
MR. KLINE: -- understanding this.
BY MR. KLINE:
Q You start off, I think, with the comment, the RMX zone says that Cabin Branch only would have allowed 120,000 square feet of non-residential use, or did you say non-residential or retail, if you recall? The last part is probably not relevant. You did say not more than 120,000?
A Can you repeat that?
Q I wrote down Mr. Unterberg says, RMX zone says not more than 120,000 square feet at one place?
A If the property to develop under RMX, the 120,000

would be a cap within that location per the zone.
Q And can you -- and is the second part of that in once place --
A Yes.
Q -- included in that? Okay. So give me the statutory section in the RMX zone that basically tells me that.
A I believe that is 59 C-10.2.2.
MR. CHEN: Say that again please, sir.
THE WITNESS: 59 C-10.2.2.
BY MR. KLINE:
Q And the part that says that?
A That was just the optional method. It's the first sentence, under this method, general commercial uses and higher density residential uses are allowed in the RMX zones provided that they are in accordance with the provisions of Section 59 C-10.3, as well as the density, numerical limitations and other guidelines, limitations and other guidelines contained in the applicable master plan.
Q So the limitation is prescribed by the master plan, not by the zoning ordinance? Let me try it again, 120,000 square foot number comes from and flows from the master plan and not from the zoning ordinance?
A It, the numerical, it refers to the numerical in the master plan for the RMX.

Q So the 120,000 square feet we find in page 67, I think it is, that's the limitation that you say is imposed on the property?
A For the RMX, yes.
Q Yes, okay. And the, at one place or how does that come in, because we've got the box in the one exhibit that had the cross-hatched area and you're saying that's, or the plan said it had to go there?
A Yes.
Q Okay. So you're saying the plan ties the hands of anybody who wants to develop the property under the RMX zone?
A It's specific --
Q Under an RMZ zone?
A It's, to proceed under the RMX optional method is specific on what you can do.
Q Okay.
A Or needs to be specific on what you can do.
Q We've agreed that the zoning is RMX-1 TER, have you had a chance to verify that?
A I did verify that what I was looking at, I confirm it's RMX-1 TER.
Q So looking at this chronologically, in 1994 we adopt a master plan and that's where the 120,000 number comes from?

A For the '94 master plan, 120,000.
Q And then we do a comprehensive rezoning and we put RMX01 TER zone on the property?
A I think they go hand-in-hand because --
Q Yes. Well, do they? I mean normally a comprehensive rezoning follows a few months after.
A The master plan --
Q They go --
A -- and the zoning is implemented from the master plan.
Q So my point is is that, and it goes back to the question I asked the other day, how did the 120,000 square foot number get in the master plan because that came before the zoning ordinance? We didn't have an RMX zoning on the property to limit to 120. We had a plan that said you should do 120. So I'm asking you where is the, what's the derivation of that 120?
A I believe I testified that as far as how they got to that number, I don't know. I do know in the technical appendix on page 12 it speaks, I think it's 75,000 square feet. And then subsequent, it carried forward to 120,000 square feet in the master plan. But also within the master plan their recommendation to rezone to RMX is included to implement that.
Q My point is is that for some reason the 120,000

square foot limitation showed up in a plan that predated the imposition of the RMX zone, RMX-1 TDR zoning on the property, correct?
A I would not necessarily agree with that because I think they go together with the master plan.
Q Okay. Well, we don't know why the 120 is there?
A As far as exact, how that came out the exact number, no.
Q But my point is is that the limitation of 120 is not derivative of the zone, it's derivative of the master plan. That's the controlling --
MS. ROBESON: Correct.
MR. KLINE: -- that's the governor.
MS. ROBESON: Is that a question?
MR. KLINE: I'm sorry. No, Your Honor. I'm sorry. I got a little too casual.
BY MR. KLINE:
Q Is that correct?
A I don't believe so because, again, I think you have to put them together because the master plan also recommended the zoning. So it was foreshadowing the zoning that would implement that.
Q Well, if you do put them together, how does that change the situation? How does that work to the benefit of the applicant and its theory of how this all shows up on the

property?
A Can you say that again please?
Q Yes. I -- what's the difference in terms of you say you treat them together?
A Well, the RMX requires a number and there's a number in the master plan, okay? Separate from that it also recommends a floating zone, MXPD, which allows up to 20 percent retail. So with that recommendation, the actual master plan which we've testified to, it's silent to that, that retail in the MXPD.
Q And the plan essentially gave this alternative recommendation that said RMX-1 TER or MXPD if you think you can do a better mix job? That's maybe a little too casual way of saying it, but is your answer, yes --
A That's, that --
Q -- you --
A -- that's your language, yes.
Q Okay. Well, is my description or your alternative recommendations in the plan base zone of RMX-1 TER and in the alternative an MXPD zone?
A You could proceed under RMX optional method and implement the plan. And there is an option to proceed also with MXPD.
Q And would the, is there anything in the plan that would tell us that if you do follow the MXPD zone, you could

have more retail than 120,000?
A It's silent on that, but then the MXPD zone allows up to 20 percent of the total commercial area.
Q Yes, I think we all pretty well understand that. I'm just asking does the plan suggest that there should be more retail if you use the MXPD zone?
A It recommends neighborhood retail for the 120,000 square feet and it's silent as far as the specialty or comparison retail.
Q You said that the, there was, I'm sorry, there was a preliminary plan of a subdivision approval for a large piece of Cabin Branch, maybe it was the whole amount. When did that occur?
A 2004 the preliminary plan was approved. It was for all of Cabin Branch. Based on the APFO findings, about three quarters of the density was approved at that time.
Q And did the preliminary plan cover the entire property or just part of it or did it ask for all of the APF approval at that time?
A It covered the entire property and it graphically showed all of the density and the APFO approval controlled the amount that was approved.
Q And I'm gathering the way you described it, the preliminary plan showed on it where nodes of neighborhood retail were going to be located?

A It did.
Q Okay. Did the, let me see if I can read the question, go back and see if I can properly cite Mr. Harris's question to you. I wasn't that good at my note taking.
MR. KLINE: Do you have a copy of the opinion by any chance?
MS. ROBERTS: Which opinion?
MS. ROBESON: Which opinion? The original?
MR. KLINE: The preliminary plan opinion of 2004, I believe you said.
THE WITNESS: 2004?
MS. ROBESON: Well, wait. He didn't -- did he testify as to the preliminary plan?
MR. KLINE: He actually went into some detail about an allocation of neighborhood retail within the preliminary plan boundaries.
MR. CHEN: I objected, but --
MS. ROBESON: Okay. All right. Keep going.
BY MR. KLINE:
Q Do you happen to have a copy of the opinion?
A I do, but --
Q I'd like to see it. I'd like to see it.
(Discussion off the record.)
MS. ROBESON: Was that the allocations in Area D,

C, Gosnell --
THE WITNESS: The plan --
MS. ROBESON: -- and B?
THE WITNESS: The plan shows the allocations.
MS. ROBESON: Okay.
(Discussion off the record.)
MS. ROBESON: The development plan?
THE WITNESS: The preliminary plan.
MS. ROBESON: The preliminary --
THE WITNESS: -- shows those specifics.
(Discussion off the record.)
THE WITNESS: This is a --
MR. HARRIS: Okay. He's got it.
MR. KLINE: Thank you.
MR. KLINE: Can we put into the record?
(Discussion off the record.)
MR. HARRIS: No, can you make a copy at lunchtime for him?
THE WITNESS: Yes.
MS. ROBESON: So this will be 95, I think we're up to? No, 96. And this is a copy of the Planning Board opinion approving the Cabin Branch preliminary plan.
(Exhibit No. 96 was marked for identification.)
MR. HARRIS: I'm sorry.

BY MR. KLINE:
Q Understand, this is not a trick question. Would it not be fair to say that the preliminary plan and subdivision was to try and walk in your APF approvals and describe the development on a gross scale?
A Generally and what is said of the preliminary plan and, you know, is and how it evolves for what as a site plan.
Q You mentioned or someone mentioned APF. That was certainly a primary goal of this of being able to lock in your traffic capacity so you could do it all and not have to continually go back in and get reapproval of traffic capacity?
A That's one of the proponents, yes.
Q Looking at what's been marked as Exhibit No. --
MS. ROBESON: 96. It should be on there. It is.
MR. KLINE: Oh, down at the bottom?
BY MR. KLINE:
Q Looking at Exhibit 96, is there anything in the opinion that correlates with the allocation of neighborhood retail as you described it to us earlier today?
A In the resolution, I do not believe so. It does say, which the --
Q Okay. You answered my question. So what it says basically on the first page, total development, 1,538,000

square feet of commercial space without allocating it between retail or office uses?
A In the resolution, yes.
Q In the resolution, yes. So it would not be fair to say then, it would not be accurate to say that that preliminary plan opinion approved the distribution and allocation of the neighborhood retail as you testified or described it earlier?
A Say that again.
Q The number --
A It's fair or not?
Q The numbers that you gave us for the different nodes of neighborhood retail are not found in the preliminary plan opinion itself?
A Correct. They're shown on the actual plan that is signed with that resolution.
Q I believe I am accurately stating the question that was asked of you that in 2003, the applicant could have requested for more commercial, more retail development without, and not be limited to 120,000 square feet?
A This is the same scenario that we are requesting now could have happened in 2003.
Q Okay. But the applicant, until the filing of the development plan amendment, has never had a public expression of we shouldn't do anything other than 120,000

square feet of neighborhood retail?
A That I do not know.
Q Exhibit No., sorry, Exhibit 94 in the record, which was Mr. Harris's letter from --
MR. CHEN: 2000 --
MS. ROBESON: Five I think.
MR. CHEN: While we're on that, do you want me to get copies of that during the lunch break?
MS. ROBESON: Yes, if you could.
MR. HARRIS: Yes, please.
BY MR. KLINE:
Q Let me change this. Take a look at this, would you please?
A What is this?
Q And after you've had a chance to study it, I will give it to the Hearing Examiner and ask you to explain what it is.
A Well, without reading the whole thing, I see what it is.
Q Okay. That's fine.
MR. KLINE: Madam Hearing Examiner, could we make a memorandum of Park and Planning Staff generated from June 21, 2002, dealing the pre-preliminary plan, a subdivision for the Cabin Branch neighborhood, could that be made an exhibit in the record please?

MS. ROBESON: Any objections?
MR. HARRIS: Well, I do subject to understanding where this is going. There was no testimony until this point, no questions about a pre-preliminary plan.
MR. KLINE: I am submitting, I'm submitting this because it has a consistent expression of the, well, I basically want to show what the applicant's position has been historically until the filing of this development plan.
MS. ROBESON: Well, you can do that on your case-in-chief. I, he didn't testify to this.
MR. KLINE: Well, he --
MS. ROBESON: Malcolm.
MR. KLINE: What he, what -- what he has said is --
MS. ROBESON: Well, he testified --
MR. KLINE: -- is that we could have always asked for more than 120,000 square feet. I'd like to have exhibit, have this new exhibit, Exhibit 94, and have him basically note the fact that that's not a position that the opposition has taken.
MS. ROBESON: Well, those -- okay, well, now I'm going to act like Mr. Chen. Those documents --
MR. CHEN: Objection.
MS. ROBESON: -- speak for themselves and --
MR. KLINE: Can we put this one in?

MS. ROBESON: -- I see no point. Well, if you have, do you have an expert witness coming?
MR. KLINE: Yes, I hope so.
MS. ROBESON: Well, he can put it in the record.
MR. KLINE: Well, I have an expert land planner who is coming. I'm not going to be able to get that kind of testimony from anything other than Mr. Unterberg. If you don't feel --
MS. ROBESON: Well, Mr. Unterberg, do you know anything about this letter that you can add or subtract or you just -- no, no, don't hand it to me.
MR. KLINE: Okay.
MS. ROBESON: Do you know anything about this letter?
THE WITNESS: I know there's a -- it was a pre-preliminary plan and went to the Planning Board and I have not recently looked at it.
MR. HARRIS: And I think he said he had, didn't believe he had seen that letter before.
MR. KLINE: Yes, but I'm talking about the staff report.
MR. HARRIS: I understand. She asked about the letter, though.
MS. ROBESON: Well, the letter is in because nobody objected. What I'm talking about now is the staff

report and I don't see any purpose -- I mean you want to use it. If you want and have your witness come in and say this is what it says, that's fine. But I don't see any purpose of asking a person who knows nothing about that document what it says when I have no foundation that that document is what it is.

MR. KLINE: Okay.

MS. ROBESON: Yes, it's on letterhead, but I don't want to get this too, you know, your expert can look at the pre-preliminary plan file and say this is what I found there. So I don't see any point of cross-examination of asking him to read something that he knows nothing about or is not familiar with. He does know something about the pre-preliminary plan, but --

MR. CHEN: Well, counsel could offer the document. They may have to offer it in his case, which --

MS. ROBESON: Yes, but --

MR. CHEN: -- I understand, but he could offer it.

MR. ROBINS: He never testified to this topic.

MR. CHEN: No, I'm not saying this witness. I'm not saying this witness.

MR. ROBINS: Okay.

MR. CHEN: I'm saying --

MS. ROBESON: You're offering it for the applicant's intent as to why the 120,000 square feet got

there?

MR. KLINE: I was offering it to demonstrate that the applicants never expressed that it was entitled to be able to ask for 120,000 square feet.

MS. ROBESON: Yes and I think that's more appropriate for your land planner to bring in.

MR. KLINE: I'm beyond that now.

BY MR. KLINE:

Q I'll help you with the street name. We were talking about how we should be flexible in terms of interpreting the master plan and you were pointing out what is New Cut Road and the plan would have cut across an environmental area?

A Correct.

Q And Park and Planning agreed it could be terminated?

A Yes, now the plan has been approved.

Q And that was driven by the environmental sensitivity of the area?

A Partly and partly by the plan itself.

Q Would you elaborate on that, the last part? I understand the environmental part.

A Well, the, as the plan evolved, how this layout and this layout without the road, this combination, this is Stream Valley and that crossing was one of the, you know,

main reasons to not bring the road here.

Q And the proposal to terminate New Cut Road at the location on Broadway Avenue and not go through was mitigated by the applicant's proposal to make improvements to Old Baltimore Road to handle the traffic that would not be able to go straight through?

A Partially, although Old Baltimore Road is a master plan road and has a section that's being improved similar to 121 and then the internal streets, and particularly with the grid and the interconnectivity of the streets, that makes the plan work.

Q So what the Planning Board decided in not requiring New Cut Road to go through is there were other ways of accomplishing what the plan showed without having, doing any detriment to the intended plan which is moving traffic from the east to the west, is that correct?

A They made a finding that the plan and network would work as shown.

Q Thanks. There was a question dealing with a question of mine, dealing with page 46 of the master plan about retail in the town center.

MS. ROBESON: Well, wait. That's your cross-examination. We're going back to redirect.

MR. KLINE: Well, I'm sorry. A question was asked of Mr. Unterberg to give us some information about what's

going on in the town center.

MS. ROBESON: Oh, yes. That's true. Okay.

BY MR. KLINE:

Q And you weren't sure, but it was somewhere in the range, you thought, of 130 to 140,000 square feet. Is there any additional, well, first of all, what is that center? Didn't I hear you say it was a neighborhood-oriented center?

A I believe it's a neighborhood center with a grocery store.

Q Okay. All right. Does the town center have capacity for more retail development within, that are within the limits of the plan?

A That I do not know.

Q Okay. So if I look at page 46, doesn't the text on page 46 support paragraph 1, talk about commercial uses, 300,000 square feet and then basically talk below that about neighborhood retail uses and other uses?

A It does with the 150,000 square feet for the neighborhood retail.

Q Okay. And this sentence after that, additional square footage would be desirable and consistent with the plan?

A Okay.

Q So there could be, there will be, I'm sorry, there could be other retail uses outside of the retail center

proposed by Mr. Flanagan?
A That I do not know.
Q The plan allows for a square footage to accommodate if somebody wishes to do it, correct?
A Well, I think the only thing it would allow and I think what I saw was 130 to 140,000 square feet. And if you go down to the second bullet from the bottom, it talks about an actual square footage of retail, 150,000. So it could, you know, the difference between 40 and 130 and 140,000 to 150, that could happen.
Q But we still have in the fourth paragraph up to 300,000.
A This talks about --
MS. ROBESON: Well, I think the second bullet, just to speed this up, I think the second bullet refers to the retail center east of the historic district.
MR. KLINE: I would concur with that. That was the, I guess the orange box or triangle that was on the exhibit.
MS. ROBESON: Do you disagree with that, Mr. Unterberg?
THE WITNESS: Say that again.
MS. ROBESON: If the second bullet with the 150 refers to the retail center east of the historic district?
THE WITNESS: The second bullet from the bottom?

MS. ROBESON: Yes.
THE WITNESS: Okay.
MS. ROBESON: If you look at the top bullet, it says a retail center designate is proposed east of the historic tenant, the neighborhood. A maximum square footage, and then the second bullet says, a maximum square footage of the retail center is proposed up to 150,000. Because there, the whole text, well, I'm not going to get into the interpretation of the plan. But I don't think it's helpful to keep asking him what he thinks. At the end of the day, the plan speaks for itself and I know Mr. Chen is saying -- I just --
MR. KLINE: May I, or --
MS. ROBESON: If you're intended to say, to -- you're trying to find that the town center as opposed to this property specifically contemplated additional retail, correct, is that where you're going with this?
MR. KLINE: Yes.
MS. ROBESON: Okay. So I understand that. Mr. Unterberg, do you disagree with that, that there's explicit language in this plan authorizing additional retail in the town center that is not in the Cabin Branch section? You've testified that the Cabin Branch section is silent on additional retail --
THE WITNESS: Yes.

MS. ROBESON: -- other than the 120. Do you agree that this town center portion says there's 153,000 square feet of neighborhood retail, but there may be up to 300,000 square feet.
THE WITNESS: It does say that, but the only thing I'll add is the commercial, it says 300,000 of commercial uses --
MS. ROBESON: That's correct.
THE WITNESS: -- which is a broader range --
MS. ROBESON: Term than retail.
THE WITNESS: -- possibly, yes.
MS. ROBESON: Okay. Is retail a commercial use?
THE WITNESS: Retail is included as a commercial use.
MS. ROBESON: Okay. Go ahead, Mr. Kline.
MR. KLINE: And that does complete my questioning in that regard.
MS. ROBESON: Okay.
BY MR. KLINE:
Q But I believe your comment was that, or the question to you was how does specialty retail support residential and office? Can you elaborate on how that does, those two work together? Actually, you know, you may not have said office, you may have said road residential.
A Well, and I think I said it within the context of

Mr. Bogorad's --
MS. ROBESON: He did.
THE WITNESS: -- testimony.
MS. ROBESON: His opinion as a land planner was based on Mr. Bogorad's opinion.
BY MR. KLINE:
Q It's good to mix retail, residential and employment when we can do this, correct?
A Yes.
Q Okay. Is that necessarily true -- what are the benefits of mixing specialty retail, a regional outlet center with residential and employment?
A Excuse me for a second. Can you say that again?
MS. ROBESON: What are the benefits of mixing specialty retail with residential?
THE WITNESS: I think the benefits of a specialty retail is that it's going to happen soon and will happen based on the other testimony and whether or not the neighborhood retail, particularly a grocery store, will happen over a longer period of time or, frankly, not at all. And that speaks to the fact that getting something going at Cabin Branch sooner versus later helps the whole community.
BY MR. KLINE:
Q We both worked on the Wegman's case, correct?
A Correct.

Q Would you agree with me there's nothing in the Planning Board's decision that would suggest that there's any other grocery store anything like Wegman's that would be considered an employment use?
A I don't think it said it that way. They did make a finding that the retail within Seneca Meadows was employment use.
Q The retail or the Wegman's?
A The retail which includes Wegman's.
Q But it was the Wegman's that was driving that because Wegman's is very employment intensive because of the nature of the way it operates?
A They are the largest user, yes.
Q All right. And apropos that, when is the last time you designed a plan that had a 60,000 square foot grocery store in it?
A For Seneca Meadows or --
Q No, for any place.
A Offhand I don't know, but it's a number of years ago.
Q My question was relating to an answer about what was sort of the net after you got rid of the grocery store in Cabin Branch and 60,000 square foot grocery stores are not common any longer, are they?
A Not necessarily. I know, I believe the new Harris

Teeter that's being built is in that range.
Q And that would be the new Harris Teeter in what location?
A In Clarksburg Village in --
Q And --
A -- Clarksburg.
Q -- give us a number, how, what is the basis for your foundation of that answer?
A Well, I believe that store is 60,000, if not a little bit over 60,000 square feet.
Q Can you think of any other retail user that is as intense as a Wegman's store in terms of employees?
A If you go to larger retail, there's probably a few of them in there, yeah, there's a number of name brands out there.
Q Just give me an example.
A If you just, comparable to square foot, it's larger, Walmart or other stores like that.
Q So the fact that there's going to be a Wegman's and the Planning Board found that to be, have an employment benefit doesn't necessarily tell us that other retail or any retail, therefore, is an employment use, am I correct?
A Well, that retail at Seneca Meadows is a little over 200,000 square feet and Wegman's is 120,000 square feet. So approximately 80,000 square feet was included in

that finding, which is the other supporting.
Q Wegman's was the driving force in that, the Planning Board's conclusion, was it not, since we both sat there and listened to it?
A Wegman's was part of that. Whether it was a driving force, that --
Q It was certainly the dominate theme.
MS. ROBESON: Okay. Are you arguing --
THE WITNESS: I don't.
MS. ROBESON: -- or are you going to ask a question?
BY MR. KLINE:
Q Would you not agree with me that the Wegman's was the dominate feature both in terms of square footage, intensity of use and interest to the public in all of the retail that was going on in that location?
A It's definitely the largest and depending what the other use is, I'd speak to that once I know what the other uses are.
Q Well, sticking on my train of questions of large buildings --
MS. ROBESON: How many more questions do you have?
MR. KLINE: Probably three.
MS. ROBESON: Okay.
BY MR. KLINE:

Q I believe the question was asked could a Walmart have been, could a Walmart be constructed in Cabin Branch and as long as it's less than 120,000 square feet would be within, in accordance with the master plan?
A It would, hypothetically it would depend on, spoke to different locations of retail and different square footages. And depending what size and I know they're large, but I don't know the exact square footage of the Walmart offhand, if it fit within -- it wouldn't fit, in the four areas I described, it definitely, I presume it would not fit. I don't know if it would fit in the fourth --
MS. ROBESON: Well, you've got the 50,000 square foot limitation too.
THE WITNESS: Well, under the new proposal, the 50,000, and I know from testimony at the Planning Board that would preclude a Walmart from going to this site.
BY MR. KLINE:
Q What I was leading up to was, and wasn't even taking into account the 50,000 square foot limitation since I've raised a question about its validity, but aside from that, the Walmart, if it were to come, would have to go through site plan review, would it not?
A It would.
Q Okay. And a standard of site, the 59 D.3 site plan review, its consistency with the master plan?

A That is required.
Q Okay. So --
MR. HARRIS: Objection.
MS. ROBESON: Basis?
MR. HARRIS: The site plan, 59 D.3 does not require consistency with the master plan.
MS. ROBESON: Well, you don't have to argue, that's not a basis -- you can, that's not a basis for --
MR. HARRIS: I objected to the premise of his question. He asserted something --
MS. ROBESON: I understand.
MR. HARRIS: -- that's incorrect.
MS. ROBESON: I understand. I think 59 D.3 speaks for itself. And plus your witness said yes. So --
MR. HARRIS: It called for a legal conclusion --
MS. ROBESON: I understand that.
MR. ROBINS: You should be sitting over there to shut it up.
MS. ROBESON: I understand that and I definitely will refer to 59 D.3, so you don't have to pursue that line of questioning.
MR. HARRIS: The subdivision ordinance requires substantial conformance.
MS. ROBESON: I know that.
MR. HARRIS: There is nothing in the site plan

regulations that requires consistency or conformity.
MS. ROBESON: I haven't read those in a long time, but I will refer to them. Now, Mr. Kline --
MR. KLINE: Wrap it up.
MS. ROBESON: -- that's one question.
MR. KLINE: Okay.
MS. ROBESON: Do you have more?
BY MR. KLINE:
Q You mentioned an amphitheater. Do you anticipate that the amphitheater would be located in -- would it be located in a place that it would be neighborhood oriented?
A The, I think the ones discussed would be, which is shown as green space, it would be used both by the neighborhood and anyone that visits to the site.
MR. KLINE: Yes. I realize what I said, three questions. I had a series of questions all related to -- I'll reserve them because they are actually related to forest conservation, storm water management. I'll reserve that to the witness that I believe they're going to be calling on storm water management.
MS. ROBESON: Okay. But if your questions are on forest conservation, they should be directed to Mr. Unterberg.
MR. KLINE: Okay. Fine.
BY MR. KLINE:

Q If I understand your theory is that the area of the regional outlet center, it's certainly the subject of all this, is such that its development will not infringe on any of the areas already dedicated and shown on the forest conservation plan for whatever treatment are shown on the plan, am I correct in my understanding?
A Say that again as far as --
Q Sure. The -- whatever provisions existed in the forest conservation plan, when the regional outlet center is implemented, it will not infringe or encroach any of those forest conservation areas, so there is not an inconsistency between the applicant's development plan proposal and the final forest conservation plan you gave us?
A The development plan can be built with the approved forest conservation plan.
Q Okay. How frequently has the forest conservation plans been amended so far, preliminary or final?
A Well, with --
MS. ROBESON: I think --
THE WITNESS: It's noted on the plan, but primarily it's --
MR. KLINE: Just an order of magnitude, one --
THE WITNESS: Each site plan gets updated.
BY MR. KLINE:
Q So does that give us five times, 10 times? And

I -- go ahead.
A So far it's been updated nine times.
Q Okay. Thank you.
A There's no --
Q All right. What's been marked as Exhibit 95 shows on various pages storm water management facilities in conjunction with the forest conservation plan feature shown on each of the pages, correct?
A Storm water is shown on the pages.
Q Okay. And in many cases the storm water management feature shown in Exhibit 95 will not be built or implemented, correct?
A There's only two cases where those would not be built.
Q Okay. Tell me what that is.
A This is --
Q And, Mr. Unterberg, only in the area that we're talking about, in the retail outlet center, the total way over --
MS. ROBESON: Well, wait a minute.
MR. HARRIS: Wait a minute. This is going beyond my --
MS. ROBESON: The scope of --
MR. KLINE: Okay. I'll hold it until we get the storm water management expert in here.

MS. ROBESON: Okay.
MR. KLINE: I'm okay with that.
MS. ROBESON: If he does. He can rely on what's in the record now.
MR. CHEN: Well, if there's a plan in the record, how do I cross-examine him?
MR. KLINE: Can I explain what I'm trying to do here?
MS. ROBESON: Well, what I want to do is get through this witness. So --
MR. KLINE: All right.
MS. ROBESON: -- you can explain what you're trying to do --
MR. KLINE: Well, I'm actually, I thought, trying to be helpful so that we don't end up with this situation where we're screaming something different. Exhibit 95 shows storm water management facilities --
MS. ROBESON: Yes, it does.
MR. KLINE: Right.
MS. ROBESON: But he didn't testify on that.
MR. KLINE: Okay.
MS. ROBESON: And what I'm trying to do is I'm looking for the, I'm going to make the applicant put in everything that 59 D requires. So, and also we have a public interest standard. Okay. So 59 -- I'm looking at

the town center. Okay. Development program. That's not it. Basically you've got questions you want to ask about storm water management and how it's going to be accomplished?
MR. KLINE: I, actually my question relates to forest conservation, but to get the point, I have to ask a question on storm water management.
MS. ROBESON: Well, proffer what your relevance is.
MR. KLINE: I can do that, sure.
MS. ROBESON: Because he didn't, you're on recross now.
MR. KLINE: Yes, but --
MS. ROBESON: And he didn't testify to any of this?
MR. KLINE: No, but there was extensive examination of the forest conservation plan.
MR. CHEN: And it came in during his redirect. Exhibit --
MS. ROBESON: Okay.
MR. KLINE: All right.
MS. ROBESON: So what is your -- where are you going with this? Just tell me.
MR. KLINE: Where I'm going is that the forest conservation plan that you've got as Exhibit 95 cannot, will

not be implemented that way. It will have to be amended because of features that will be changed due to the changes in storm water management regulations.
MS. ROBESON: Okay. So --
MR. KLINE: And I want --
MS. ROBESON: -- my question is --
MR. KLINE: And I want him to explain why he doesn't, therefore, have a forest conservation plan --
MS. ROBESON: Okay. Well, that --
MR. KLINE: -- that explains --
MS. ROBESON: -- does go to my question.
MR. KLINE: That is my question.
MS. ROBESON: So, all right, go ahead.
MR. KLINE: Thank you.
MR. CHEN: And if the Examiner, please, the question that Mr. Harris put to this witness on, that goes right to this was does this DPA conform, that's the word they used, conform to the final conservation plan? And --
MS. ROBESON: Okay. That's fine.
MR. HARRIS: Yes, they said it does.
MS. ROBESON: So I'll let Mr. -- if Mr. Unterberg --
MR. HARRIS: They say --
MS. ROBESON: -- is qualified to answer, I'll let him answer your question.

MR. KLINE: Yes. I think I will stop at that point because if he says the forest conservation plan is, leaves him enough buildable area, I'll leave it at that and we'll just get it from another witness.
(Discussion off the record.)
MS. ROBESON: Well, that's up to you.
MR. KLINE: Okay. Well, then let me go ahead and ask the question and we can see if --
MS. ROBESON: That's what I would do.
MR. KLINE: -- they follow. Okay. Fine. All right.
BY MR. KLINE:
Q Mr. Unterberg, is it correct that the storm water management feature shown in Exhibit 95 are grandfathered under the changes to the state storm water management law?
A Which is Exhibit 95?
Q That would be the forest --
MS. ROBESON: That's the final forest --
MR. KLINE: -- conservation plan.
MS. ROBESON: -- conservation plan.
THE WITNESS: Okay, our new forest conservation.
MR. KLINE: Right.
MR. HARRIS: We've got it.
THE WITNESS: Everything is grandfathered for the storm water management, for the approvals May 3rd, except

for two ponds. There is Pond 12 and Pond 15.
BY MR. KLINE:
Q Are either one of those ponds within the area?
A Pond 12, Pond 12 is outside the area of A and we've been discussing that as the potential site for an amphitheater. It's generally in this light green area south of Area A and there's an OS label on it for open space. Pond 15 was shown in this general location which overlaps C and, again, part of the green space. Everything else has been approved and this exhibit which is 21H, Pond 11 has been approved and that is under construction. Pond 13 has been approved and permitted. Pond 1 has been approved and permitted and those are the specific ponds that overlap primarily with the 283 acres for MXPD.
Q Please help me understand what you just testified about in the statement of staff report. I'm looking at page 27 of the technical staff report, exhibit number, which I'm afraid I don't have, and I'm on page 27 up at the top. Everybody okay? Maybe two-thirds of the way down there's a description and a sentence beginning, overall of approximately 30 storm water plans, and then it talks about ponds, have been approved or permitted. The areas that have site plan approval receive permits on or before 2013 that are grandfathered under the old storm water management regulations. And my question is is the area within the

regional outlet center area the subject of a site plan, thus, storm water management is grandfathered?
A About half of it is grandfathered.
MS. ROBESON: Is this the one near the proposed amphitheater?
THE WITNESS: No, that is, that is, that's Pond 12. That is not approved and that will be, basically the amphitheater would be replaced in that pond. Pond 11, which is in this general location --
MR. HARRIS: Explain what location.
THE WITNESS: Which is south of Area A, just at about the end of Golden Eye, Pond 11 which is under construction, that covers the drainage area that roughly goes north to the property line and covers the area west. And that is grandfathered with the pond that's, well, under construction. The area, again with this line north/south, the area that's east along 270 is not grandfathered and will need to provide storm water management per the current regulations.
BY MR. KLINE:
Q And under the current regulations, you would be dealing with techniques different than what are shown in the forest conservation plan that we have as Exhibit 95?
MR. HARRIS: Madam Examiner, at this point I want to object again. We're getting into all this storm water

management issues that were not part of the redirect and I -- someone is off base here in terms of what even needs to be submitted in connection with a development plan.
MS. ROBESON: Okay.
MR. HARRIS: 59 D 1.3(g)(5) requires the general location of all onsite storm water management facilities.
MS. ROBESON: That's for the town sector homes.
MR. HARRIS: Oh, that is for the town --
MR. KLINE: Yes.
MR. HARRIS: I beg your pardon. You've made that mistake before and I fell in that same trap. Well, then I don't believe there is a requirement that you have a final storm water management plan submitted.
MS. ROBESON: Well, I am going to let him ask the questions and we can argue about it later, whether it's actually required or not. So can you continue, Mr. --
MR. KLINE: Sure. And --
MS. ROBESON: -- Kline?
MR. KLINE: -- again, I will kind of bring it to a higher level.
BY MR. KLINE:
Q And that is wouldn't the features that would be installed, storm water management features that would be installed under new storm water management regulations cause modifications to the forest conservation plan because of

different pattern of outfalls than what had been anticipated with the previous storm water management concept?
MS. ROBESON: If you know.
THE WITNESS: Well, I'm going to say not necessarily because I believe the, under the new regulations the development envelope that's shown, which is generally Area A, which is also consistent with the forest conservation plan, this can be built with storm water management within that developable area and within the limits of disturbance shown on the forest plan.
BY MR. KLINE:
Q But I am correct that EDS's, or environmental site design features, will have different transmission features that could conflict with the forest conservation plan approved that the applicant is relying on?
A Depending on, until we have a final plan, we won't know that. And yet if -- and that's why particularly with the site plan, with that detailed forest conservation plan is updated or reconciled and it would be minor changes, if any.
Q You're saying minor changes. Well, why do you say minor changes?
A Say that again. I was --
Q Yes. Why -- you used the phrase minor changes and how do you come to that conclusion?

A Well, there is, already there is a number of easements recorded in this general area which is the northern area of the Stream Valley. There's also a storm water management easement for Pond 11, storm water management easement for Pond 13. Those are all recorded with the County. They typically don't change.

This -- we will be doing ESD within this envelope which is also consistent with the envelope that's shown on the forest conservation plan and actually the forest conservation plan is more specific than the development plan. And I believe that, that development can be built with the appropriate storm water within that envelope and that limited disturbance shown.

Q In any of the nine modifications in the forest conservation plan you alluded to, have you changed the areas of the forest conservation plan, how they were going to be treated?

A There have been some instances, but those were for particularly storm water management ponds and the outfalls. Under the new requirements, we cannot do ponds. So those outfalls would be less likely to change.

Q So you're saying the outfalls for the approved storm water management plans which currently don't conflict or you've already taken into account conflicts with the forest conservation plan, you feel that the ESD measures

will basically fit within the constraints you've already established?

A Yes.

Q Won't the ESD features necessarily change the configuration of how you lay out the parking and the circulation within the regional outlet center and since I'm guessing these plans predate the change in the storm water management laws, are we going to be changing the building envelopes for those uses as well?

A They could change, but that typically is done at site plan with your final storm water management within that development envelope.

Q And that's when you would change the forest conservation plan as well to be consistent with that?

A If needed, yes.

MR. KLINE: No further questions.

MS. ROBESON: Okay. Mr. Chen.

MR. CHEN: That covered, I think, pretty much what I had and I can be short.

RECROSS EXAMINATION

BY MR. CHEN:

Q Mr. Unterberg, as I understand your testimony, Exhibit 95 you stated that the DPA conforms to Exhibit No. 95, is that right?

A I believe I stated that we would build the

development shown on the DPA within the parameters of the forest conservation plan on 95.

Q Well, what does within parameters mean?

A Well, it shows a disturbed area and a buildable area and we can build this development within that.

Q And are you representing to the Examiner that every page in Exhibit 95, and there are several pages that do say forest conservation plan, will not have to be changed in this document?

A Except that site plan, how this has gone forward, then we have a specific site plan, the Planning Board reconfirms the forest with those specific details.

Q What would cause a change at site?

A I don't know at this point. It depends on the plan.

MR. HARRIS: Madam Examiner, again, let's try and put this thing into context. The regulations require submission of a preliminary forest conservation plan at the time of a development plan. Even if you assume that that requires a preliminary forest conservation plan at the time of the development plan amendment, it's a preliminary plan. That plan will almost always change by the time the final forest conservation plan --

MS. ROBESON: So --

MR. HARRIS: -- is approved later.

MS. ROBESON: What is your objection?

MR. HARRIS: I object to the whole line of questioning. They're inferring, implying that we need to have a nailed down, unimmutable forest conservation --

MS. ROBESON: Okay.

MR. HARRIS: -- plan and that's not the requirement.

MR. CHEN: The --

MS. ROBESON: Well, no, that's legal argument that you can make. I'm going to let him continue his questions and we'll give it the weight it deserves depending on what the law says.

MR. CHEN: Counsel represented that we do not merely have a preliminary plan. He represented we have the final and this is what we got, that's how we got to Exhibit No. 95.

MS. ROBESON: Well, he testified that it's final, but it's amended at site plan as the development gets into that detail. Now I'm going to let you continue the questions you had.

MR. CHEN: Thank you. This is --

MS. ROBESON: And you can save that argument.

BY MR. CHEN:

Q Now are you saying then, therefore, sir, that there will be no change in the configuration of any

buildings that are represented on Exhibit No., I think it's 59, is that right?
MR. HARRIS: Objection.
MS. ROBESON: Your objection is noted.
THE WITNESS: I did not say that.
BY MR. CHEN:
Q Okay. What are you saying then?
A Is there a question?
Q You have just testified that at site plan there could be changes based upon forest regulations and standards and all I'm trying to get at is that going to have any possible impact on Exhibit 59 in showing the location of buildings?
A The, again, the development plan shows the location of buildings. It's noted that they're preliminary. And there's also a note that says at the site plan they will be subject to change, the site plan is one of the following steps that we'll --
Q You're --
A -- this is not the final location of buildings. This is the general location of buildings.
Q Well, okay.
MR. CHEN: Save for cross, Your Honor.
MS. ROBESON: What?
BY MR. CHEN:

Q Go to page, sheet 3, if you would, of Exhibit No. 95. Are you there? My, this is my copy, sir.
A Yes, she gave it to me.
Q Thank you.
MR. CHEN: Do you have it, Ms., Madam Examiner?
MS. ROBESON: Yes, I do.
MR. CHEN: Okay.
BY MR. CHEN:
Q As I understand, I could be mistaken, but when I'm trying to locate the Northern District or Area A and B, I'm looking at the areas on sheet 3 that are six, seven and eight, am I correct, and nine, am I correct, sir?
A Generally for the northern part of the property, yes.
Q Okay. And as I understand your testimony, because they're white, that you can build in those areas, that therefore for this development plan amendment there will be no need to change any of the sheets that are covering these particular areas?
A Say that again.
Q Yes. None of the shown forest conservation plans for those areas which covers, there's where the retail is going to be, are going to change?
A The developable area will not change and this will be updated at the site plan.

Q Yes, I know about the developable area. I'm talking about the approved forest conservation plan, though, sir. As I understand your representation because you've testified that this plan conforms or, excuse me, that the DPA conforms to this plan, as I understand what you're saying is, therefore, the forest conservation sheets that are approved, or 95, are not going to change?
A I did --
MR. HARRIS: He did not say that.
THE WITNESS: -- not say that.
BY MR. CHEN:
Q What are you saying then, sir, because you said it conforms. I'm just trying to get to what conforms meant.
A I said the developable area was generally what's in white on sheet 3, this, what's proposed can be built within that area. The individual sheets will be updated at site plan.
MS. ROBESON: Updated in what manner? What does that mean?
THE WITNESS: To reflect to the, to reflect the specific design of the site plan.
MS. ROBESON: And --
THE WITNESS: Building streets and so forth.
BY MR. CHEN:
Q Yes. What I think I now understand what you're

saying, the white areas indicate that construction can be built in that area, but you really don't know what's going to happen until their site planning?
A That's the process you go through --
Q Okay.
A -- with the site planning.
Q All right. Thank you.
MR. CHEN: I'm going to be short.
MS. ROBESON: Okay.
BY MR. CHEN:
Q Let's go back to Exhibit No. 86, which is a 2011 Clarksburg master plan amendment. Your counsel took you through this. I've got like one or two questions.
MS. ROBESON: Okay.
BY MR. CHEN:
Q Would you please, sir, go to page 10? Now as I recollect, counsel took you through this and you testified that the thrust of this, maybe that's my word, but I think it's accurate, that this particular master plan amendment was very narrow, in fact, you've encountered a number of words that were affected by it, do you recall that testimony?
A I do.
Q Okay. Looking at page 10, do you see the paragraph at the top that has got the bold labeled, council

directive?
A Bear with me a moment. I think I buried, buried that in my pile.
Q Okay.
A Page 10?
Q Yes, sir.
A Okay.
Q Do you see the top label where, in bold that says counsel directive?
A Yes.
Q Do you see the paragraph right under it?
A Okay.
Q Could you please read the final sentence where it begins, the following?
A The following factors were considered in preparing the amendment.
Q Okay. And then would you then drop down please to the next to last bullet? Read that.
A Whether to allow a grocery store and potentially ancillary uses outside the town center, brands in the village center, brands to proceed.
Q So that -- what this document is stating is at the time that it was being considered, the master plan was being prepared, one of the considerations it took into account was whether to continue to allow a grocery store in the village

centers, is that right, sir?
A It says they were considered.
Q Okay. And upon, or at the time of the adoption and approval of the 2011 master plan amendment, there was no change to the master plan as to grocery store, particularly a grocery store in the Cabin Branch community, isn't that right?
A Say that again. You're saying that --
Q Yes. At the time the 2011 master plan amendment was approved and adopted, there was no change to the provisions for a grocery store in the Cabin Branch community in the underlying Clarksburg master plan?
A Okay. That sounds right.
MR. CHEN: What is your next exhibit number?
MS. ROBESON: It is 98. Oh, no, 97.
MR. CHEN: 98 is the current one?
MS. ROBESON: Seven. Seven, 97.
MR. HARRIS: I beg your pardon, what was 96, ma'am?
MS. ROBESON: 96, Planning Board opinion approving Cabin Branch preliminary plan.
MR. HARRIS: Okay. Thank you.
MR. KLINE: While we're doing this, could I borrow Exhibit 96 from you and I'll take that at lunch --
MR. HARRIS: This is already in the record.

MR. CHEN: Is it?
MR. HARRIS: It's already --
MR. CHEN: It's part of?
MR. HARRIS: It's part of the technical appendix, 60C.
MR. CHEN: Yes, I understand.
MS. ROBESON: Well, I tell you what, I don't, I can't find it at the moment. I would prefer not to have it going out, so we'll make copies.
MR. KLINE: I'll get it from your staff.
MS. ROBESON: No, we can make copies at lunchtime. I'll try to.
MR. KLINE: Okay. Not a problem.
MS. ROBESON: Okay. So this is 97 and what do you call this?
MR. HARRIS: I don't think we need a new exhibit. It's page 12 of Exhibit 60.
MR. CHEN: I want to focus on this and make it a separate exhibit and ask the witness a question.
MR. HARRIS: Well, I would like the whole thing put in then.
MR. CHEN: It is. The whole thing is in already.
MR. HARRIS: Then why are you submitting a duplicate exhibit?
MR. CHEN: Because I want to --

MS. ROBESON: He's going to refer to it, so let's admit is as --
MR. HARRIS: Okay.
MS. ROBESON: -- a separate exhibit. And this is page 12 of the technical appendix of the master plan.
MR. CHEN: Right.
(Exhibit No. 97 was marked for identification.)
BY MR. CHEN:
Q Mr. Unterberg, I'm just showing you Exhibit No. 97. Do you see it, sir?
A Yes.
Q Do you see the section in the middle of the page in bold saying, neighborhood retail centers?
A I do.
Q Okay. And following that is a paragraph, isn't that right, sir?
A Yes.
Q And that does describe what is under this master plan, a neighborhood retail center, isn't that right?
A It discusses neighborhood retail centers.
Q Fine. Thank you. Mr. Harris took you through this process of how you got to the amount of retail square footage for the DPA. This will be like one question. He referred and you referred to Section 59 C-10.2.2, the

optional method under the RMX zone, is that right, sir?
A That is correct.
Q Now as I understand that provision, it provides for numerical limitations, is that right?
A It says numerical, yes.
Q And as I understand your computations, you use, in order to determine the amount of retail square footage being proposed by this DPA, you utilize as your numerical limitation the 120,000 square feet provided for in the Clarksburg master plan, is that right?
A Rephrase that or restate that.
Q Well, okay. Where did you get the numerical limitation that is provided for in Section 59 C-10.2.2?
A For this DPA, we were proceeding with MXPD and RMX does not apply.
Q No, no, no, no, no. You testified that you made a computation to get up to 484,000 square feet of retail for this DPA, isn't that correct?
A Correct, to get 20 percent of the total commercial.
Q Right. Now, but I thought I heard you testify a little bit ago was that in order to utilize that computation, you went to 59 C-10.2.2, is that right?
MR. HARRIS: Objection.
MS. ROBESON: Well, let him answer if it's right

or wrong.
MR. CHEN: Yes, if he didn't, yes.
THE WITNESS: I don't believe I did.
MR. CHEN: Fine. Okay. The record will speak for itself. That's all I've got.
MS. ROBESON: Okay.
MR. HARRIS: May I ask --
MS. ROBESON: That --
MS. ROBERTS: -- ask a few follow-up questions?
MS. ROBESON: No. You have rebuttal and we don't --
MR. HARRIS: Okay.
MS. ROBESON: -- usually give re, re --
MR. HARRIS: Okay.
MS. ROBESON: -- redirect. We're going to break. How many more witnesses do you have, Mr. Harris?
MR. HARRIS: I'm not sure. We have to --
MS. ROBESON: Again, you have --
MR. HARRIS: -- just a couple.
MS. ROBESON: Okay. All right. So possibly one more?
MR. HARRIS: Possibly one more, possibly two, but probably only one more.
MS. ROBESON: Okay. How many witnesses do you have, Mr. Kline?

MR. KLINE: Mr. Salt has already testified and Mr. Ferguson would be the only witness I have.
MS. ROBESON: Okay. Mr. Chen, how many witnesses do you have?
MR. CHEN: Mr. Noonan.
MS. ROBESON: Mr. Noonan?
MR. CHEN: Ready to go today.
MS. ROBESON: Ready to go today. Okay.
MR. CHEN: After they close.
MS. ROBESON: No, I understood that. I understand that and that's fine. I -- just one housekeeping matter. Mr. Kline, on your legal motion --
MR. KLINE: Yes.
MS. ROBESON: -- about the ability to implement the 50,000 foot condition, I am going to refer that to Ms. Susan Scaladendi (phonetic sp.) --
MR. KLINE: That's fine.
MS. ROBESON: -- who would be the person at --
MR. KLINE: That's fine.
MS. ROBESON: -- DPS in charge of that issue and get her comments. I'm going to ask for her written comments on it. And you will all be cc'd on the letter to her.
MR. KLINE: That would be fine. Could I ask for this modification? You brought up a provision in the ordinance that you said another hearing examiner had used,

the stipulation --
MS. ROBESON: Yes.
MR. KLINE: -- the finding stipulation. I have been in the process of doing a supplement to my memorandum of law. I'd like to finish that. I couldn't get it done yesterday. I'd like to finish that, give that to everybody and then have you ship both of them over to Ms. Scaladendi.
MS. ROBESON: My only problem with that is when we are, how are we going to finish this case? Well, we'll probably end up leaving the record open after the 12th anyway because most people in a case like this prefer to have the transcript before they do any kind of closing statements, unless you want to waive that.
MR. KLINE: In this case that's fine.
MR. HARRIS: I was hoping to do closing statements after the last witness and do them orally so that we can move this case along.
MS. ROBESON: Well, I need to, what I need to do is call Ms. Scaladendi --
MR. KLINE: Yes.
MS. ROBESON: -- and see what is a reasonable time frame for her to respond --
MR. KLINE: I --
MS. ROBESON: -- because I don't want to rule on that without some input from DPS.

MR. KLINE: I understand your timing issue. If you could just give me until close of business Monday, I can have it here by then.

MS. ROBESON: Well, okay. Let me think about that because I, there's some other things I want to make sure we get cleared up in the record. So let me reserve on that and I'd like to call Ms. Scaladendi and see if there's anything that would prohibit her from looking at it within this reasonable time frame.

MR. KLINE: Sure.

MS. ROBESON: I am going to, I'm not going to discuss the substance of the memo or if you prefer me, I'll put the whole thing in writing to her, but I'm going to put it in today and I can alert her that there's a supplement coming.

MR. KLINE: You know what, my supplement, now that I think about it, probably doesn't deal with -- no, I take that back, it does, yes. Okay.

MS. ROBESON: So what I'm going to do is refer it to her today, advise her that there's a supplement coming and ask her in writing when she can respond. And did you have a response --

MR. HARRIS: I did not. I was going to --

MS. ROBESON: -- that you would like to go to her as --

MR. HARRIS: I have prepared a response. I was going to submit it today now, but now that Mr. Kline says he wants to extend it, I can reply briefly orally right now, first, and I can submit mine, but then, you know, I would like a chance to reply to his supplemental, so I don't know if that's the best way to do it. I think we're off on another tangent here. It's not just a question of whether DPS can count square feet which, by the way, I believe they can and I believe they do, but rather whether there is any mechanism in the post-development plan process by which that can be done and I believe there are multiple ones. The site plan process at Park and Planning is the most specific.

MR. KLINE: Which is the subject of my supplemental memo.

MR. HARRIS: Mr. Kline's case, the Butz property, there is a requirement, a binding element in there that the impervious area will be limited to X percent. I think it's 23 percent. Now, clearly, that binding element has to be enforceable or Mr. Kline was not, you know, playing fair with the Hearing Examiner in that one. If you can measure, if DPS or other bodies can measure impervious area on a 50-acre tract or whatever it was, they sure as heck can measure the square footage of a store. It is far easier to measure the square footage of a store than the impervious area.

I would add further that the zoning ordinance has

in it a definition for combined retail stores, that it has a square footage component in it. So clearly the zoning ordinance recognizes that there are post-approval processes for measuring square footage and making sure whether something does conform with the zoning ordinance or not. It's just, I mean we're, so many things in this case are taking us so far afield from what the issues are here and it gets frustrating to many of us, I guess, but I'll submit my memo today. I'll submit it now and, you know, but I think the question is more than just Susan Scaladendi. I think you can answer the question that square feet can be counted.

MS. ROBESON: Well, my position is more that if they have to be counted, they will be counted whether there's a set process for it or not. But because I would like her input if there really is some absolute prohibition on it, out of an abundance of caution before we go to the Council, I would like to have the bases covered. I do know personally, well, not personally, from being a Hearing Examiner, cases where they have had to measure square footage and they measure square footage for parking.

But I would like her input because this is such a large use. I'm going to ask her input in writing. Now if you want to, what I'm going to do is I'm going to submit his original memo today and if you have a response, I'll submit that to, over to her. I'm going to give you the opportunity

to file a supplemental response on Monday and I'm going to give you the opportunity to file a response to that and you can both cc Ms. Scaladendi on the response.

MR. KLINE: Point of personal privilege, since my credibility has been drawn into question, if you'd talk to Mr. Grossman, if you'd talk to Ms. Carrier, this is not an issue that I'm raising for the first time. Whenever I have been instructed by my client to prepare binding elements, I have always tried to correlate them with the three standards that are for binding elements, use, staging and density or something. I can't remember now what it is. I don't even remember the binding element there. But this is a position I've taken for a long time and this is just a case where it really was ripe --

MS. ROBESON: I --

MR. KLINE: -- to bring it up.

MS. ROBESON: I'm aware of that.

MR. HARRIS: And I, on the other hand, have put in binding elements that have been accepted that go way beyond that.

MS. ROBESON: And actually the scope of the binding element has been at issue, you know, quite a bit, at least early on, but there's less a limitation on binding elements in schematic, no, in, I'm sorry, development plans than there is in schematic development plans. I think the

provision is broader in a development plan than it is in a schematic development plan.
MR. KLINE: Well, I know it's been suggested, and I'm not right about anything, but the only time you see the word binding element in 59 D-1 is in the context of a schematic development plan.
MS. ROBESON: That's correct, but it's kind of like it has become known as a, quote, binding element. It's, I think Ms. Carrier used to refer to it as textual binding elements.
MR. KLINE: Yes.
MS. ROBESON: Now it's become more binding elements in each case, but I don't think the nomenclature defines legally what it is. But I'm going to let you make your argument --
MR. KLINE: Sure.
MS. ROBESON: -- and I am going to refer it to Ms. Scaladendi.
MR. KLINE: That's fine.
MS. ROBESON: So if you would kindly get your response to his initial memo in and then you can respond --
MR. KLINE: Respond.
MS. ROBESON: -- and I'm going to refer both your initial memo and your response to her -- when do you think you can get your response in?

MR. HARRIS: Five minutes.
MS. ROBESON: That's fine. And so I'll do it by close of business, all right? So we're going to take an hour break for lunch and we will return possibly with a witness from the applicant and, if not, Mr. Chen or Mr. --
MR. HARRIS: I --
MS. ROBESON: -- do you want to go first?
(Discussion off the record.)
MS. ROBESON: Then we'll go with Mr. Chen. So we're adjourned until 2:15.
MR. KLINE: If I might, I just, I have confirmed that I can't go beyond 5 o'clock today and --
MS. ROBESON: Do you wish to put your witness on first?
MR. KLINE: He's not here. And the way we structured everything, Mr. Chen was going to go first.
MS. ROBESON: Okay.
MR. KLINE: I mean we're --
MS. ROBESON: Well, I can't control the cross-examination.
MR. KLINE: Oh, no, I understand that. I understood. Apparently the 12th -- I'm just saying that I can only go until 5 o'clock today.
MS. ROBESON: I see.
MR. KLINE: I'm certainly -- everybody on our side

is available on the 12th.
MS. ROBESON: Well, the other -- we do have the 12th and if we need to, I'll see about a Saturday hearing, although that's not something I want to encourage.
MR. HARRIS: I want to get it done. I'll go with Saturday, Sunday, whatever.
MS. ROBESON: So I did check.
MR. KLINE: We'll come to Columbia.
MS. ROBESON: I did check. We have the capability to do Saturday hearings, so -- all right. With that, we're adjourned until 2:15. Oh, you want to --
MR. HARRIS: Less than five minutes.
MS. ROBESON: -- submit it on the record?
MR. HARRIS: Less than five minutes, yes.
MS. ROBESON: I'll mark this as Exhibit 98, which is response to, 98 is memorandum of law submitted responding to, I don't know, legal arguments contained in exhibit, whatever exhibit --
MR. HARRIS: Yes, it's dated today.
MR. CHEN: Why don't you just put Harris memo of 9 --
MS. ROBESON: I like that a lot better.
(Exhibit No. 98 was marked for identification.)
MR. ROBINS: Is Mr. Unterberg excused?

MS. ROBESON: What? I'm sorry?
MR. ROBINS: Is Mr. Unterberg excused?
MS. ROBESON: Yes. He can go have a drink or something.
MR. ROBINS: Well, he may still be around.
MS. ROBESON: Okay. So now we are continued until 2:15 and we're off the record.
(Recess.)
MS. ROBESON: We're going to decide whether to put on another witness.
MR. HARRIS: Yes. And this will require a little discussion here. I'll start out --
MS. ROBESON: Why doesn't that surprise me?
MR. HARRIS: Exactly. From the outset, we did not believe that either forest conservation or storm water management were issues in this case given the advanced development state of the property and the advanced level of those approvals. I won't get into the reasons, while I still think they're not issues, but nonetheless we have a problem going forward today.
We, to the extent any issue was going to come up on those issues, we expected it weeks ago given that this hearing started in July and so we had Mr. Bassong and Mr. Rude on call for pretty much any hearing date in August. Well, now that we're into September, Mr. Bassong in

particular had a long, previously scheduled two-week vacation which is, we're in the middle of that right now. So Mr. Bassong is not available today and Mr. Rude is on another project as well, so not available.

We heard concern from the opposition that they think those are relevant issues, even if I don't, and that they want to cross-examine someone on those issues other than Mr. Unterberg. I sensed as well that you would like the record to reflect however we're dealing with that. And so we're willing to do that, we just can't do it today.

That leaves us with several options and I'll suggest what I believe to be the preferred option. I think we can go forward with Mr. Noonan today and Mr. Ferguson, if he's available today, and I assume he is, recognizing that the opposition may need to recall them after Mr. Bassong and Mr. Rude testify, although neither of them is an expert in the areas of storm water management or forest conservation and so I don't think they would need to come back. I don't think their testimony relates to that.

We would -- since we have September 12th already scheduled, even though Mr. Bassong will not be available, there are other engineers at Rogers Consulting, his firm, Mr. Unterberg's firm, that could testify. No, we did not identify a different one from Rogers in our prehearing statement because we didn't think we would need that. So if

the opposition were -- if you were agreeable and perhaps if the opposition were agreeable as well that we could substitute someone else for Mr. Bassong, we could bring that person in and Mr. Rude in on September 12th to address those discreet issues and only those issues and then use the remainder of the time today, 2 1/2 hours or whatever it is, to, we probably wouldn't get past Mr. Noonan, so probably Mr. Ferguson would be up on the 12th as well and he could go after Mr. Bassong and Mr. Rude. So that's my suggestion.

MS. ROBESON: Mr. Chen and Mr. -- Mr. Chen or Mr. Kline?

MR. KLINE: Well, I use the term in terms of substitution of replacement of experts as being, they are fungible in many ways. They probably would object to that characterization, but I have no problem with replacing -- I'm sure Rogers has more than other adequate people and I can't imagine why we would have any worry about their expert credentials at all. So I have no problem with that proposal.

MS. ROBESON: Okay. Mr. Chen?

MR. CHEN: No.

MS. ROBESON: Certainly. Are those the copies? Can you just hand me the original, Mr. Unterberg? Thank you.

MR. HARRIS: Thank you.

MR. CHEN: I call Mr. Noonan.

MR. HARRIS: Okay. Thank you, gentlemen.

UNIDENTIFIED SPEAKER: Thank you.

MS. ROBESON: Okay. Thank you. Please -- I'll let you put those books down before I ask you --

MR. NOONAN: Thank you.

MS. ROBESON: -- to raise your right hand. Please raise your right hand.

(Witness sworn.)

MS. ROBESON: Thank you. Mr. Chen.

MR. CHEN: Thank you very much.

DIRECT EXAMINATION

BY MR. CHEN:

Q Sir, could you give the Examiner your full name and address?

A My name is James Noonan. I'm at Storm Environmental at 10245 Old Columbia Road in Columbia, Maryland.

Q What's your occupation?

A I'm director of planning at Storm Environmental and I'm a certified planning in AICP since 2007. I've worked for 40 years in planning.

Q You previously testified as an expert witness as a planning?

A Yes. Most recently, I guess, in Harford County in

a variety of different cases you and I can understand, but dealing with rezoning of properties mostly in the growth area of different residential densities and consistent with the current zoning pattern there. There was one commercial rezoning at, just outside of the growth area in northern Harford County as well. That was the most recent.

Q Have you ever testified before the Office of Zoning and Administrative Hearings in Montgomery County?

A No, I have not.

MR. CHEN: Madam Examiner, I submitted pursuant to a letter of August 27, 2013, Exhibit 71, a biographical statement of Mr. Noonan and he can orally elaborate on that, but it was a pretty extensive biographical sketch giving his background, his education and experience. Mr. Woodcott (phonetic sp.) would offer him as an expert in the area of land planning.

MS. ROBESON: Land planning?

MR. CHEN: Yes.

MS. ROBESON: Okay. Any objections?

MR. HARRIS: I would like to have voir dire, if I may please?

VOIR DIRE EXAMINATION

BY MR. HARRIS:

Q Mr. Noonan, I don't know if I met you before, I did a lot of work with --

A I think we did.
Q -- the planning before, so I'm sure we did with Robert Brightner --
A Robert Brightner.
Q Exactly right, yes. Thank you for remembering, indeed. I know he spent a lot of time with that.
A I have your business card.
Q Okay. There we go. We go way back and didn't know it.
A Yes, didn't know it.
Q I didn't notice on your resume whether, where you went to school and what degrees you have.
A Oh, okay. It should have been on there. I went to the University of Maryland, graduated in 1972 with a degree in geography. I graduated in 1978 with a master's degree in urban planning at Johns Hopkins University in Baltimore.
Q Okay. That does ring a bell now. I must have seen that somewhere. I didn't see it when I --
A It's in there.
Q Okay.
A It's probably not organized.
Q Okay. The -- when I go through your bio there, I see a lot of experience in terms of the state-wide planning policies on which you worked with the Office of Planning and

Department of Planning, public infrastructure planning and environmental assessments seems to be more of something that you're doing today --
A Today.
Q -- now, yes.
A Yes.
Q So that's the bulk of your career as a planner?
A Well, actually most of my early career was involved in working with, from the Department of Planning's perspective on the viewing of County water and sewage plans and amendments for consistency with local comprehensive plans. It's kind of interesting when you actually review a County document, usually a County document, and then you challenge them in terms of consistency with your own plans, but that was sort of my role. And those kind of comments and letters were advisory to the Maryland Department of Environment who then had approval or disapproval authority over whatever the amendment was.
I also worked for some time in local planning assistance and we actually, we had a staff of -- well, we had regional staff at a variety of locations around the state of Maryland who actually did local competence planning at some of the smaller municipalities and we would also do the state review of the County plans we were provided. One of the reasons you don't see Montgomery County and places

like that in my resume that much is the County planning staffs were often bigger than the state's planning staff. So it's a little presumptuous sometimes for us to try to go in and do their local planning.
But in the sense, from a regulatory perspective, we did review proposed water and sewage amendments, and many in Montgomery County over the years, you know, for consistency with master plans like -- well, not Clarksburg so much because water and sewage services were more recent than my state service actually, but various issues across, well, across the state and Montgomery County as well.
Q Okay. I remember some of that. I didn't see anything in your resume relating to serving as a planner in the private sector to plan a specialty retail or a mixed use employment center such as we're proposing here, am I correct in concluding that?
A I think that's my correct. My experience with the private sector is in writing actual ordinances and helping to write comprehensive plans, master plans.
Q Okay. And you're also, I assume, not holding yourself out as an expert in terms of the development of those facilities? You haven't built or operated or --
A No.
Q -- any of those kind of things? How about the Montgomery County zoning ordinance, again, I know you've

operated at a state level more often. I don't -- I'm going to jump to a conclusion that you wouldn't hold yourself out as an expert on the Montgomery County zoning ordinance, even though you are holding yourself out as an expert as a planning, planner?
A I believe I have expertise in terms of rating and interpreting zoning ordinances because I've worked with them for 30 years or 40 years and have had to write some. I have to admit, though, Montgomery County's process and ordinances are pretty complex, you know, but the bottom line is I think that any certified planner with a, the amount of experience I have is capable of sitting down and making, and reading those things and providing a decent level of interpretation of those.
Quite frankly, what I've been asked to do does not parse the language of the zoning ordinance so much is to look at the proposed development plan amendment in this case in terms of its consistency with the vision and policies of the master plan, which I think I am qualified to do.
Q Okay. Final question on the zoning ordinance then, so you've sat here really the whole hearing, I think, and you've heard --
A I might be an expert just --
Q Yes, you've heard more debate than you wanted about the difference between the zones. I'm assuming that

was more or less your first exposure to the inner-workings of the MXPD zone versus the RMX zone?
A Yes. You know, I've seen some of the language before, but I couldn't even tell you a project. So I mean I'm not even going to argue on that point. I think the details of the MXPD zone in terms of the specific details, I'm probably -- what I know is what I've read in preparation for this case. I think that's --
Q Okay. That's fine.
A -- you know.
Q And a similar question with respect to the Clarksburg master plan. Again, you're operating at a state level.
A Uh-huh.
Q I see your master plan isn't dog-eared like mine. I'm assuming that you're a relatively recent reader of that plan?
A Yes, I think it's fair to say that I'm coming in without a bone to pick and hopefully with some fresh eyes, if that's fair.
MS. ROBESON: Are you objecting to his qualification as a land planner?
MR. HARRIS: No, I'm -- no, no, I'm trying to understand how broad his qualification is is all I -- no, I have no objection to him being admitted as an expert in land

planning, I just wanted to determine whether they were going to be offering him as an expert in particularly the Montgomery County zoning ordinance and/or the Clarksburg master plan and I'm hearing that it is not the case.
MS. ROBESON: All right.
MR. CHEN: But he will be, he is going to be offered and he is offered as an expert with regard to the proposal, the DPA, and how it complies with the requirements --
MS. ROBESON: Yes. I --
MR. CHEN: -- of the Clarksburg master plan.
THE WITNESS: Yes.
MS. ROBESON: And we don't typically, we do have land planners come in and interpret or say, yes, it complies or, no, it doesn't comply. So I guess I'm not going to qualify his qualifications, no, qualify his expertise in that way. He is a land planner. I think what you voir dired him on is relevant more in cross-examination as to the weight of the testimony. But he did testify that he has examined numerous zoning ordinances and I'm not going to qualify him, say exclude his opinions on that basis.
MR. HARRIS: I don't -- I would not, I was not planning on objecting to him offering his opinions. I think it goes to the merit, to the weight of his opinions on --
MS. ROBESON: That's --

MR. HARRIS: -- those topics.
MS. ROBESON: Well, that's for you -- I understand and I'll let your questions in for that reason --
MR. HARRIS: Okay.
MS. ROBESON: -- without making that. Okay.
MR. HARRIS: Fine.
MS. ROBESON: So he is qualified. I assume you have no objections, Mr. Kline?
MR. KLINE: I have no objections.
MS. ROBESON: So he is qualified as an expert in land planning. Mr. Chen.
MR. CHEN: Thank you very much. If I may?
BY MR. CHEN:
Q Mr. Noonan, have you had an opportunity to closely review the master plan for the Clarksburg property? It is the Clarksburg master plan, Hyattstown special study area?
A Yes, I have.
Q Okay. I'll refer to it as I have before as the Clarksburg plan or the master plan. You've also reviewed the 2011 amendment to it, is that correct, sir?
A Yes, I have.
Q And you have also reviewed certain documents that are part of the development plan amendment that is pending before the District Council?
A Yes, sir.

Q Okay. And you also sat in on, every day of hearing thus far, is that correct?
A Yes, I have.
Q Okay. Now based upon your view of the requirements or the provisions of the Clarksburg master plan and, by the way, let me back up here, would you just briefly note the material that you have reviewed relative to the DPA?
A Okay. I've reviewed the master plan, as we've said, and its amendment. I have reviewed the development plan amendment proposal, that's not the correct word for it, the justification statement, development plan amendment. I've also reviewed the staff report dated, I have several other piles of paper, dated July 8, 2013, on the development plan amendment. And I've also had reason, due to follow-up testimony, other things to look at, various other documents related to the MXPD zone and the RMX zone, yet I'm not, you know, as fast as others on some of the background, but I've read those documents as well, as well as the, looked at, at the presentation materials prepared by the applicant, Cabin Branch.
Q That includes what has been identified as Exhibit No. 45?
A Yes. That's the slide presentation, yes.
Q Yes, sir. And as I think I've noted, or both of

us, you've listened to the testimony presented by the applicant in support of the application, is that correct?

A Yes, that's correct.

Q Okay. Now based upon all the foregoing, have you an opinion as to whether the proposed development plan amendment is, substantially complies with the Clarksburg master plan? That only calls for a yes or no answer.

A No, it does not comply.

Q Okay. Could you explain why?

A Yes. It's somewhat of an elaborate explanation. I think there's been a lot of discussion about various nuances and various aspects of the proposal. What I'd kind of like to do in explaining why I came to that conclusion is to go and refer to the specific language that's actually in the master plan. I think the development plan amendment is inconsistent on two levels.

The first level is it's inconsistent because it, essentially it sets up a competing center for urban activities and center for activities in the town to the town center district. And, second, it's inconsistent with specific requirements of the Cabin Branch neighborhood plan in the document. I'd like to go through those reasons in a little bit more detail.

Q Okay. Please do.

A Okay. First of all, I'd like to kind of start

with a division and one of the reasons, and I, on the first day we heard testimony from, from citizens both for and against the development plan amendment. But in particular, against, there was a lot of concern about setting up a competing retail center and activity center and center for urban development and activity in competition with the master plan amendment. And you really have to think a little bit about why that's a problem, why that is even an issue because, quite frankly, looking at the proposal when I first got it from Mr. Chen, you know, I looked at it and I said, well, it seems to be pretty high-quality development proposal, it's in the overall development planning district, why is that a problem?

And then I started to, you know, at his request started to read the master plan. And I just want to go through some of the language in a little bit different order. You've seen it all before, heard it all before. But I wanted to go through it a little bit different in order to try to put it in context about why I came to the conclusion I came to, which was a little different.

And really if you start off early in the plan, if you look at the proposed concept plan for Clarksburg as a whole, not just for Cabin Branch, you start seeing some key policies reflected there and I want, what I want to do is go through these and some of the broad policy statements for

the Clarksburg area as a whole, kind of lay out the key ones related to specialty retail and activity centers for the Clarksburg area and compare those policy statements to where they actually appear in the various sectors in the master plan, try to lay out, you know, why is a discussion about Clarksburg being a town at a larger scale than Germantown? You know, why is that discussion relevant to this development plan amendment and why is this plan amendment somehow inconsistent with that?

So if we look at the policies first on page 6, it's a concept plan for Clarksburg, and there are a lot here I'm not going to go through. I'm going to try to focus on, and actually, I think, three or four. And first is No. 1, that the plan envisions Clarksburg as a town. I think that's a key word because we're referring to its impact of the development plan amendment on the town center. Clarksburg is a town at a scale larger than proposed in the '68 master plan, but smaller than a corridor city such as Germantown, which is right down I-270 from this location.

In addition to that, it says the plan proposes a comprehensive transit system and reduced dependency on the automobile and I'll get into why that's important a little later. The plan proposes a transit-oriented, multi-use town center which is compatible with the scale and character of the Clarksburg historic district, which is another

component. And, finally, the plan emphasizes, excuse me, not finally, the plan clusters development into series of transit and pedestrian-oriented neighborhoods. It kind of starts laying out what's to happen in the town center, what's to happen in the various areas around the town center.

And then, finally, the plan emphasizes the importance of I-270 as a high technology corridor for Montgomery County and the region, and preserves key sites adjacent to I-270 for future employment options. And a lot of that policy relates directly to the development plan amendment.

So you look at those six things and you go, then you look at Policy 1, the town scale of development and what does that mean. And it includes the historic district as a key component of expanding town center. It kind of implies that that's, doesn't apply to states, that that's where the center is going to be. Balances and need for higher density for transit need to protect the area's environmental resources which is an important component. Then strives to maintain an identity from Clarksburg separate from Germantown or Damascus. And then recognizes the importance of civic space and some public uses as to the development of a town concept.

And, again, what I want to do is to go through

these things and then point out where in the remainder of the document when we talk about the specific development areas in the town, in the land use plan part of the master plan, about where those policy statements exist in the -- and how they're used. So if we do that and we go over to the town center discussion which begins on page 42, and the town center is a fairly large district, it's not the largest in the planning area, 635 acres.

What are the plan objectives for the town center analysis area? And right away you start, it says to create a town center, which will be a strong, central focus for the entire study area. So right away, you know, the first element in the town scale of development and the first element of the proposed concept plan for Clarksburg focuses on what's going to happen at the town center.

Now thinking about other -- Clarksburg in general is, it's almost -- when the 1994 plan was written, it was almost no complaint. There's the historic district and then there's a lot of open area around it. I mean it's like we get that from the zoning document here. You can, you know, you can read that pretty clearly here.

So what we're looking at here is a planning document that's laying out a very long-term future for a total, new development and what is it going to look at. And I look at, I think of something that happened 20 years prior

to this one which was Columbia, for example, it had a defined town center and it had defined neighborhoods around it. I'm not going to compare the two because they were planned in two different times and the rules are different and everything else, but the concept there is a hierarchy of places, focusing on the town center as the strong, central focus for the entire study area and supported by a number of residential neighborhoods around it with the added little, not so little, but the added complication and mix in here of a transit corridor in there that the town center is supposed to be in place to accommodate and utilize. And also I-270 is a major transportation hub. Those two things can do, to alter the traditional look of a town center surrounded by small neighborhoods and the location of those two transit functions means that there are certain, going to be certain other employment nodes or locations of high density that aren't in sort of an open plan with a concentric circle in a town development. But at least at the very start, the plan says create a town center. It has a strong, central focus for the entire study area.

The next one I wanted to look at is encourage the mixed use development pattern of the town so it help create a lively and diverse place. Now that says more than what is said in a lot of the neighborhood centers in that what's envisioned in the town center then becomes a center of

activity for the whole planning area developed in the master plan, and maybe even outside of it to draw people in to look at the, mostly the historic center, but also other retail and commercial and activity uses, civic uses in the Clarksburg area that are envisioned for the area. And actually they went to the bother of actually putting on paper an illustrative sketch of what the planners in 1994 thought the Clarksburg area was going to be looking at.

Q Is that Figure 20 you're referring to?

A That is Figure 20 on page 45.

Q Is that the one with the amphitheater down in the lower, left-hand corner?

A Yeah, there is something there, I think it's an amphitheater. And what the illustrative sketch demonstrates here is it's a fairly large, residential neighborhood with a neighborhood center, this is actually described in the text, surrounded -- on the one side of the historic district and the other side of the district is enough density and employment and retail services to support a transit center actually, which is actually a much higher density and much more intensive use because you have to justify ridership on a continuing basis to actually get the start-ups for, to get that kind of transit in place.

So the vision here is not only just that the town center is going to be one of the neighborhoods, but it's

going to be a center of activity and it's going to hide the density of mix of uses to support a transit use there. So, and I believe that actually shows up in another -- oh, here it is. Create a transit-oriented land use pattern within the town center, this is on page 51, and link all portions of the town center with transit ways, bus ways and bike ways, and pedestrian-oriented streets. So it's got an emphasis here that Clarksburg is going to be the center of activity for the planning area.

Another policy that was in the --

MS. ROBESON: You mean the town center is going to be the --

THE WITNESS: What did I say?

MS. ROBESON: You --

THE WITNESS: Well, actually the town center is going to be the center of activity for the whole planning area.

MS. ROBESON: Right.

THE WITNESS: I hope that's the point we're making. It also talks about reinforcing the concept of I-270 as a high-tech employment corridor by a designated, suitable site near I-270 for employment use. That's actually a policy that's going to appear again in relation to the Cabin Branch development. So we see here that four of the, the four major proposed concept plans for Clarksburg

actually appear in the planning document as something that should occur in the town center.

The reason I thought the town center illustrative sketch was kind of interesting and Mr. Chen was kind of leading me there, he pointed out the civic uses in this location. You know, again, it's part of the overall vision from what Clarksburg is going to be. This is the area where the activities, you know, the nighttime acuities, and then the other kind of things that makes a viable center for a region, for an area. This is where the master plan envisions those centers to be occurring. And I'll contrast that in a little while with the use of the word civic uses as they relate to the neighborhood uses at a different scale.

Getting ahead of myself a little bit, one of the things that is fascinating about the Cabin Branch development plan amendment is many of, even though the layout is different because of the geography, many of the activities that you would associate with a town center, including restaurants drawing nighttime activity, some of the employment uses, some of the civic uses like the amphitheater that was just mentioned, also appear on the development sketch for the North District in Exhibit 45, which has been referred to a number of times. It's this one.

So we can see --

MR. CHEN: I can't, pardon me must a minute, we don't have pages on exhibit --

MS. ROBESON: That's right.

MR. CHEN: -- 45, but we do have the title --

MS. ROBESON: But the slide is entitled North District, right?

MR. CHEN: Thank you.

THE WITNESS: Right. And I think we've seen it four or five times. It's a really illustrative sketch about what's being proposed in the development plan amendment. And, again, I don't want to attack the details of the development plan amendment, I want to talk about how it fits in with the concepts for the different planning areas in the master plan. I think that's the important thing to look at.

So at the first level when you start seeing that, you start seeing an area that's a competing use in a sense. And, again, I'm not talking about, you know, not yet about whether or not the town center can survive in competition with this, so what should come first? I think there's some language in the plan that we'll get to in a little while that will talk about that. But you have in terms of the geography and what's proposed in this location, it dovetails very nicely with the uses and activities that are actually proposed in the plan document for the town center. That's

the basic underlying point that has probably been made before, but I wanted to restate here.

So how did the -- what does the plan say just by contrast for the neighborhoods? And I'm going to talk about the Cabin Branch neighborhood in particular because that's the one at issue, so we've got to look at that. So we go to the plan documents for the Cabin Branch area which is on page 65, 64, okay? And we go back to the overlying policy objectives on page 60 and then compare the two to the town scale with development, okay?

What we have for the Cabin Branch neighborhood is to provide a mixed uses, including employment, to encourage the employment pattern which is supported by 270 as the high technology corridor. Those things exist in here. A transit-oriented land use pattern, but it's a transit pattern that orients the neighborhood to the MARC station at Boyds and the future transit way which actually exists in the town center of the transit corridor.

BY MR. CHEN:

Q What page are you on?

A I'm on page 67 at the very bottom.

Q Okay.

A Okay? Inner-connected roadway system. These are all -- create a strong neighborhood focal point by concentrating public and retail uses in the same general

area. It's a policy statement for the Cabin Branch neighborhood. I have to contrast that to the policy statement for the town center which says, create a town center which will be a strong, central focus for the entire study area. So you can see, start seeing the differences that start to inform a reader of the master plan as to why some of the numbers are different in terms of retail uses and other land uses in the area.

Mixed in in how, in complicating this issue is I-270. And if we go back to the concept plans for I-270 on page, bear with me while I look for it a little bit, well, you can go to the town scale of development on page 16 and you can see I-270 employment centers on both sides of those issues, of the highway facility. So the planners here were not talking, were not -- and there's also Policy A, which is employment. That's really why I wanted to go with this. continue the role of I-270 as the high technology center composed of the scale and intensity of employment use that is consistent with the town scale of development. Okay. broadens the employment base by identifying areas that are non-office, low-intensity industrial uses, that's really on the other side, but incorporate office and retail uses as part of neighborhood development. Okay. Incorporates its office and retail uses as part of the neighborhood development, not as part of a town center development in

terms of the scale.
So what the authors here are doing, and it said here in a variety of places, is to take advantage of the, the existence of I-270 and its visibility to attract some of the high-technology employment that planners were envisioning back in 1994 before the dot com crash of 2000. And the reasons, there are reasons these things sometimes occur or don't occur we don't have to get into. But the vision here is that they're taking advantage of the high technology development that they envision to occur throughout the I-270 corridor, not just in Clarksburg. This is in a node of its own. It's to build on the success that Montgomery County has had in traffic, things like NIH and the National Bureau of Standards and other things, going out to I-270. That's the overall vision here.
So if we again go back to the Cabin Branch thing, we start to see that the scale of the interaction between that large employment area which is a large square footage just for employment, it's 2.5 million square feet I think at the high-end level, which is much larger than anything else you see in the town center or other, where, other way, but that exists not because they wanted Cabin Branch to be a competing center within Clarksburg, but to take advantage of the I-270, the area. So and the original vision, as I understand it, was for a hospital and that would have fit

quite well with the proposal, the land use proposals for that area.
I want to go into a little bit about the retail activities here. Again, there's been a lot of discussion back and forth about different kinds of retail and what neighborhood retail is. Just today we were given a definition for neighborhood retail that fits in quite well and is in the technical, in the technical report to the master plan.
MS. ROBESON: The appendix?
THE WITNESS: The technical --
MS. ROBESON: Yes.
THE WITNESS: -- appendix. Yes. Thank you. Which lays out, you know, at least a starting point for how we got to some of the square footage for retail uses. Everywhere in this document when they talk about retail, they're talking almost specifically when those numbers apply to neighborhood retail uses. They talk about shopping centers. They talk -- shopping centers. They talk about grocery stores, ancillary uses associated with drycleaners, pharmacies, things like that as it's developed. It's a very neighborhood orientation for all of those numbers.
The only place where retail and other kinds of retail, commercial and development is discussed any way in this document occurs in the town center discussion on page

46 and there it talks about more of a mix. There's still a retail center for neighborhood support because there's going to be residential development in the town center and that's 153,000 square feet, at least on page 46 of the document.
But then it also talks about commercial uses for 300,000 square feet are proposed which basically states that in addition to the neighborhood retail and the neighborhood retail is proposed for all of the little, all of the substantial neighborhoods around the town center, this is the only place that we've talked about, the square feet, square footage for commercial use above and beyond that neighborhood's supported retail.
And I think if -- it's telling because as we've heard several times, the plan is silent on things like the other retail that might have been used in the MXPD zone, for example. It's just silent. It doesn't say yes or no. But certainly there was an opportunity to say yes or no and to say this is our vision for that area, we can have commercial uses above and beyond and we want commercial uses above and beyond the neighborhood retail uses. But the only place that's actually stated is in the town center and I think that's a telling difference in terms of what this document tells us 20 years after the fact about what the author has intended because I can't read their minds, I can only read what they put on paper and say here's what we want.

So, you know, again the scale differences are important. And I think that's where the development plan amendment starts to fail in the Cabin Branch neighborhood in the sense that it not only has a center that somewhat competes with the town center in terms of scale and intensity and type of uses, but it also starts to fragment in some way, but less than the square footage of retail uses that are neighborhood-oriented. So you've got a neighborhood that in terms of residential development is equivalent to New Cut Road, but it's not going to get the same kind of services that are supporting of neighborhood development.
On the other hand, it would have the advantage of being walkable and have access to much more upscale and retail services in the north part of the development plan amendment. It's a, it's strictly a matter of opinion which is more desirable for a neighborhood. But in terms of the kind of uses, retail uses that a neighborhood relies upon like a grocery store, those uses are reduced fairly substantially given the development plan amendment compared to the 120,000 square feet that are allowed. I think the difference is the numbers from the applicant go down to a fourth, 50,000, you know, and upward from there. But, in fact, if you counted in some other retail uses that are actually office like on the Gosnell property, it can go down

as low as 24,000 square feet in those uses.

So, you know, the kind of retail uses and then centers of activities around those uses are that this plan envisioned to, in the little neighborhood sense, and I want to avoid the use of towns, the term town center in the neighborhoods. In the neighborhood centers, the Cabin Branch actually doesn't have access to those local support services to the degree that the other neighborhood centers will still have. And, again, if the, from my perspective, the grocery store argument has any telling meaning, it's that's what it means for the residents of Cabin Branch, they have to get in their car and drive over into the town center on New Cut to go to the grocery store where the residents of those two neighborhoods don't. They have that services in place. And that's a service that was specifically envisioned in the master plan itself.

The final thing I want to talk a little bit about is staging in terms of some of the recommendations that were written in the plan document itself, just to touch on this because I don't think it's been emphasized as much. And if I can find my next cheat sheet, I have a thousand of these things somewhere. They're all mixed up.

At any rate, on pages -- here they are. On page, those staging recommendations for the Clarksburg study area that go beyond the question of when sewage service is

available and that's a big-scale staging. It's absolutely necessary for certain aspects of master plan to be implemented. But there are also plan objectives that are clearly stated in the staging policies. The plan objective to foster early development of the town center and the east side of I-270 in general highlights the need for development to occur according to established staging principles. That's Policy No. 10 on page 34, page 34 of the plan. Okay. Yes. There it is. I want to make sure I got you the right reference. Bear with me for a second.

The timing, another statement is, the timing and sequence of development should reinforce the master plan's community design and identity goals for Clarksburg, which is, as I said, focused on the town center. And that stage is Principle No. 4 on page 189 of the plan. I'll skip around here a little bit.

This plan favors initial development east of I-270 where great care has been taken to recommend a land use pattern that fosters the mix of housing, retail uses, employment and community facilities and transit usage. That's page 189 of the document. The plan encouraged residential development patterns that best support a strong town center identity early on, page 190. And, finally, encourage the early development of the town center to create a strong sense of community, identity, and to provide a

model for later development in other areas, page 189.

Those concerns speak to planners who are working on an ominous and empty page with just the historic district as the center of activity to work with. They're not working with an established town center that has an identity of its own already, that can stand on its own and weather the storm, if you will, of competing, the economic development around it. So, clearly, what's being written here is the focus on the town center early on and as a priority and at a much less intensive scale, at least in terms of the retail uses supporting the residential in the neighborhoods around it. And that's -- nobody actually, it's almost like they didn't say that right up front but, again, if you put it all together and you go step by step, that's clearly what they were doing.

I don't want to sit here and say, because I don't have the expertise to say, that if they build Cabin Branch today, that development of the Town Center will never occur. But it seems quite clear that those kind of concerns were at the forefront in the minds of the people that actually wrote the plan planned on and that they were concerned about those issues and that's why those staging policies were there. And that's actually repeated, that concern, in the 2011 amendment for the master plan which talked, which actually set aside one of the staging requirements and the rationale

for that staging requirement was that there was residential occurring in that case in the New Cut neighborhood and those residents needed some of the neighborhood retail services to kind of complete that, the experience in that area as a neighborhood center. Cabin Branch hadn't started up, but they wrote, they wrote out a, one of the staging principles in the plan at that time in order to allow a grocery store to be developed there prior to additional retail development in the town center itself because the residential development was already occurring and those people had needs. So it's a very specific thing.

But when they wrote the amendment, they restated and stated indirectly that they were not changing the densities, they weren't changing the visions for the Clarksburg master plan as a whole, they were reinforcing it and just said we need these neighborhood centers, let's allow those things to go forth. So how does, why is the, again, why is the development plan amendment a problem related to all of these kind of things? We can kind of close the loop here.

One of the things I read was the importance of the town center as a, as a center of activity. I want to read from page 13 of the justification statement for the development plan amendment.

BY MR. CHEN:

Q That is --
A That's, I'm sorry.
Q No, it's me. It's the --
A I know it's on record, I just don't remember the number.
Q Yes.
A I'm sorry.
Q I've got it right here. It's -- I had it right here. Do you have it?
MR. KLINE: No. 21?
BY MR. CHEN:
Q I think it's Exhibit 20. It's the May 29 dated justification statement.
A That's the one I have, yes.
Q Okay. Go ahead.
A At No. IV, No. 4 there, it says, this plan strives to maintain an identity for Clarksburg separate from Germantown and Damascus. That's from the master plan policies on page 16, a policy which was restated in the town center document. I want to make these connections.
Q Go ahead.
A The statement from, it the development plan amendment below that is, the development proposed as part of the DP unquestionably will establish a true identity for Clarksburg. This type of employment center with employment,

retail, signature office, R&D, medical, hotel, entertainment and residential uses will be one that is unique to the County and responds to the needs and desires of all its users. This mode of implementing the recommendations in the master plan for this specific location will put Clarksburg on the map and establish Cabin Branch as unique, one-of-a-kind and highly desirable community.
Now, again, I said in my opening statement, I'm really impressed by what's proposed here. But if you read that statement in terms of establishing Cabin Branch as a one-of-a-kind, highly desired community and putting Clarksburg on the map, that's part of the rationale and the desire and the vision for the town center, not for the Cabin Branch neighborhood. It gets -- that's the connection I want to make.
Now the plan recognizes the importance of civic spaces and public uses through the development of a town concept. Again, master plan, page 16. The development, below that, this is on the same page, the development plan amendment embraces this recommendation. The applicant is proposing a significant amount of highly desirable, public use space, including but not limited to the outdoor amphitheater that will be made available to the public for performances, gathering and other community activities. The development plan amendment continues to provide substantial

public use spaces and integrates them in the plan as an extremely important component.
And, again, I -- when you look at civic uses related to the development, the neighborhood development, what they talk about is charges, you know, some smaller activities related to the intensity of a neighborhood, not a town center. So there's a competing level of emphasis and level of I don't want to say quality, you know, quality is small spaces, but the level of activity that's being placed in the north part of the town, of the Cabin Branch neighborhood that, again, is envisioned for the town center.
To get back a little bit to what I said about the neighborhood retail and the employment and the I-270 as an employment corridor, there's a lot of discussion in here about --
Q When you say here, what are you talking about?
A In the justification statements --
Q Exhibit 20?
A -- I, that. Yes. About the Cabin Branch development being the catalyst for encouraging office and retail development. You know, again, it's -- the location of that office development isn't an accident. It's there to take advantage of Interstate 270. But in the absence of that impetus for economic development, the core of what's necessary for the master plan to be successful is a focus of

a community on a town center level of development in the master plan and then sufficient neighborhood development around it that that can actually become a town center kind of an activity where people would go on weekends and see concerts and go to restaurants and participate in other community activities.
There's a question and, again, I'm not the, an economist here, but I remember the statement from Mr. Bogorad that, I hope I pronounced his name right.
MS. ROBESON: Bogorad.
THE WITNESS: Bogorad, I'm, I apologize. That this is an important catalyst and they need to take advantage of I-270 and the retail and any advantage you get to encourage that office and employment development. But his testimony ended with, either under questioning or he testified directly, I can't recall, that even with this development, the office and employment development there might be 10 to 20 years down the road. In other words, this isn't a catalyst that's going to bring in the office and employment development most likely, from what my understanding is, immediately after the development. So in place of development here that supports the I-270 corridor as a high-tech employment corridor, we've got a retail development and we've reduced the amount of neighborhood associated retail with the residential. We're not

necessarily saying we won't ever, but not necessarily immediately, at least in immediate terms getting the office and the employment development that this whole proposal is said to be a catalyst to bring along and that's the purpose of it.

So I see a disconnect on a variety of levels. And the last one is, if I didn't say it, if in fact this does serve to either delay or undercut the kind of development that's envisioned in the town center, the whole idea of that transit car starts to get threatened as well and that's something we're probably moving forward with at a state level and other ways. I think it's currently a bus rapid transit facility. Whatever it happens to be requires the kind of densities that are envisioned in this document to keep it moving along and to keep it moving forward. So if we undercut it from that perspective, there's an additional issue in that perspective to allow that development to go forward.

BY MR. CHEN:

Q So it's your opinion that it will undercut the development of the town center?

A I believe that it will, but I base that belief on reading of the concerns that, of the office of the master plan even 20 years ago, that they understood that they had to do this in the right sequence in order to make it happen

the way the vision proposed it. And if you, and maybe even -- that may be even a more important concept now that we have an economy where there may not be that high-tech office employment coming down I-270 and we're competing for a more limited economic -- I'm starting to get out of my field and I better stop because I'll get challenged but, yeah, I mean if you can read the master plan's concerns and you can translate it 20 years later, those concerns have been justified in terms of the viability of what's going to happen in the master plan and bringing it along.

The last point I wanted to make is that there is discussion in the development, in the staff report about amendments to the master plan and the fact that it's 20 years old and we can, and we need to be flexible. I think the master plan has a lot of flexibility built into it. That's why you can nail down, you know, specific numbers in specific places. It's giving you a lot of flexibility in terms of where proposed development should go and what kind of the internal densities should be, at least a mix of the densities, not the sequencing.

But, frankly, if it's envisioned that the plan has failed, which I don't think we can conclude because as recently as 2011 the planning staff, the Council, I guess, adopted the 2011 amendment, restated their agreement with the overall densities and visions of the Clarksburg master

plan. But if, in fact, it has been, failed, the right way to approach and to change that is not to make it even more difficult to implement the plan, that the right process would be to go through an amendment process and try to figure out what's envisioned now that you really will support and work.

I just feel that the development plan amendment in a variety of ways in terms of, you know, on the one hand the, its impact on the vision for the town center and the secondhand what it does to the, to the vision for neighborhood development in Cabin Branch itself is inconsistent. Both of those have a place.

Q Now the second area you were going to address was most specifically the development plan amendment vis-à-vis the Cabin Branch community and the provisions of the master plan for that community.

A Well, I started to go there, but and, again, in the master plan community if you go to page, Cabin Branch community, if you go back to page 67 through 70, it's pretty specific, I think, about what's proposed there. You've got the largest employment square footage of any area in the, I believe it's the largest, of any area in the master plan area. That's 2 to 2.3 million square feet. But I don't want to call that accident of geography but, you know, the Cabin Branch in terms of the residential uses is pretty

consistent with the other neighborhood development in New Cut in terms of its, of the residential dwelling units is square foot of retail space and the public uses that are envisioned there. And that's worship in churches, synagogues, whatever, childcare, community building, park and potentially an elementary school.

So to the extent that we don't support that with the retail uses that make that a good place to live, if -- I used to be a real estate agent, so I probably shouldn't go too far in this direction. You know, one of the things you look at is, you know, you have two competing areas with similar kind of housing stock, you know, where do you go to first? You go to the area that has the neighborhood center with these kind of uses in it, including the grocery store. I don't want to harp too much on that. Or do you go across the road? Well, heck, I can get in my car or even walk on occasion over to the retail center, when the retail center is just as, potentially just as accessible to the folks in the New Cut Road area. So it kind of undercuts that whole neighborhood community aspect of what's envisioned in this document.

Q Now --

A Again, you just put those uses together, 120,000 square feet with the grocery store, places of worship, childcare, community building, park and elementary school,

you know, in a coherent location so that's sort of the center of the neighborhood activity as opposed to the town activity. And this undercuts that by fragmenting it to some extent, reducing the actual square footage that's dedicated to those uses and replacing some of the civic uses with, frankly, some attractive, but more regional kind of public spaces and uses up in the north end of the development plan.

Q How there's a numeric limitation on retail development for the Cabin Branch community, is that right?

A Yes, for -- yes, there is. There's a numerical limit of 120,000 square feet for retail development.

Q Is there any language in the master plan that in any way would qualify or indicate that there is any basis for changing or increasing that numeric limitation?

A I looked in the master plan for that language and didn't see it. The only place I saw where a term, an equivalent term to retail -- well, let me step back. It's quite clear in this document that the use of the term retail in terms of those numbers are associated with neighborhood retail uses and you go back to the technical amendment, the technical --

Q What's the title of the document?

MS. ROBESON: Appendix.

THE WITNESS: Technical appendix to support those, the definition of what those neighborhood uses are. The

only area in this document that has a discussion of what I would call other retail with commercial uses is in the town center, not in the residential neighborhoods. So I don't see anything that would justify increasing that beyond the 120,000 square feet.

BY MR. CHEN:

Q Now go, if you would, to page, your master plan just for a quick second. I'm going to take you through something very quickly. Go to page 105.

A 105. Got it.

Q Okay. And directing your attention to Section 4, do you see --

A Yes.

Q -- the top? What are we dealing with on that page, that section?

A Well, you -- again, it is what it says. It's the key land use recommendations. There's a variety of housing types. The mixed use neighborhood and they define mixed use in the discussion of the neighborhood --

Q Take the Examiner to that. Where --

A Pardon me?

Q Indicate where they deal with that.

A The mix of uses is down on page 67. We've referred to it several times already. Residential, employment, retail and public uses.

Q Okay. Keep going.

A Then to encourage an employment pattern which is supportive of I-270 as the high technology corridor.

Q Yes.

A Which was just before.

Q And now shifting to the right, the zoning recommendations, do you see those?

A Yes.

Q Okay. Now do you see the first recommendation there?

A Yes.

Q What is that for?

A Designate areas recommended for residential and retail uses as RMX-1 in a mixed use zone.

Q Okay. Go to page 101.

A Page 101? Okay.

Q Top paragraph.

A Yes.

Q Does that deal with the RMX zone?

A Yes, it does.

Q Is there any discussion, again, in the plan whereby the RMX zone would be a base zone for increasing the retail component in the Cabin Branch community fourfold?

A No, there's nothing that mentions retail at all. What's mentioned is significant area of new employment,

which I reference back to the support of I-270 as a high technology corridor.

Q Okay. Then it recommends the RMX zone?

A Yes, base zoning, RMX zoning would be the base zoning for the northern portion of the site and I-3 zoning for the southern portion. Do you want me to go on?

Q No. You know, the document speaks for itself.

A Okay.

Q Now the plan calls, as you've just identified, 120,000 square feet of retail --

A Right.

Q -- in the Cabin Branch community. DPA recommends a fourfold increase in that, is that correct?

A Yes, 120,000 to 484,000.

Q Okay. Is that increase substantially in compliance with the master plan's provision for retail in the Cabin Branch community?

A No, it's not.

Q Why?

A Well, again, the Cabin Branch community is very specific in the context of the whole master plan about the amount of retail development and the kind of retail development that's being proposed in this neighborhood and that's 120,000 square feet of neighborhood retail development. And even reading through the other things,

if -- you cannot find a policy statement in here that says that we want commercial development, for example, as part of the employment mix or anything else that mentions additional retail development in the Cabin Branch area.

Q Now let's go back to the Cabin Branch provisions at page 60 --

A Seven.

Q Yes. Go to page 68 and, you know, we've all heard about this, but I've got to direct your attention to it. Do you see the provision on 68 for the guidelines for the Cabin Branch community?

A Yes.

Q Can you see the provision there to locate a grocery store within the core?

A Yes.

Q Okay. And are you aware that the DPA does not include a provision for a grocery store?

A Yes, I am aware of that.

Q Okay. Is that a factor that leads to substantial compliance with the master plan?

A Again, I believe it is because the master plan has laid out a series of uses and a square footage for retail uses in the areas and the master plan also refers to the technical amendment that defines what those retail uses are to be or what their purposes are. So -- and one of those is

the grocery store.

Q Okay. Now --

A So I got to your point.

Q Okay. Now in the testimony you've thus far given, you've explained your opinion as to why the DPA does not, is not in substantial compliance with the master plan.

A Uh-huh.

Q You have, however, you're aware that the technical staff of the Park and Planning Commission has opined that it is in substantial compliance with the master plan?

A Yes, I'm aware of that.

Q Okay. All right. Do I take it that you do not agree with the technical staff?

A No, I don't agree with the technical staff.

Q Please explain why.

A Well --

Q I mean I assume it goes to the reasons you already expressed --

A Yes.

Q -- in exam, but directly focusing on the technical staff and its report.

A I guess it builds on the same, the same discussion about where, where the uses are supported in the master plan, where they are to occur versus what's in the development plan amendment. If I open up the technical, the

staff report on page 13, for example, it starts to talk about master plan consistency and consistency with the recommendations in the Clarksburg master plan.

This is the area I think you want me to address, okay, one of which is referenced here and we're talking about the Cabin Branch area, the town scale of development. Here they've taken that discussion of town scale development and focused on, very narrowly on one aspect of that town scale development. The proposed DPA has the same area, 2,420,000 square feet in scale as recommended in the Clarksburg master plan. The buildings step down in height and density from I-270 to the adjacent area from the Cabin Branch neighborhood in the RMX-1/TDR zone for compatibility.

Basically what that's saying is that they're saying, well, the building's height and densities are the same. We can accomplish that. So it's being, it's a very narrow interpretation, but they don't address the issue of the competing uses and the retail uses there. So they're taking one phrase out of this whole discussion of town scale of development on page 16, if I go down, back to it -- I keep jumping around here on the thing -- and that they talk about one line out of here, okay, which is the density of building, you know, and making Cabin Branch, in fact, in terms of density, a transition from the I-270 employment corridor down towards the lower density residential and

eventually transitioning into the areas, the rural areas outside of the planning area.

But the town scale of development policy, this has a lot more bullets in it than that one statement, and that's where it talks about, you know, it serves to maintain the identity of Clarksburg separate from Germantown and Damascus, recognizing importance of civic spaces and public uses in the development of a town concept. You know, it includes the Clarksburg historic district, other than the expanded town center that, you know, those kind of, those kind of policies are, some are really not consistent with the proposal. You know, so they've taken one bullet out of a series of seven or eight and said it's consistent because it's consistent with this one bullet. And is that clear enough why I think that's not consistent?

Q That's really the most important one, but you can also go to, you know, employment on page 14, okay?

A The DPA continues to establish I-270 as a place for employment uses. It broadens the employment base by identifying opportunities for office, research and development, light industrial, hotel, urgent care facilities, medical office and professional services, as well as retail, entertainment and public uses. My view of the development planning amendment is the difference between it and the current amendment is the square footage of the

high-end retail that they're proposing from 120,000 to 480,000, 484,000 square feet. The development planning amendment doesn't do anything more for the employment base for office, research and development, light industrial, hotel, urgent care facilities and those aspects here then that was existed in the, in the development plan as it currently exists. So the only thing that's added there is retail, entertainment and public uses which, as I said, start to compete with and conflict with the town center proposal.

So, again, it's, you know, it's taking -- we're consistent in this aspect and, therefore, the whole development plan amendment is consistent, whereas if you try to read it a little further, you can find a myriad of places where it could be found to be inconsistent.

Q Okay. Similarly, I take it you've heard the testimony of Mr. Unterberg and his land planning opinions that he's expressed relative to the master plan, is that right?

A Yes.

Q Okay. Am I correct in concluding that you similarly disagree with his conclusion, is that right?

A Yes.

Q Okay. And can you just briefly explain to the examiner the basis for that disagreement?

A Well, I think it goes to the, to, again, to very similar, to viewpoints. If you can, you can look at just the densities in the area and say, yes, this is consistent, but it's not only a question of density, it's a question of the purpose of, the supposed purpose of development in the Cabin Branch area versus the town center and how it competes with that and also whether or not you're actually providing services to the residents, the residential portion of the town, of the neighborhood that are envisioned in the master plan. That's where I think it falls apart.

Q Go to page 67 of the master plan.

A I'm there.

Q Okay. Do you see the reference to the use of the MXPD zone?

A Yes.

Q Okay. I know you touched on that briefly and I really don't want you to belabor the point, but could you explain your understanding at least as to the master plan's proposal for utilization of the MXPD zone?

A Well, I mean the MXPD zone is, it's like any other zoning classification written county-wide. So it's going to have a lot of uses that are permissible in the MXPD zone that may or may not be consistent with any particular planning area or master plan amendment. So -- and, frankly, this, the master plan document in front of us actually tells

us why they want, they suggest that the MXPD zone be applied.

And this is the first place where it does that. And, again, I can't interpret intent. I have to read, read the document here. The plan recommends a mixed-use plan zoning strategy, MXPD zone, we're the second below the page 67, for the employment frontage to foster an integrated plan which could include residential units, which tells me that they're attempting to make some residential development in with the office and research and development.

The MXPD zone would allow more intensive office uses on the northern portion of this site than would be allowed under the RMX based zone. So that's a very specific -- here's why we want to use the MXPD zone, you know, find an integrated mix of residential with the employment uses on the whole area and to allow more intensive office uses which is shifting somewhat some of the density on the northern portion of the site than would be allowed under the RMX-based zone. Nowhere does it say the RMX-based zone is constricting the amount of retail space and it could very easily have said, bear with me, this plan could very easily have said the MXPD zone would allow more intensive office and retail uses on the northern portion of this site than would be allowed under the RMX-based zone. It doesn't say that.

So, and when you start reading the hard numbers, really the hardest numbers in here in terms of the square footage for neighborhood retail space, and again the only place they talk about other commercial things in the town center, it may be silent about the use of commercial space, but really it isn't. He says here's why I want you to use the MXPD zone. Here's its purpose.

Q Yes.

A I'm going to stop there, I guess.

Q No, but just right in line with that, okay, in addition to this section you've just addressed on page 67, go back to 101, all right?

A All right.

Q That top paragraph again.

A Again, we're talking about implementing the vision of I-270 as a high technology employment corridor and this is related to the whole master plan area. The most significant area of new employment is located in the Cabin Branch neighborhood, again, where up to 2.3 million square feet of office type uses could occur. This plan recommends this development occur as part of a mixed use concept to allow the opportunity for housing. RMX zoning will be the base zoning for the northern portion of the site and I-3 from the southern portion, with an MXPD option over the entire area to allow for competence planning of these mixed

uses. And the mixed uses it refers to are above, housing and office and employment uses.
Q Now in addressing or with specific reference to these two sections of the master plan that provide for the recommendation for the MXPD zone, is there -- and I'm talking here on page 67 and 101 --
A Okay.
Q -- the two you've just looked at, has there been any discussion, and I know a document speaks for itself, but there's any discussion or any inference that can be drawn from these provisions in the master plan relating to the use of the MXPD zone for an increase in retail square footage above and beyond 120,000 square feet?
A No, I think the plan has been pretty specific and it does not include an increase in retail.
Q No? You may have touched on this and I apologize if you have, but I know you've reviewed the technical appendix to the Clarksburg master plan and you may have done this, and I think you may have done it really fast, but does it contain a reference to retail use in the planning area, the technical appendix is what I'm talking about?
A And I'm looking for that.
Q Yes, I know.
A I don't have it in front of me but, okay, yes it does.

Q Okay. Can you explain to the Examiner what it provides?
MS. ROBESON: I'm sorry, what document?
MR. CHEN: The technical --
THE WITNESS: The technical amendment.
MR. CHEN: Or the technical appendix.
MS. ROBESON: Appendix, okay.
THE WITNESS: Yes, I've got it. Sorry to delay the --
BY MR. CHEN:
Q Okay. Could you point that out?
A What page is it? Page 12? I think it was copied for you earlier today and you actually had the full document in front of you. It mentions retail uses specifically on page 12. The planning department staff has evaluated future retail space needs in Clarksburg based on future population. This is actually preceded by a discussion of jobs, house and ballots, which is a fairly common way to try to, try to estimate based on population or employment growth how much retail space, commercial space would also be needed.
Two types of retail mains were considered, neighborhood or commercial, excuse me, neighborhood or convenience retail and comparison retail. Oddly enough, this document doesn't mention comparison retail after that line, but then it goes into a definition of neighborhood

retail centers.
Neighborhood retail centers, or also referred to as neighborhood shopping centers, are anchored by a supermarket, perhaps with a pharmacy, now often found within the supermarket and are usually visited more than once a week by most households. They usually incorporate other frequently visited stores and service establishments such as video rentals, I doubt that exists any more, beer and wine stores; deli, sandwich and pizza restaurants; sit-down restaurants; drycleaners; banks and greeting card stores. That gives you kind of a scale of kind of neighborhood developments.
Then it follows with a retail recommendation to reflect the following findings and they actually recommend square footage for areas west of I-270, which is the Cabin Branch area, of only 75,000 square feet. I even found that the line connecting that 75,000 square feet to 120,000 square feet. I think the important consideration that it's a lower number, not a higher number, in terms of what they need to support the neighborhood.
Q What are the goals and objectives of the master plan in he Cabin Branch community relative to employment and that component?
A I'm sorry, I missed that.
Q Yes, I'm sorry. I went too fast and too fast on

what you just finished. Addressing the employment component --
A Okay.
Q -- for the Cabin Branch community, what is the provision in the plan for that?
A Well, again, it's to encourage an employment pattern which is supportive of I-270 as a high technology corridor.
Q Does the DPA that is before the District Council support achieving those goals, those employment goals?
A Based on the square footage, it certainly has employment still built into it. I don't want to downplay that. But I remember the testimony of Mr. Bogorad again about the likelihood of early employment development in this location given the market for that kind of development as being 10 to 20 years away. Given that, the employment types that it supports for the Cabin Branch area is retail-based. I would have decent, relatively decent paying jobs, but they're in the retail industry which isn't some of the highest paid. They're certainly not --
MR. HARRIS: Objection. This is beyond the scope --
THE WITNESS: I --
MR. HARRIS: -- of his expertise.
THE WITNESS: And I, I'll --

MS. ROBESON: Stop.
THE WITNESS: Okay.
MR. CHEN: All right.
BY MR. CHEN:
Q You heard the testimony of Mr. Unterberg this morning about the maximum amount of retail that could be developed in, under the DPA and really already exists in the Cabin Branch community, isn't that right?
A Yes.
Q Okay. And do you recall the breakdown on the numbers? I think I --
A Yeah. I took some notes this morning.
Q Okay.
A I'll just --
Q Yes, let me take it to you. He identified four areas, but I want to focus on -- I'll get to all four of them, but let me deal with one at a time. The first area was Area A, do you recall that sir?
A Yes, and I know where Area A is, yes.
Q Okay. And that's where --
A That's basically the retail core in the north area of the concept plan.
Q Okay. He then --
A The North District, I'm sorry.
Q He then also identified Area B, is that right?

A Yes. Yes, I think A and B are both in the North District.
Q Yes, the B, as I recollect, the B was the what I think he meant by neighborhood retail.
A I think as it was described to me is B would be the more likely place for the neighborhood retail because it's closer to some of the higher density housing that's proposed.
Q Okay. And his testimony was the maximum --
MR. HARRIS: Objection. Leading the statement is not questions.
MR. CHEN: I'm just giving him the testimony of a prior witness. That's all I'm doing. I haven't even gotten it out yet.
MR. HARRIS: Well, his testimony was his testimony. If you have a question about --
MS. ROBESON: Well --
MR. HARRIS: -- his testimony --
MS. ROBESON: -- how can --
MR. CHEN: I can --
MS. ROBESON: I'm going to --
MR. CHEN: I think I can --
MS. ROBESON: Can you rephrase it?
MR. CHEN: Yes.
BY MR. CHEN:

Q Do you recall the amount, the maximum amount of retail square footage in Area A that Mr. Unterberg identified that could be developed under the DPA?
A I actually don't recall A specifically. I recall A and B being about 450,000 square feet.
Q Well my notes indicated he was at 450,000 square feet for A and 150,000 for B.
A Okay.
Q And there's a third area, is that right, the Gosnell --
A Yes.
Q -- tract? Okay. How much do we have at Gosnell, do you remember?
A 8,600 is what I wrote down.
Q Okay. Assuming you have the numbers that Mr. Unterberg has identified, that leaves square footage, retail square footage for Area C, which is at lower neighborhood retail area --
A Yes.
Q -- what's our math do this?
A Your math and mine don't match up because if I added 150,000 to 450, I get 600,000 square feet, which is, exceeds the 484,000.
Q Right. Do you recall his testimony that he said it would be 30,000 square feet in Area C, up to 30?

A Yeah. I --
Q Up to 30,000?
A I don't want to be arguing with my own, but I think the numbers were 450,000 in Area A and B, 8,600 in Gosnell, which left 28,000 for the retail center, on the retail center town side of that.
MS. ROBESON: He can assume.
MR. CHEN: Yes.
MS. ROBESON: Why don't you assume that it's Area A --
THE WITNESS: It's 480 --
MS. ROBESON: -- is zero to 150, Area A is zero to 450 --
THE WITNESS: Yes.
MS. ROBESON: -- Gosnell, I can't remember, but it is around 84 or 8,600 and --
MR. HARRIS: 8,600 --
MS. ROBESON: -- and Area C is zero to 30. So is your question, Mr. Chen --
MR. CHEN: I haven't gotten to it yet.
MS. ROBESON: Oh, okay. Well, assume those amounts.
THE WITNESS: Okay.
BY MR. CHEN:
Q What does, what is, what does that leave with

regard to the implementation of the neighborhood retail for the residential component of the Cabin John Community?
A By the residential component, do you mean the area south of --
Q Yes, excuse me.
A Anywhere from --
MS. ROBESON: Wait, south of what, in Area C?
THE WITNESS: South of the, south of the North District down in the area on the other exhibits which were --
MS. ROBESON: Area C.
THE WITNESS: -- indicated as employment in the residential.
MS. ROBESON: Okay.
THE WITNESS: 25 to 28,000 square feet, depending where the range is that the Hearing Examiner has given.
BY MR. CHEN:
Q Is that square footage consistent with what the master plan contemplates for a neighborhood residential center, a residential, I'm sorry, my terminology, the neighborhood retail center?
A No, it's not. I mean, again, the retail center proposed in the master plan is 120,000 square feet. So, and again, one of the things we, I talked about in my testimony earlier was the fragmentation of the neighborhood center and

the civic uses and the retail uses and the viability of the area, of the neighborhood orientation for the residents of Cabin Branch. So we've gone from 120,000 square feet, which might be quite a viable mix of uses, down to 28,000 square feet, which could be a store.
Q Let me just shift you back momentarily to the 2011 master plan amendment. Did that master plan amendment change any of the underlying goals and objectives of the Clarksburg master plan?
A No, it did not.
Q And the document speaks for itself. I won't take you through that. But the document is in evidence and the Examiner can, certainly can read the document. I want to touch on one last area. I think I've exhausted you on your opinions of the master plan, haven't I?
A Probably. I can speak for a long time, but I think --
MS. ROBESON: Well, I have a question, but you finish yours and I'll --
MR. CHEN: Yes, I'm coming to another subject, but it's my last subject.
BY MR. CHEN:
Q You heard the testimony of Mr. Bogorad, is that right, sir?
A Yes.

Q And he identified three outlet centers owned by the Simon Properties, isn't that right?
A Yes.
Q He identified Hagerstown and Queenstown, do you recall that?
A Yeah, Hagerstown and Queenstown were identified as two rural outlet centers that really weren't comparable to the situation in Cabin Branch or Clarksburg.
Q Do you agree with that opinion?
A Yes, I do.
Q Okay. And he also identified a third one, Leesburg, is that right?
A Yes.
Q And you heard his testimony relative to the information you supplied to the Examiner about the status of Leesburg, isn't that right?
A Yes.
Q Okay. And subsequent to that, I asked you to contact Leesburg --
A Uh-huh.
Q -- and make inquiry of their master plan relative to that development, is that right, sir?
A That's correct.
Q All right.
MR. CHEN: What is our next number?

MS. ROBESON: It is 99.
BY MR. CHEN:
Q As a result of my request, you did contact the town of Leesburg authorities --
A Well --
Q -- is that right, sir?
A Yeah, we actually, we actually went to all three locations --
Q Okay.
A -- took some photographs and looked at the land uses around it. And I did speak to the town planning director in Leesburg.
Q Okay. And did you make inquiry relative to their outlet center?
A Yes, at first I wanted to know how old it was and if I recall correctly it was built in 1999.
Q Okay.
A Hopefully I've got my notes right. But also there was an interesting statement in, that they put in their competence plan. I was frankly hoping to get a study corroborating it. I think you, are you going to hand something to me?
MR. CHEN: Yes.
MS. ROBESON: Wait, I'm sorry. They put in where?
MR. CHEN: I'm not going to go there yet.

THE WITNESS: Oh, you're not going to go --
MR. CHEN: Well, I'm about to go there.
MS. ROBESON: Okay.
BY MR. CHEN:
Q Okay. Now let me show you what's been marked as Exhibit 99. Can you identify that for the Examiner?
MS. ROBESON: Well, do I have that?
MR. CHEN: No, it's not --
MS. ROBESON: Oh.
MR. CHEN: But I have --
MS. ROBESON: Oh, you marked it? Okay.
MR. CHEN: Yes. Isn't that our next number?
MS. ROBESON: Yes.
MR. CHEN: Okay. Just for the record, I gave copies of these to --
MS. ROBESON: I saw you.
MR. CHEN: -- counsel. Okay. What is --
MR. HARRIS: Before we go forward, I do want to object. This is four pages from a document that's obviously many, many more pages and we don't know what those other pages say. If you're going to put this in as an exhibit, I think you need to provide the entire document.
MR. CHEN: Well, wait a minute. This was directly obtained based upon Mr. Bogorad's testimony back when he contacted in Leesburg, what he found out about their retail

center. If you recall, he talked about land that was vacant out there and what they said, what they knew about the land and that type of thing. What we have here, I would proffer to the Examiner, is an excerpt from the Leesburg town plan. We could probably get the whole thing.
THE WITNESS: It's online.
MS. ROBESON: Yes, I was going to say --
THE WITNESS: But I printed it off the Internet. I didn't --
MR. CHEN: And what we're doing here is to address, you know, that specific aspect of their master plan. But --
MS. ROBESON: I will take it in with the understanding that how soon could you submit the whole thing?
THE WITNESS: I could get it next time we meet. You can have it. Or I could give you a link if you --
MR. CHEN: No, we'll give you the whole thing. We'll give you the whole thing.
MS. ROBESON: Well, how about sooner, well, how about this. I would prefer if you could send our office an e-mail with the link.
THE WITNESS: Monday morning.
MS. ROBESON: And then, and you can address it to me with a cc to Ms. Behanna-Moseley and all the parties.

And then you can bring the hard copy on Thursday.
MR. CHEN: That's easy. And --
THE WITNESS: No problem.
MR. HARRIS: And am I inferring that you will circulate it to us or may I ask that he send it?
MS. ROBESON: No. I'm asking him to --
MR. HARRIS: Okay.
MS. ROBESON: -- send it.
MR. HARRIS: You'll send it to me?
THE WITNESS: You're going to get the e-mail.
MR. HARRIS: Fine. You have my --
THE WITNESS: Probably not, unless your business card hasn't changed.
MS. ROBESON: Well, don't, can you do that later?
(Discussion off the record.)
MS. ROBESON: Can you do that later?
THE WITNESS: Yes.
MR. HARRIS: Sure. Sure. Don't let me forget.
THE WITNESS: I won't.
MS. ROBESON: Okay.
(Discussion off the record.)
MR. CHEN: We'll get it after the hearing. Okay.
BY MR. CHEN:
Q What is Exhibit No. 99?
A I, well, it's the cover page and except of pages

from the town of Leesburg, the Leesburg, Virginia, town plan. It's dated June 26, 2012.
MS. ROBESON: So expert, excerpt from Leesburg, Virginia town plan?
THE WITNESS: Right.
(Exhibit No. 99 was marked for identification.)
MR. CHEN: And in the nature of what is good for the goose is good for the gander, I'm not going to ask the witness and I'm not going to read any of the excerpts that are there for you in the, in Exhibit 99.
MS. ROBESON: Thank you.
MR. CHEN: Madam Examiner, I do have a question for you. You, do you make site visits?
MS. ROBESON: I do upon request of the parties periodically, but usually it's to the site in question.
MR. CHEN: I understand.
MS. ROBESON: And there's a lot of parameters around what we have to do now under the recent case law. So --
MR. CHEN: Yes. Yes.
MS. ROBESON: -- is there --
MR. CHEN: Oh, boy.
MS. ROBESON: -- is that what you're requesting?
MR. CHEN: Oh, boy. As I recall that decision,

representatives have to be present.
MS. ROBESON: Well, it has to be a public hearing.
MR. CHEN: Yes.
MS. ROBESON: Now, and the problem, the logistical problem is --
MR. CHEN: Yes.
MS. ROBESON: -- I did do, I did just do one, but the logistical problem is that we don't have a recorder go out with us.
MR. CHEN: Okay.
MS. ROBESON: So nobody can say anything to me and then when I come back to the next hearing and everybody has to be invited and I announce my route and then when I come back to the next hearing, I place my observations and pertinent observations into the record, although the last site visit I had to admit I parked at the public library because that became relevant and not on the street, but so that's how we have worked.
MR. CHEN: Okay.
MS. ROBESON: So it is a public hearing, anybody can come, I have to announce it in advance, nobody can speak with me, I'll announce my route, nobody can speak to me while I'm there and then I come and place my observations on the record.
MR. CHEN: Okay. Thank you very much.

MR. HARRIS: I don't know where this is going.
MR. CHEN: It's going nowhere.
MR. HARRIS: Okay. Okay. There we go. Okay. Good.
MR. CHEN: It's going nowhere.
MR. HARRIS: That makes it easy.
MR. CHEN: Yes.
BY MR. CHEN:
Q Okay. Let me show you what's been marked as Exhibit No. 10. Can you identify that? What is that document?
A That's an aerial photo with, outlining the Leesburg corridor premium outlets location and the corner of U.S. Route 15 bypass and Virginia Route 7.
Q Who prepared this document?
A My staff.
Q Is this document, first of all, does it present accurately an aerial photograph of the Leesburg Center?
A Yes. It's recent, fairly recent image.
Q Okay. And your staff has or your business has the technology to do the outline and --
A Yes.
Q -- and the graphs?
A Uh-huh.
Q Okay.

MR. CHEN: Mr. Harris, do you want to cross-examine on that document?
MR. HARRIS: Somehow, I gave mine --
MS. ROBESON: What document is this?
MR. HARRIS: Do you have another set?
MR. CHEN: Yes. Hang on.
MR. HARRIS: I don't have the Leesburg and I apologize.
(Discussion off the record.)
MR. HARRIS: He's got one.
THE WITNESS: Here.
MR. HARRIS: Okay. Thank you.
(Discussion off the record.)
MR. CHEN: Mr. Harris, do you want to examine --
MR. HARRIS: I haven't examined it.
MR. CHEN: Okay. Madam Examiner, I'd offer Exhibit No. 10, No. 100.
MS. ROBESON: Okay. And what do you call this?
MR. CHEN: This is the aerial photograph of the Leesburg Center.
MS. ROBESON: Okay.
(Exhibit No. 100 was marked for identification.)
MR. CHEN: Do you have all the photos, Mr. Harris?
MR. HARRIS: I beg your pardon?

MR. CHEN: Do you have all the photos?
MR. HARRIS: Which one? The whole set? That would be great. Thank you.
BY MR. CHEN:
Q Mr. Noonan, I'm going to show you what's been marked as Exhibit No. 101. Can you identify it please?
A That's a photograph of the actual, the parking area in the building. This is the Leesburg Center and the --
Q How many, if the Examiner please, I put all these photos in one exhibit rather -- there's a series of them. I don't think there's a need to have separate exhibit numbers for each photo.
MS. ROBESON: Okay. Well, I just have one.
MR. CHEN: No, I've got another series.
MS. ROBESON: Oh, oh, oh.
MR. HARRIS: Well, can I just interrupt for one second?
MR. CHEN: Yes. Go ahead.
MR. HARRIS: You said 101. I've got -- I'm missing something. I have 100.
MS. ROBESON: No, he said 100.
MR. HARRIS: Did you say 100?
MR. CHEN: This is 100.
MR. HARRIS: Okay.

MS. ROBESON: Wait, let me see --
MR. HARRIS: I thought you said --
MS. ROBESON: -- what's 100.
MR. HARRIS: I thought you just 101.
MR. CHEN: Hang on. This is 100.
MS. ROBESON: Yes.
MR. CHEN: Okay.
MS. ROBESON: He's correct.
MR. CHEN: And I gave, I gave Mr. Harris --
MR. HARRIS: Yes.
MR. CHEN: -- 101.
MR. HARRIS: Which is? Oh, you don't have that yet. Okay. Okay.
BY MR. CHEN:
Q How many photos are there?
A How many are there?
Q Yes.
MR. HARRIS: 15.
THE WITNESS: Thank you.
BY MR. CHEN:
Q Okay. Can you identify these and tell the Examiner when they were taken?
A They were taken about three weeks ago in the middle of August after the, I believe after the testimony of Mr. Bogorad, that's why we were asked to go down and take

photographs of the outlet center and surrounding residential, surrounding retail and office development.
MR. CHEN: Can I have your indulgence one second, Madam --
MS. ROBESON: Yes.
MR. CHEN: -- Examiner?
(Discussion off the record.)
MR. HARRIS: 100A, B, C?
MR. CHEN: 101, Bob.
MR. HARRIS: Okay. So 100 is still a separate one?
MR. CHEN: 100 is, it's the lead, the lead number.
MR. HARRIS: Yes, 100 is still a separate exhibit.
MS. ROBESON: It's the aerial photograph.
MR. HARRIS: And 101 has --
MR. CHEN: I'm sorry, 101, it's going to be 101A, B, C, D.
MR. HARRIS: Right.
MR. KLINE: Would your site visit rule still apply if we took a site visit to Virginia, out of state?
MR. HARRIS: Even more so.
MR. KLINE: Would it not apply?
MR. HARRIS: You're a fast one.
MS. ROBESON: Yes.
(Discussion off the record.)

MR. HARRIS: So this is 101A through N?
THE WITNESS: That's what I have.
BY MR. CHEN:
Q Can you describe, going by reference to the number in each of the photos?
A Well, okay.
Q No. Hold on.
(Discussion off the record.)
MS. ROBESON: While you're doing that, I'm going to take a five minute break.
(Recess.)
MS. ROBESON: You numbered your exhibits?
MR. CHEN: Yes. Thank you very much.
MS. ROBESON: Marked your exhibits?
MR. CHEN: Yes. Madam Examiner, if I may, I'm going to give you Exhibit 101A through N.
MS. ROBESON: Okay.
MR. CHEN: Does counsel have it?
BY MR. CHEN:
Q Mr. Noonan, in an effort to expedite your testimony, could you just, starting with 101A, just go through each photo and briefly explain to the Examiner what each photo depicts?
A 101A is a photograph of part of, I believe it's part of the parking lot and looking across the parking lot

to the Leesburg outlet center building. 101B is a part of a pedestrian walkway between the outlet stores themselves. Item C is actually out of order, the Walmart is not part of the outlet center. I believe it's --
MS. ROBESON: Where is the Walmart?
THE WITNESS: I think the Walmart is, looking in the aerial photograph here, it's north of the Leesburg outlet center.
MS. ROBESON: Oh, okay. I think I see it.
THE WITNESS: On the same side of 15.
MR. HARRIS: Across Fort Evans or whatever that is?
MS. ROBESON: Yes, I can't read the road, Fort Evans.
THE WITNESS: Is that what it is? Yes. I believe that's the location of the Walmart. These, I believe, are additional stores in the outlet center.
MR. HARRIS: No, I don't --
THE WITNESS: No, they're not?
MR. HARRIS: Wait, you took the pictures.
THE WITNESS: No, actually my staff did, that's why I was wondering why we were going through them. Okay. All right. We've got surrounding neighborhood shopping centers in the photograph. This is one of them. I believe this is going to be even further north on, I don't know what

route that is, Route 15.
This is just a photograph of some of the neighboring -- E is a photograph of some neighborhood auto-oriented retail operations.
MR. HARRIS: Let me interject here a minute. I just heard a moment ago that he didn't take these photographs --
THE WITNESS: I had staff take these photographs.
MR. HARRIS: -- and so we can't verify, for instance, where this is.
MR. CHEN: We could do it on Thursday.
MS. ROBESON: Well, he's going to have to come back as a witness.
MR. CHEN: Well, he has to come back in any event because --
MS. ROBESON: Yes, okay.
MR. HARRIS: Okay.
MR. CHEN: With that, with that one exception --
MS. ROBESON: Right.
MR. CHEN: -- my examination of Mr. Noonan is concluded.
MS. ROBESON: Oh, it's what?
MR. CHEN: With that one exception, my examination of this witness --
MS. ROBESON: Okay.

MR. CHEN: -- is concluded.
MS. ROBESON: All right.
MR. HARRIS: All right. Is there any testimony with respect to these pictures?
MR. CHEN: We're going to bring him back on Thursday to give you the information on each photo.
MR. HARRIS: Oh, he can give it to me now, I just want to --
MR. CHEN: Oh, I thought there was an objection from Mr. Robins?
MR. HARRIS: No, I was the one who objected, but if you're going to bring him back and he can verify where they are, that's fine. I don't mind him telling what --
MR. CHEN: Okay.
MR. HARRIS: -- what they are today.
MR. CHEN: Okay.
MR. HARRIS: But then on, you know, I want to make sure this Shell station and Merchant's Tire isn't in Vienna or whatever.
MR. CHEN: We can do that. We can do that.
BY MR. CHEN:
Q Okay. Continue.
A Okay. Where did I leave off?
MR. ROBINS: The Shell station.
MR. HARRIS: With the Shell station in Vienna.

THE WITNESS: In Vienna. All right. Yes, let's see, Shell station, the, with the, I'll just say, you know, a sign for a little development called Leesburg Square. That appears to be one of the older mix of office and mostly office, professional building in the area. 101G is part of the county office complex.
MR. HARRIS: Do you know where that is with respect to --
THE WITNESS: That's actually across, the county office complexes, I believe, are across Route 15, closer into the town of Leesburg. Let's see if I can find the map now.
MR. HARRIS: Here.
THE WITNESS: Okay.
MR. HARRIS: Here you go.
THE WITNESS: I believe the complex is where this is.
MR. HARRIS: That looks like it's up there, right there.
THE WITNESS: Yes.
MR. HARRIS: Left of the bypass 15 at the half mile radius ring it looks like.
THE WITNESS: I'm not quite sure where the Bob Evans is. Let me find it. If I had known I was going to do this, we would have labeled the aerial photograph. Sorry.

There's 101I, is that I?
MR. HARRIS: Yes.
THE WITNESS: It is additional office development around the Leesburg center. J gives you, is a, it gives you an idea of some of the businesses that are located in the general vicinity within that half mile radius, a large consulting firm as I see it, and some other firms. There's also some more low-end, highway related to the state government. This is the Virginia Department of Transportation facility, K. I'll give you the location for that important -- I think it's across Route 7, but I'll verify that.
Again, some of the office complexes and most of them you can see are two to three story office complexes. If you go to M, this is an indication there's more development activity in the area going on and expected to go on. N is a picture of a local bus stop. I'll give you some of the idea of the pedestrian access or I would call it lack in same between the, you know, the various retail outlets. This isn't really a planned development, frankly. One of the things we found when we went down there and looked at it was that it's, unlike your development, it's, the Leesburg center was developed and the surrounding development is strictly unrelated and independently approved and developed. So, you know, the pedestrian access and your walkability

here is minimal.
One of the things we attempted to do when we went to any of these locations is see what kind of office or employment development is encouraged around it. So that's, that was the purpose of going down there. We found a whole lot more in Leesburg, frankly, than we did in the other two locations that weren't particularly relevant. But we don't see, you know, a massive amount of development associated really with the outlets. What we see is in government development, some technology development that might be more related to the location of the county government, the Loudoun County government in that location than it is in account of the retail outlets. But, and again, it's a typical suburban mix of development that we found down there.
MR. CHEN: No further questions.
THE WITNESS: And I'll go with that.
MR. CHEN: No further questions. We'll supplement next Thursday with the location.
MS. ROBESON: Yes, I think that would be --
MR. ROBINS: May I ask a question related to these pictures just like in terms of --
MS. ROBESON: Yes.
MR. ROBINS: I would just like to know when these pictures were taken, were you with somebody when you took

them or --
THE WITNESS: No, I sent some staff out --
MS. ROBESON: He wasn't there.
THE WITNESS: -- and take, I sent staff on field trips to Queenstown, Hagerstown and Leesburg and actually Washingtonian to see what I can, what photographs we would take of subsequent or related office development since that at the time was an issue we wanted to --
MR. ROBINS: I don't want to jump the gun on our ability to question to him, but have you been to these locations?
THE WITNESS: I've been to all of them at one point or another, but I wasn't there when the pictures were taken.
MR. ROBINS: Because you keep referring to the word we and I don't know who we is.
THE WITNESS: I'm sorry, my staff. I'm sorry, I'm referring to my staff at Strong Environmental. I sent them out to take these photographs.
MR. ROBINS: We can get into this in our --
THE WITNESS: Yes.
MR. ROBINS: -- our cross if you would like. I have a problem with the pictures, but --
MS. ROBESON: Well, I guess the issue with the pictures, Mr. Chen, is if you want to bring the staff --

MR. CHEN: Yes, I was thinking the same thing.
MS. ROBESON: -- that took the pictures --
MR. CHEN: Right. I'll let you know.
MS. ROBESON: So --
THE WITNESS: I mean I can make them available. We may withdraw, we may withdraw the photos.
MR. CHEN: Don't say anything.
MS. ROBESON: It's, don't, yes, don't say anything yet. So they're marked, well, 100 is in the record.
MR. CHEN: Right.
MS. ROBESON: Which is the aerial photograph. The rest are marked, but I have not included them in the record yet. So they'll be marked as 101A through N.
(Exhibit Nos. 101A through N were marked for identification.)
MS. ROBESON: I had one question about your testimony on the master plan.
THE WITNESS: Okay.
MS. ROBESON: So moving away from the photos --
THE WITNESS: Thank you.
MS. ROBESON: -- were you here for Mr. Bogorad's testimony that we don't need to worry about the town center retail because it's a different type of mix --
THE WITNESS: Yes.
MS. ROBESON: -- of retail? But what I hear you

saying, and correct me if I'm wrong, is that it's more than just a neighborhood center, it's that the, that the, we also need to worry about the town center being the focal point for activity in the area, for instance, perhaps the amphitheater should be in town center rather than here or can you -- are you understanding my question?
THE WITNESS: Yes, I mean I, I didn't necessarily want to refer specially to an amphitheater or something, but --
MS. ROBESON: But the concern you expressed is with specific uses and the more regional uses here. This is going to become the study area focus of activity instead of the town center, is that what you're saying?
THE WITNESS: Yes, that is what I said.
MS. ROBESON: Okay. I just wanted to make sure I understood that.
THE WITNESS: I think it's important to focus not necessarily on -- you don't always focus on numbers, but think about the visions of the master plan and what the authors clearly intended and are saying they intend in the document. You know, when you look at the general plan policies, and I think I said this --
MS. ROBESON: Yes.
THE WITNESS: -- you know, for the whole planning area and they talk about center of activity, you know, the

unique place, you know, they repeat those comments invariably in the town center --
MS. ROBESON: Okay.
THE WITNESS: -- section of the master plan. There are other things that are repeated and they're important for the neighborhood centers, you know, the services to the local residential community. The location at Cabin Branch it happens to be along I-270 and why that was originally intended as the employment card, it's quite logical. That's where I-270 is. It's not an investment you can ignore. But in terms of the activity center for the Clarksburg master plan and what they envision that whole area as a community, the center of activity and the place, and the part of the area in the planning area that gave it a sense of cohesion and a community identity was supposed to be in the master plan. Now --
MS. ROBESON: That was supposed to be the town center you mean or --
THE WITNESS: Yes, the town center.
MS. ROBESON: Yes.
THE WITNESS: I'm sorry.
MS. ROBESON: No, it's okay.
THE WITNESS: I trip over it.
MS. ROBESON: It's a long day. Yes.
THE WITNESS: It's supposed to be in the town

center and that's clearly outlined in the master plan.
MS. ROBESON: Okay. I just wanted to make sure I understood your point. Mr. Kline, do you have any follow-up questions?
MR. KLINE: Yes, not too long I don't think.
DIRECT EXAMINATION
BY MR. KLINE:
Q If I understood your testimony, Mr. Noonan, when the plan was adopted, there was a hierarchy and there was a balance and there was a character for each of the different neighborhoods and districts? Something I will say, the plan was in balance or the instate would be balanced and built out in the way projected in the plan?
A I think that's the goal and the vision, that would be in balance, yes.
Q Okay. And was there any, well, in the the 2011 limited master plan --
MR. HARRIS: Objection. The first question was nice testimony perhaps. The second one is just, well, could you rephrase it to --
MR. KLINE: Sure.
MR. HARRIS: -- as a question?
MR. KLINE: Sure. Sorry.
BY MR. KLINE:
Q Did the 2011 limited master plan amendment in any

way change that balance or hierarchy or character of the different neighborhoods and districts?
A No, the 2011 master plan amendment was very limited in scope and specifically stated that it wasn't changing any of those underlying assumptions --
Q Okay.
A -- and vision.
Q There was an exhibit that we had that had the, I think it was from the technical appendix that talked about the amount of retail --
A Yes.
Q -- in the different neighborhoods?
MS. ROBESON: I think it's page 12.
MR. KLINE: Thank you.
BY MR. KLINE:
Q Would it be fair to say that was suggesting a critical, massive retail services adequate to support the neighborhood that it would be serving?
A Well, again, it's essentially saying how much square footage of retail area would be appropriate relating to the staff's assessment of the jobs, housing balance. What's typically done here is they'll do an estimate of projected population and a projected of employment and compare that kind of, that ratio and it's much more difficult to project, my understanding of how these things

are done, that you rarely project commercial space. You project the employment and the population, which the demographers have a pretty set standard or way to conduct that. And then you relate the square footage of commercial space to that based on a formula which I don't have.
So they estimate the population projection. I think they mentioned what round of the regional forecasts they were using at the time and they forecast employment for the area as well and then place these numbers for appropriate square footage in neighborhood shopping centers in support of --
Q And for Cabin Branch, we ended up at 120,000 square feet?
A Yeah, but, again, I can't, from this document which you gave me, I can't connect those dots. This document says 75,000 square feet for the neighborhood retail on the west side of 270. So, clearly, somebody somewhere along the line made a policy decision on some basis to raise it to 120,000 square feet.
Q Okay. I --
A But I couldn't connect the dot.
Q Was your testimony that the Cabin Branch -- the development plan amendment proposal detracted from providing those retail services that were anticipated to be found in the Cabin Branch neighborhood?

A My testimony was without respect to specific services, when you look at the definition of what's in the neighborhood retail center --
Q Okay. Yes.
A -- when you reduce that from 120,000 square feet of those kind of services down to 50,000 square feet or 28,000 square feet, that, in fact, you have not provided them, you didn't provide -- and in addition you're not providing them necessarily in a unified center, but you spread them out over the three --
Q Okay.
A -- three subsequent areas --
Q So we're --
A -- in the proposed area.
Q Apparently the development plan will not, the development plan amendment will not propose as much neighborhood retail as was shown in the plan?
A That's correct. Yes.
Q All right. And I think the same, if I heard what you just said, and it's distribution or diffusion will detract from that critical mass aspect of having it all in one place which is why we have a concentration provision in the master plan?
A The master plan seemed to be very concerned about that concentration, so I would defer to them. I don't want

to necessarily say that that critical mass is broken up, but it certainly appears that we're not providing the same level of service and community cohesion in the central location that the neighborhood vision, plan would envision.
Q Okay. And --
A And that's a determination.
Q And to the extent there is a concentration and it's in A and B, and it's adjacent to the regional outlet center, can we say that it has a neighborhood orientation?
A I think there was a statement either in the development plan amendment or in the staff report that said, that emphasized the regional nature of this, but then said that the, it could focus -- there would be a neighborhood function to it, but the catalyst and the vast, and not -- the majority of the square footage is related to more regional and whatever all the retail we're talking about here. It's not neighborhood retail.
Q Okay. Based on what, in --
A My own language though.
Q -- you were asked questions about the grocery stores and I would say how do you measure the importance of grocery stores in the neighborhoods as fulfilling the vision in the master plan?
A I would defer to the actual 2011 amendment that really speaks to the importance of the, importance of

grocery stores in the neighborhoods. I'll find the language for you. I didn't really want to substitute my opinion on that. Frankly, I avoid grocery stores if I can. I've got it here somewhere. The Council directive, which is on page, I guess it's 9 of the 2011 document.
(Discussion off the record.)
MR. CHEN: The one in evidence is -- the copy of the --
MS. ROBESON: I think it's 10.
MR. CHEN: Yes, the one that's in evidence. So Exhibit 86.
THE WITNESS: Okay. Council directive to the, directive of the Planning Department modified the master plan to allow preparation of limited, to amend it, to seek whether to amend the retail staging provisions, okay? I'm looking for what language was mentioned about the grocery store.
Town center development has not moved forward with retail, including grocery store. Other property owners have expressed an interest in building a grocery store, and their directive is whether to allow a grocery store and potentially ancillary uses outside the town center in the village centers to proceed. And the result of that was to remove the 90,000 square foot retail cast here and allow, specifically with grocery stores, to proceed in the

neighborhood development. So they clearly viewed it as important supporting neighborhood retail in the neighborhood centers.
BY MR. KLINE:
Q The 2011 limited master plan amendment allowed retail development to occur today in Cabin Branch or New Cut, correct?
A Yes.
Q Okay. Not likely somebody is going to want to build a grocery store in Cabin Branch today, there's no houses to buy, correct?
A I would assume, yes.
Q Okay.
A Correct.
Q Well, then wouldn't the prudent thing to do from a planner's perspective is to reserve some square footage so that we, there can be a grocery store at some time in the future when there's market there to support it?
A Yes. That sounds prudent to me if I, that is a yes.
Q Okay. Are there any features that you identified that you expected to see in the town center that you now find in the Cabin Branch proposal in terms of shifting of the one place to another or duplicating?
A Well, certainly. The, some of the retail uses

themselves or it could be in the mix uses in the one portion of the town center, especially along the transit corridor and the transit stop.

Q Okay.

A There are other things that several put it out like the amphitheater and some of the civic spaces. And at one point we had the block of the north district up on the screen and we talked about some of the civic spaces and the town square kind of activities. All of those kind of things are consistent with the town center development.

Q I think your phrase was it's not a question of density in terms of finding substantial compliance within the master plan, it's not a question of density, isn't really a question of intensity or the activity that's associated --

MR. HARRIS: Objection.

MR. KLINE: Okay. Let me try it again. Sorry.

BY MR. KLINE:

Q Am I correct that you stated that it's not a question of density in terms of how the land uses are changing?

A Yes, I was less concerned about density than I was about the perception that the North District in particular and the Cabin Branch development amendment here is now the focus for community activity in the larger Clarksburg master

plan area. So it's the impact and the vision, the amount of activity that goes on, the kind of things that Governor Glendening used to talk about, you know, eyes on the street and nighttime activities that bring a vibrancy to a town center kind of environment. Those kind of things are -- if the center is successful, you get a good, professional staff might make it successful --

Q Okay.

A -- are the kind of activities that will now be occurring on this side of I-270 and not in the town center where the vision in the master plan says that they're going to be.

MS. ROBESON: Or at least it says it's going to be, well, that's true. But I guess my question is say long-term, is your opinion also that it violates, or it's not consistent with the staging policy, because say there's enough here eventually for a town center to happen for, you know, once this whole thing gets built out, the town center can get retail and -- are you saying that, is part of what you're saying that the staging wanted to ensure that to happen in the town center first, is that what you're saying?

THE WITNESS: Yeah, the policy objective I cited in the document earlier related to --

MS. ROBESON: Yes.

THE WITNESS: -- preference, priority be given to

development of the east side of I-270, especially at the town center, to my mind those policy statements went to that concern about making sure that the vision for the town center had some viability and weight and would continue in the future before some of the development would occur around it. Now understand, there's still no language in the master plan to support this development in my opinion, this development in terms of retail and development. So, but at least at that point you would have a rationale to go to the Planning Board and say let's change the vision to this.

If the office and retail development is never going to occur, we've got a viable town center now, we can support this and we would have a rational basis to do this without undercutting the vision for the town center. That would be the appropriate time. I don't know when that time would be given --

MS. ROBESON: Yes.

THE WITNESS: -- issues of the town center currently, but that's the vision in the master plan.

MS. ROBESON: Right.

MR. KLINE: Mr. --

THE WITNESS: Does that answer your question?

MS. ROBESON: Yes, you did. Thank you.

BY MR. KLINE:

Q Mr. Noonan, this Exhibit 45 --

A Yes.

Q -- the applicant's Powerpoint presentation, and do you recall the afternoon I came over and met with you and Mr. Chen and we had this on the table and do you recall your reaction when you looked at these images and visions?

A Well, I --

MS. ROBESON: I can't see what you're looking at.

MR. KLINE: I'm sorry. This is --

MS. ROBESON: Oh, 45?

MR. KLINE: -- Exhibit 45 and there's --

MS. ROBESON: Okay. I know what it is.

MR. KLINE: -- there's a number of basically images --

MS. ROBESON: Yes. I recall.

MR. KLINE: -- of what's place making, et cetera, et cetera.

BY MR. KLINE:

Q And, Mr. Noonan, I'm just asking you would you tell the Hearing Examiner what you told me your reaction was to that exhibit and the images that were contained in it?

A Well, giving a little context, I was asked when I was first approached to get involved in this, I said, well, you know, we want to make -- an outlet center is being proposed, we want to make sure that didn't threaten the development of the town center. Okay. I got to my office

and I get this and I said this isn't an outlet center --
Q This is --
A -- this is a town center.
Q This is Exhibit 45, right?
A Yes, this being Exhibit 45 --
Q Okay.
A -- to my mind is, you know, I'm sorry for the developers in the room, but my view of an outlet center is --
MS. ROBESON: Queenstown?
THE WITNESS: -- you know, Queenstown or large parking center. This to me is a town center development. And to that extent, you know, if the marketplace doesn't support the competing nodes in Clarksburg in this day and this master plan still expresses concern and the desire that it occur in the town center first, and I think it, and it still does, then this clearly undercuts the viability of implementing this master plan.
But the uses in here are, and the scale as I look at these photographs, to me that doesn't happen in the neighborhood center. That's a town center scale of development. And, quite honestly, I think, and I don't want to ramble, but I think the development plan amendment justification statement supports that and I cited it before. You know, this type of employment center, referring, you

know, will establish a true identity for Clarksburg.
This mode of implementing the recommendations in the master plan, again, I don't agree that it does, for this specific location will put Clarksburg on the map and establish Cabin Branch as a unique, one-of-a-kind and highly desirable community. And that's the goal for the master -- Clarksburg as whole, of course, but specifically for the town center.
MS. ROBESON: Okay. Anything else, Mr. Kline?
BY MR. KLINE:
Q How does the replacement of the originally contemplated Adventist Hospital and whatever related medical facilities with that, how does the replacement with a regional outlet center promote the vision of this property contributing to the high technology I-270 corridor?
A I don't think it does. I mean it's the position that the folks, again, if I -- I might have to find the right language, but there was testimony in front of the Planning Board, for example, that this development would serve as a catalyst for that development. You know, frankly, I heard testimony in front of you that said the opposite, that, yeah, it would be a catalyst in the sense that it's not going to hurt and every little advantage helps, but that the office and the high-tech development in the Cabin Branch area was unlikely for the next 10 to 20

years. That's the testimony I heard the first day of your hearings.
I don't, I don't have the expertise to say that this is going to influence employment in the high-tech corridor, but I can hear and I listened to that testimony and that's what I recall here. My own opinion is that it wouldn't, either it's, but again that's stepping outside of my box a little bit.
MS. ROBESON: All right. Anything else?
MR. KLINE: I have no further questions.
MS. ROBESON: All right. It's 10 until 5:00. Mr. Chen, I am going to -- we're averaging of the experts, we're averaging like one a day.
MR. CHEN: Don't blame me.
MS. ROBESON: I'm not, no, I'm -- I guess I didn't mean to single you out in that sense. I'm asking you to see if you can clear another weekday in your schedule. Yes, I know. But not now. I'm going to ask you if you can communicate with the other gentlemen here.
MR. CHEN: You should have seen the e-mail I got this morning from one of the other attorneys.
MS. ROBESON: I can but request.
MR. CHEN: Yes.
MS. ROBESON: I'm trying not to hold a hearing on Saturday. So you don't have to ask, sorry, answer me now.

MR. CHEN: I'll try --
MS. ROBESON: Because we --
MR. CHEN: -- but I've got to tell you, honestly --
MS. ROBESON: I know.
MR. CHEN: I could show you my calendar.
MS. ROBESON: I do know you're under constraints.
MR. CHEN: I can show you my -- I'm literally in depositions every day.
MS. ROBESON: Well, then I'll tell you, we have to give Deposition Services at least two weeks notice if we need another hearing on a weekend, which would put us 14th, at September 28th would be the earliest we could get a hearing, so -- on a Saturday.
MR. HARRIS: Let me interject here. Many of us have made all kinds of sacrifices to make hearing dates. We have two people who risked the wrath of God by violating a Jewish holy day, okay? We're doing a lot of things. You know, I'm sorry that Mr. Chen is so busy, but he's the one that got into this case and, you know, the hearing was called July 29th. We should be able to move it forward.
MR. CHEN: Wait a minute. There were --
MS. ROBESON: Okay. Just a second. What I'm asking --
MR. HARRIS: People have to make their schedules

flexible.
MS. ROBESON: I know that and what I -- Mr. Chen --
MR. CHEN: Yes.
MS. ROBESON: -- it's too late in the day for that. Just see if you can find another date and I will be flexible to try to do it on a Saturday. Don't plan anything for September 28th if we have to use it, okay, because I can see a significant amount of cross-examination coming from Mr. Noonan. I'm just trying to be realistic, so let's get the dates up front and then we have Mr. Kline's expert, we have potentially another expert from you and then we have rebuttal.
MR. HARRIS: Yes, ma'am.
MS. ROBESON: So being realistic, I think we're looking at another day and so I'm putting you all on notice today that keep the weekend of September 28th free, it would be a Saturday because that's the only day we have security in here.
MR. HARRIS: What -- I don't remember, and I haven't looked at your calendar, Mr. Chen, I heard, I thought I heard something about the 13th, Friday the 13th being available when we talked --
MS. ROBESON: No, no.
MR. CHEN: No, I never said that.

MS. ROBESON: No.
MR. HARRIS: No?
MS. ROBESON: Yes. That was a long time ago --
MR. HARRIS: Okay.
MS. ROBESON: -- and then we thought we were going to end on the 6th. That's why I don't care when we think we end at this point, but I'm getting dates --
MR. HARRIS: Okay.
MS. ROBESON: -- okay?
MR. HARRIS: Well, I agree with that objective wholeheartedly.
MS. ROBESON: So, Mr. Chen, you don't have to -- and no one is blaming you. This is a prior commitment. So I am not holding you responsible for this. I'm simply asking you if there's any way you can continue your efforts to find dates, otherwise we'll try and keep the 28th.
MR. HARRIS: Let me now, having said that, of all the days I haven't objected to a single day. I think I deserve some credit.
MS. ROBESON: Don't tell me that.
MR. CHEN: And I can't do it either.
MR. HARRIS: September 28th --
MS. ROBESON: You can?
THE WITNESS: I could possibly be in town that.
MS. ROBESON: I would say you're probably critical

to this. How about -- at one point somebody had October 4th.
MR. HARRIS: What about the 14th and the --
MS. ROBESON: Oh, I have hearing on October 4th.
MR. HARRIS: What about September 14th or September 21st, the Saturdays?
MS. ROBESON: Well, he needs --
MR. CHEN: I'm out of town the 21st.
MR. HARRIS: The 21st? What about the 14th?
MS. ROBESON: I can't get Deposition Services on the 14th.
MR. HARRIS: Oh.
MR. ROBINS: But wasn't there another day besides the 12th, Bill, that you indicated you were available? I thought I saw two dates?
MR. CHEN: No, I ran a date and I found out I was not available.
MR. ROBINS: Oh.
MS. ROBESON: I'm going to leave it like this.
MR. CHEN: I ran two dates.
MS. ROBESON: See if you can get a date during the week at any time in September or early October.
MR. CHEN: Okay.
MS. ROBESON: And since I don't know when we're going to get to rebuttal, Mr. Harris, and, again, I'm just

asking questions at this point, but could you address -- the way your master, or your development plan amendment is set up, there's a possibility that no neighborhood services are going to go in because theoretically you could have 450 of specialty retail in A, you could have 150 of specialty retail in B, I mean what assurance do we have, and I do, there is language in the master plan about the importance of having neighborhood services within the neighborhood so people don't have to travel, and I keep going back to Policy 7, what assurance do we have that people aren't going to, you know, that that's going to occur? Don't answer me now.
MR. HARRIS: We will look at that. I just offer -- planners are very good about making recommendations, but they've got to meet reality. If there's not a market for neighborhood retail, saying so in the plan doesn't make it happen or making it a binding element doesn't make it happen.
MS. ROBESON: Well, that's what this whole case is about. I mean this is a plan that for whatever, trying to salvage the original concept is what we're trying to do.
MR. HARRIS: The original concept was destroyed when Mr. Kline got a Wegman's approved in Germantown. That changed many things.
MS. ROBESON: Well, you know, we can argue that all day long, but this is 535 acres.

MR. HARRIS: Yes, it is.
MS. ROBESON: So I'm thinking that I would rather go to a grocery store within --
MR. HARRIS: Okay.
MS. ROBESON: It's not the grocery store, it's just --
MR. HARRIS: Okay. Now -- I'll think about the other one, but --
MS. ROBESON: Don't, don't --
MR. HARRIS: -- you've been told clearly --
MS. ROBESON: I don't want to argue.
MR. HARRIS: -- don't put a grocery there, it will kill the town center.
MS. ROBESON: I don't want to argue about grocery stores, in fact, I don't want to argue about anything right now. I'm just saying how this is not just a regional center, it's a neighborhood, and how are we going to make sure that the neighborhood gets served? All right?
MR. HARRIS: Okay.
MS. ROBESON: And with that, we're going -- yes, Mr. Chen?
MR. CHEN: At the last hearing --
MS. ROBESON: You have a date?
MR. CHEN: No. At the last hearing you said you would take administrative notice of the staff report on the

2011 master plan amendment. I've got copies and your Exhibit 86 is that limited amendment.
MS. ROBESON: Correct.
MR. CHEN: I'm thinking maybe 86A might be a good number for the staff report?
MS. ROBESON: Okay. That's fine.
MR. ROBINS: Do you have copies?
MR. CHEN: Yes.
MR. HARRIS: Thank you.
MR. ROBINS: Thank you.
MS. ROBESON: Thank you. So 86A will be the staff report for the 2011 limited amendment to 1994 Clarksburg master plan. Okay.
MR. HARRIS: With all this excitement, I would just like to, am I correct in assuming Mr. Noonan's direct testimony is complete?
MS. ROBESON: Well, I --
MR. HARRIS: Yes?
MS. ROBESON: What about --
MR. HARRIS: Mr. Chen?
MS. ROBESON: -- the pictures?
MR. HARRIS: The pictures?
MR. CHEN: We are either going to have to be prepared to satisfy Mr. Robins or withdrawn them. They're not in evidence.

MS. ROBESON: I know, but was he going to offer additional testimony on them?
MR. CHEN: All the concern was from Mr. Robins was location and do they accurately depict what they purport to show. That's all it was.
MR. ROBINS: And was he there?
MR. HARRIS: What --
MR. CHEN: Yes, that's what I mean, yes.
MS. ROBESON: No, that's what --
MR. HARRIS: No.
MS. ROBESON: -- he's coming in for.
MR. HARRIS: Well, that's part of it, but I want to, is there going to be testimony about what the pictures are being offered for?
MS. ROBESON: All right. Is there going to be additional testimony about --
MR. HARRIS: Yes, that --
MS. ROBESON: -- why they're relevant?
MR. CHEN: I'm contemplating just the authenticity.
MS. ROBESON: Okay.
MR. HARRIS: That's it? You're just going to put them into the record with no testimony?
MR. CHEN: No, that's not what the --
MR. HARRIS: Well, that's what my question --

MR. ROBINS: That's what we're asking you is.
MR. HARRIS: No, no, be quiet. My question is is there going to be any substantive testimony about those photographs?
MR. CHEN: As to the location, I think we have to.
MR. HARRIS: Other than location?
MR. CHEN: No, it is what it is.
MR. HARRIS: Well --
MR. CHEN: They show the environment of Leesburg outlets and that's it.
MR. HARRIS: Some of the environment, okay. Well, I --
MR. CHEN: Well, in fact, what I'm thinking, Mr. --
MS. ROBESON: Okay. I see maybe two hearing dates.
MR. CHEN: No, no, no, no.
MS. ROBESON: No, no, no. I'm teasing. So there -- his testimony will solely be for authentication purposes, correct, with the locations?
MR. CHEN: I --
THE WITNESS: I will have those.
MR. CHEN: Yes. I mean the -- as I recollect Mr. Noonan's testimony, he testified as to where the scenes were as depicted on each of the 101 exhibits. I recollect that

he did that. Didn't you do that?
THE WITNESS: I --
MS. ROBESON: I don't, I think there was some uncertainty --
THE WITNESS: I think we need to do more location.
MR. CHEN: Then -- okay. Then we're going to do one of two things then. Either we'll have a witness here that can authenticate the location and provide description and maybe Mr. Noonan, maybe somebody else with him, or we'll withdraw the photographs --
MS. ROBESON: Okay.
MR. CHEN: -- one of the two.
MS. ROBESON: All right. Thank you. So with that, oh, last thing. I would like to make the September 12th hearing begin at 8:45 also, unless anyone has a problem with that.
MR. CHEN: Do you know which room we have?
MS. ROBESON: I think we have 200, the second floor hearing room. So with that, this meeting is adjourned until, or continued until September 14th at 8:45 --
MR. KLINE: September 12th.
MS. ROBESON: Yes.
MR. KLINE: How quickly we forget.
MS. ROBESON: September 12th at 8:45 in the second floor hearing room, all right? Thank you.

(Whereupon, at 5:01 p.m., the hearing was concluded.)

C E R T I F I C A T E

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

Petition of Adventist Healthcare and Cabin Branch Commons
DPA 13-02

By:

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Tracy Hahn, Transcriber

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99 (6)
81:25;249:1;250:6;
252:24;253:6,11

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

FOR MONTGOMERY COUNTY

ADVENTIST HEALTHCARE, INC., and CABIN BRANCH COMMONS, INC.	:	**Case No. DPA 13-02**

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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Also Present:

Leonard Bogorad
Christopher Turnbull

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
82	Planning Board Resolution 10-156	107
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84	Hearing Examiner's Report/ Recommendation in LMA G-439	107
85	Excerpts from Gaithersburg Vicinity Master Plan	108
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87	Schedule of Adoption of 2011 Limited Clarksburg Master Plan	123
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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

P R O C E E D I N G S

MS. ROBESON: This is a continuation of the public hearing in the application of Adventist Healthcare, Inc. and Cabin Branch Commons, Inc. requesting an amendment to the development plan approved by the District Council on September 9th, 2003 in LMAG 806 for property consisting of 283.5 acres east of Clarksburg Road, west of I-270 and north of West Old Baltimore Road in Clarksburg, Maryland. Welcome back. I hesitate to ask this but are there any preliminary matters? Yes, Mr. Harris.

MR. HARRIS: I have two. One, you had asked for letters of consent from the other property owners --

MS. ROBESON: Yes.

MR. HARRIS: -- that are part of the Cabin Branch project. I have those and I'll submit those, but I will renew, for the record, my objection to the need for that. I see nothing in the regulations that require all property owners in a development plan area to be, to consent to or otherwise be part of the application. And in fact, there are numerous instances where that has not been the case. If you go to Montgomery Village, that is a development plan for the entire Montgomery Village and I can guarantee you they don't get 5,000, 10,000 people to sign every development plan amendment that comes in there. The same is true for the Churchill and other sectors of Germantown where it's

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

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

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

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

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

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

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

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

course, of 59, the subparagraph 3 stipulation.

MS. ROBESON: Yes.

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

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

MR. HARRIS: Just one quick point on that to give you a little teaser on what I will be submitting. Irrespective of the DPS' ability to do it, this project has to go through a site plan approval and the Planning Board has every ability to and regularly does measure and define those things so there is no difficulty of enforcing this.

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

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

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

MR. HARRIS: Correct. Among many other ways.

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

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

MS. ROBESON: Yes.

MR. HARRIS: -- and my reply.

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

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

MS. ROBESON: Would be the last date.

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

MS. ROBESON: Okay.

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

MS. ROBESON: Well, I guess --

MR. HARRIS: -- more days but.

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

MR. CHEN: Yes.

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

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

MS. ROBESON: Two experts, correct.

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

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

MR. HARRIS: Correct.

MS. ROBESON: Just for his case.

MR. HARRIS: Correct.

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

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

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

MR. HARRIS: Within 10 days of what?

MS. ROBESON: -- are you prejudiced?

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

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

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

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

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

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

MR. KLINE: Mr. Soltesz will be available to testify today.
MS. ROBESON: Okay.
MR. HARRIS: And then Mr. Ferguson on Friday.
MS. ROBESON: Yes, correct?
MR. KLINE: I know he has other professional commitments but he'll be here Friday or I won't have a witness.
MS. ROBESON: Okay.
MR. HARRIS: I'm not happy about it but I can accept that.
MS. ROBESON: All right. With that, are you ready to proceed?
MR. HARRIS: Yes.
MS. ROBESON: Okay. And our next witness?
MR. HARRIS: Next and continuing witness is Mr. Gary Unterberg.
MS. ROBESON: Okay. Mr. Unterberg. I'm sorry. I have a growing file here and I'm looking for the transcript. Mr. Unterberg, you're still under oath.
MR. UNTERBERG: Yes. I understand that.
(Witness previously sworn.)
DIRECT EXAMINATION
BY MR. HARRIS:
Q When we were last in the hearing, I think it was

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

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

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

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

the general recommendations in the master plan, is that correct?
A Yes. The previous testimony regarding the general recommendations, my opinion that the, that the plan is substantially in compliance with those general recommendations of the master plan, and that was per my August 14th testimony.
Q And there again, with respect to the general recommendations in the master plan, did the staff and the Planning Board come to a conclusion?
A Yes, they did which also it is previously noted --
MS. ROBESON: You don't, I don't want to interrupt your flow but you don't, we know what the Planning Board and staff did.
BY MR. HARRIS:
Q Is it your opinion that this development plan is substantially consistent with the general recommendations in the master plan?
A Yes. It's my opinion that this is generally consistent with the general recommendations of the master plan.
Q And do you have an opinion with respect to consists, substantially consistent with the specific recommendations with the master plan?
A Yes. Again, it's my opinion that this is

substantially consistent with the specific recommendations of the master plan, and that was also from the August 14th testimony that we went through point by point.

Q Now, are you aware that there's been some discussion through cross-examination about the 120,000 square foot retail recommendation in the master plan?

A Yes, I am, as been mentioned already.

Q I want to turn your attention to that then. First of all, with respect to the zone, what does the MXPD Zone allow in terms of retail?

A The MXPD Zone allows 20 percent of the commercial development to be retail, particularly without any requirement for master plan recommendation so long as the retail is compatible with the other uses in the MXPD Zone.

Q And with respect to the 120,000 square foot recommendation, do you have an opinion with respect to the nature of the retail that the master plan contemplated there?

MR. CHEN: Objection. The nature of the retail?

BY MR. HARRIS:

Q That type of retail were they --

MS. ROBESON: He can't ask a leading question so if you -- go ahead, Mr. Unterberg. You can answer.

THE WITNESS: Regarding the 120,000 square feet of retail, it's my opinion that the recommendation for the

120,000 was specifically for neighborhood retail and did not limit any uses for specialty retail that could be included in the MXPD. Specifically, if you look at page 65 of the master plan, that is a map that calls for neighborhood retail. Therefore --

MS. ROBESON: Wait. Which page are you on?

THE WITNESS: Sixty-five.

MS. ROBESON: Okay. Go ahead.

THE WITNESS: There's a map and the legend calls for neighborhood retail.

MS. ROBESON: Wait. Are you sure it's 60?

MR. HARRIS: Sixty-five.

THE WITNESS: Sixty-five.

MR. HARRIS: Yes.

MR. ROBINS: Are you in the technical appendix or are you in the master plan itself?

MS. ROBESON: Oh, okay. Okay. I gotcha.

THE WITNESS: Okay. The map calls for neighborhood retail. On page 67, toward the top, it says retail, 120,000 square feet. And also, the fold-out plan which also represents the legend in the map on page 65 which calls for neighborhood retail.

BY MR. HARRIS:

Q I'm sorry. Would you clarify? The fold-out map, what does it denote for Cabin Branch?

A It has a similar legend and it calls for neighborhood retail.

Q Have you had occasion to look at the technical appendix and some of the earlier draft documents in the master plan with respect to the issue of neighborhood retail and if so, what have you found there?

A I have and in summary, for the technical appendix on page 12, there's a discussion on neighborhood retail and also, it discusses comparison retail. So it does discuss a couple types of retail, and then those recommendations came forward based on the demand for neighborhood retail. That's specifically in the appendix, page 12. Some of the staff drafts, particularly pages 52 and 55 --

MS. ROBESON: Staff drafts of what?

THE WITNESS: Prior of the technical appendix.

MS. ROBESON: Oh, okay.

THE WITNESS: They also discuss the different types of retail, particularly neighborhood and comparison is the term that is used.

BY MR. HARRIS:

Q And do you have an opinion with respect to whether their analysis of the amount of retail had to do with neighborhood retail or comparison retail or both?

A My opinion, it dealt with both and they were discussing multiple types of retail.

Q And the 120,000 square feet, do you have an opinion with respect to whether that was a conclusion with respect to neighborhood retail or comparison retail?

MR. CHEN: I object to this because I think the document, including the appendix, speaks for itself but I assume the Examiner is going to allow.

MS. ROBESON: I am going to allow it for the weight it deserves and because he is an expert, so go ahead.

THE WITNESS: My opinion, the recommendation for 120,000 square feet at the Cabin Branch neighborhood was for or is for neighborhood retail. It also does not limit the uses including specialty retail that could be included or achieved through MXPD Zone.

BY MR. HARRIS:

Q Let's turn to the split zoning --

MS. ROBESON: Wait.

MR. HARRIS: Sure.

MS. ROBESON: Could I just clarify something --

MR. HARRIS: Sure.

MS. ROBESON: -- in my mind? What you're saying is they recommended a minimum of 120,000, the technical appendix said okay, you have to have 120,000 square feet of retail, of neighborhood retail, but then there's no limit on the amount of retail that you can have except per the MXPD Zone? is that your position?

THE WITNESS: The 120,000 is up to, specifically for neighborhood retail which is the master plan.
MS. ROBESON: Okay. And where does it use the word comparative retail?
THE WITNESS: In the technical appendix?
MS. ROBESON: Yes.
THE WITNESS: Page 12.
MS. ROBESON: Oh, okay. I just haven't had a chance to go through it. Okay.
THE WITNESS: Okay.
MS. ROBESON: Go ahead.
THE WITNESS: And then the master plan itself is silent as far as other types of retail, so it does recommend MXPD which allows 20 percent retail of the total.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q And just to clarify, did you say that the preliminary draft and the staff draft of the master plan discussed this topic as well?
A I did.
Q And --
MR. KLINE: Objection. Whatever's in those preliminary drafts is basically superseded by the final draft of the plan.
MS. ROBESON: But they are legislative history.

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

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

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

out in the master plan. And also, the intent at the time was to do a hospital, nursing and care facilities that were also not specific to the master plan.

BY MR. HARRIS:

Q So do you have an opinion with respect to master plan limits as far as the uses within the MXPD area?

MR. CHEN: Objection. Calls for a legal conclusion.

MS. ROBESON: I'm going to let him answer.

THE WITNESS: I do have an opinion. It's my opinion that they master plan did not preclude specialty retail in MXPD and that if the MXPD Zone were sought, that it could be approved or retail could be approved up to the 20 percent of the total employment as allowed per the zone.

BY MR. HARRIS:

Q And have you had occasion, in connection with that opinion, to compare any other development plans for project approvals with respect to either the MXPD Zone or other zones and if so, what have you learned from that analysis?

MR. KLINE: Objection.

MR. CHEN: Objection.

MS. ROBESON: Basis?

MR. KLINE: I'm not sure what would be the relevance in going and looking at other master plans because that's really what's kind of driving all of this and I think

that's what you're trying to do. You can't, you can't glean out of another master plan things that would help in this case.

MR. CHEN: Beyond that, the way the question was posed, it was not limited to a circumstance where the base zone or the previous zone was RMX Zone rezoned to MXPD pursuant to a development plan. And pursuant to that process, the development plan, I'll even take the development plan, forget a development plan amendment, that the development plan approved allowed that 20 percent of, allowed that in theory, the zone would permit, contrary to the master plan.

I mean, if there is an exact case that has pre-dated this application where you had the same standards, the same zones involved, the same type of, it doesn't even have to be the Clarksburg Master Plan but if you have the, comparable is probably a better word, if you have a comparable situation that reflects, and I think where the Examiner might go, an interpretation of, of the law in this regard, you know, I could see that being admissible but I haven't heard that yet.

MS. ROBESON: Well, I think you're going to the weight and the relevance of the evidence and not necessarily the admissibility. Mr. Harris, in what -- can you proffer the relevance of the other master plans?

MR. HARRIS: It is the combination of words in a master plan and how they're interpreted irrespective of which master plan and equally important, how the MXPD Zone and other zones have been interpreted. It's highly relevant here because that is the crux of their argument.

MS. ROBESON: So your focus is on interpretations of the MXPD Zone.

MR. HARRIS: And interpretations of master plans that, like this one, do not specify the amount of retail in an MXPD area.

MS. ROBESON: Okay. Okay. I'm going to let it in for the weight it deserves. It is, to my mind, it is not a matter of inadmissible evidence, and you are free to cross-examine on it. Go ahead, Mr. Unterberg.

BY MR. HARRIS:

Q So would you first talk about the Washingtonian Project?

A Washingtonian Center, which is G-439, particularly the MXPD Zone was written for this project from --

MS. ROBESON: How do you know that?

THE WITNESS: Well, it didn't exist before they, the 1985 Gaithersburg Master Plan and then was applied, this was the first project that it was applied to.

MS. ROBESON: Okay.

THE WITNESS: Again, it was, this is regarding the

1985 master plan, Gaithersburg Master Plan. In particular, the point I'd like to make is that the area that is the Washingtonian Center, it called for a, to be corporate district on the map which was for signature office, development buildings, specifically for office and residential uses. With that, the Planning Board, the Zoning Hearing Examiner and Council approved 400,000 square feet of comparison and specialty retail which they found consistent with the master plan because the MXPD Zone allows 20 percent retail. Also, they found that the retail is employment use.

BY MR. HARRIS:

Q Did --

MS. ROBESON: What retail is employment use?

THE WITNESS: The --

MS. ROBESON: All the retail?

THE WITNESS: The 20 percent under the MXPD that was approved.

MS. ROBESON: Okay. So under the zone, it's retail. You're saying under the zone, it's retail but under the plan, it's employment?

THE WITNESS: The plan called for it as office, light industrial --

MS. ROBESON: Okay.

THE WITNESS: -- or employment. They approved the retail per the MXPD, the 20 percent, and made the finding

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

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

MR. CHEN: They were never mentioned at the Planning Board hearing.
MR. HARRIS: The case was mentioned.
MS. ROBESON: Okay.
MR. CHEN: And it does not matter if it was mentioned frankly.
MS. ROBESON: What I --
MR. CHEN: We're talking about this hearing.
MS. ROBESON: Okay. What I am going to do is it does get too cumbersome to take official notice of 500 things that may or may not be, so every document that you want to rely on I would like to have in the record if you have them.
MR. HARRIS: I do.
MR. CHEN: What are their numbers?
MS. ROBESON: They're probably yours.
MR. HARRIS: No. If I have them.
MS. ROBESON: No. I don't -- we're not going to do --
MR. HARRIS: They're not in the record.
MS. ROBESON: I can't do it right now. Then what we're going to do is reserve the right to cross-examine Mr. Unterberg solely on what he's saying about these documents, okay? So, Mr. Unterberg, continue.
BY MR. HARRIS:

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

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

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

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

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

recommendation for that retail?
A The zone does not require recommendation for, master plan recommendation for retail.
Q Let me turn your attention to another case, the Seneca Meadows Project in Germantown. Are you familiar with that project?
A I am familiar with it.
Q And was there a master plan or sector plan approved that related to that project approval?
A That project, which is Seneca Meadows in Germantown, the Germantown Sector Plan was adopted in 2009. And that recommendation was for industrial office and technology uses for Seneca Meadows and the zone is TMX-2.
Q Did --
A Transit mixed-use.
Q Did the master plan make any recommendation with respect to retail and if so, what was it?
A It made limited respect to retail of specifically street level retail for a mixed-use development.
Q I'm sorry. What did it recommend?
A Street level retail or minor retail within mixed-use buildings.
Q Did it recommend an amount?
A It did not.
Q Let me turn your attention to page 67 of that

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

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

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

A I do. Preliminary plan number is -- there's two of them. Preliminary plan is 11998004A, and there's a site plan that went with that that was at the same time. The site plan is 820100140. And they're both in that same resolution.

Q And did the Planning Board approve a retail component as part of that preliminary plan and if so, what?

A Yeah. They approved approximately 207,000 square feet of a retail center, which is the new Wegman's that is being built in Germantown, and they found that to be consistent with the sector plan recommendation concluding that --

MR. CHEN: Objection. The document speaks for itself. It should be in the record rather than being characterized and interpreted by the witness.

MS. ROBESON: Well, I think that you are going to provide the document, correct?

MR. HARRIS: Yes. I only have one copy now.

MS. ROBESON: Well, I don't know if you need the preliminary plan, but the Planning Board resolution.

BY MR. HARRIS:

Q So, Mr. Unterberg, continue. What did they conclude?

A They concluded that retail uses are employment, and they further noted within that, within the --

MS. ROBESON: Now, where is this where they concluded that?

THE WITNESS: This is on page 4 of the resolution.

MS. ROBESON: Okay. So it's the resolution. So that's what you're going to place in the record.

THE WITNESS: Yes. Further in the resolution, they also concluded that master plans do not and cannot specify all development possibilities. Just to summarize, they did include the master plan called for employment and mixed use, the Planning Board approved, specifically, retail noting or concluding that the retail uses are employment.

MR. CHEN: Madam Chair?

MS. ROBESON: Yes.

MR. CHEN: You recognize the objection I've had.

MS. ROBESON: Yes.

MR. CHEN: Thank you.

MS. ROBESON: And I'll note it as a continuing objection.

MR. CHEN: Okay. I don't want to cause a problem with interrupting but as long as you recognize my objection as being --

MS. ROBESON: I do.

MR. CHEN: Thank you.

MS. ROBESON: Okay. Continue, Mr. Harris.

BY MR. HARRIS:

Q Mr. Unterberg, are you aware of how master plans are interpreted by the Zoning Hearing Examiner's office and the Planning Board in connection with the rigidity of their recommendations?

MR. CHEN: Objection. Calls for a legal conclusion at the least. It's now telling the Examiner what is the practice of the Examiner's office.

MS. ROBESON: I think he's already testified, Mr. Harris, that they're interpreted flexibly and it says so at the beginning of the plan.

MR. HARRIS: Okay. I believe he did. Thank you.

BY MR. HARRIS:

Q Are you aware of a recent case that you handled where that conclusion was reached as well?

A Yes. And I believe I already testified to that point, G-881, which is the Butz property. They made that conclusion on the flexibility of the master plan.

Q And do you have an opinion as to whether the age of this master plan and the nature of its recommendations, how they should be interpreted in this case?

A Yes, I do. It's my opinion that due to the changes and particularly, the land use and market circumstances over the almost 20 years and also from the testimony of Mr. Bogorad and Mr. Kaplan, that the master plan is flexible or should be flexible to accommodate these

changes and particularly, which can be accommodated in the MXPD Zone.

MS. ROBESON: I couldn't hear the last, the what in the MXPD Zone?

THE WITNESS: These changes can be, can be accommodated --

MS. ROBESON: Oh, I'm sorry.

THE WITNESS: -- within the parameters of the MXPD Zone.

BY MR. HARRIS:

Q Do you find anything in the Clarksburg Master Plan that relates to that interpretation of flexibility besides the page, Roman at 7, that you mentioned previously?

A Right. Two things in particular. We've talked about a grocery store and the anchor of a grocery store. We've heard testimony that that is not appropriate here and actually, a third grocery store in Clarksburg is not appropriate and would not be supported by the market particularly in light of Wegman's and some of the Germantown grocers who have come into town over the last 10 to 15 years.

Secondly, there's been a lot of discussion about outlet retail or specialty retail or comparison retail. This is allowed per the MXPD Zone. It's silent in the master plan, also silent in the Cabin Branch neighborhood,

but to incorporate the amenities and features such as restaurants and the other amenities that come with that, it's appropriate to, in my opinion, to include that within the parameters of the MXPD Zone.

Q And do floating zones provide sufficient flexibility to do that?

A Yes, they do. And particularly page --

MS. ROBESON: I'm going to note your objection.

MR. KLINE: Thank you.

MS. ROBESON: Really, he doesn't have to. I mean, it is legally, that is a legal interpretation.

MR. HARRIS: I think he was going to specify one place in the master plan where that interpretation is underscored that I think is pertinent testimony.

MS. ROBESON: Is there anything else in the master plan that would support?

THE WITNESS: Yes. On page 98. It reinforces the flexibility of the MXPD Zone and, quote, floating zones have more flexible development standards but they may be approved by County Council only upon finding that the development will be compatible with surrounding land uses and is in accord with the proposed clause of the zone, and that's on page 98 which addresses that.

BY MR. HARRIS:

Q And do you have an opinion with respect to the

extent to which this DPA satisfies that criterion?

A Yes. My opinion is that we are in substantial compliance with the master plan. Particularly, we have noted, with the flexibility of the master plan.

Q Okay. There are a number of findings that are required under the MXPD Zone so I'd like to review these with you. It might be somewhat tedious but from your viewpoint, is the development plan in substantial compliance with the goals, guidelines and recommendations contained in the Clarksburg Master Plan? A bit repetitive I know but I want to make sure it's clear.

A Okay. And bear with me as I go through these but, yes, it is to that question and for the reasons entered in the record with my testimony. But particularly, the DPA is substantially consistent with the use and density of the master plan.

Q Do you have an opinion as to whether the proposed use is compatible with approved and proposed uses in the area?

A Yes. And it is my opinion that it is compatible. Again, based on prior testimony. But I would like to point out one thing, that the MXPD Zone is intended to be flexible and to promote the very things that are happening in Clarksburg, or actually in Cabin Branch. The MXPD Zone encourages mixed use with the commercial component that can

accommodate up to 20 percent retail uses. This is exactly what is proposed in the DPA and the DPA, when implemented, will produce a mixed-use environment that is specifically envisioned by the MXPD Zone with residential office, neighborhood and specialty retail and community type uses. The proposed DPA provides a realistic form of implementing the goals and objectives of master plan taking into account the changes of the character of the design and development patterns, economy, current situation and needs of the community.

Q I believe you already testified but since we're going through these in sequence, I'll repeat it again. Will DPA 13-02 comply with the standards and requirements for approval of a development plan?

A Yes. It's my opinion that it does.

Q And would it comply with the purposes and standards set forth in Article 59-C?

A Yes, it does and prior, primarily based on my prior testimony.

Q Would it provide for the maximum safety, convenience and amenity of the residents of the development?

A Yes, it does. And particularly, the circulation systems have been organized in such a way to make certain there's a significant meaningful connection between various land uses that are safe, adequate and efficient.

Q By its design, does this DPA minimize grading and by other means, does it tend to prevent erosion and impact on other natural features on the site?

A Yes, it does. And particularly, with this DPA, there's no change per the prior approval and also, we have various subsequent approvals such as approved storm water plans, approved storm water management plans, approved water quality plans that accomplish, excuse me, accomplish this goal and provide for these two chapters, 22 and 19.

Q And has the District Council found that documents showing the ownership or method of assuring perpetual maintenance of any areas intended for use for recreation or other common or quasi-public purposes are adequate and sufficient?

A They have, and this has not changed.

Q Will the uses proposed be compatible with existing and proposed adjacent and surrounding uses? Again, repetitive I know.

A Yes, they do. Again, this is per my prior testimony. It's also per the findings in 2003 for G-806 with the original approval and particularly, the MXPD compatibility standards of 59-C-7.55.

Q And will DPA-1302 adversely impact existing or proposed public services and facilities?

A It will not, and there is an approved adequate

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

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

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

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

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

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

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

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

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

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

testimony?

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

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

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

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

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

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

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

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

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

MS. ROBESON: Yes.

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

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

THE WITNESS: Correct.

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

today. Mr. Kline.

CROSS-EXAMINATION

BY MR. KLINE:

Q MR. Unterberg, you made a comment today about figure 26 on page 65 of the master plan. Could I draw your attention to that? Is that it, that page?

A Can you say that again, please?

Q I believe you were talking about a graphic on page 65 of the master plan.

A Okay. I'm on page 65.

Q Okay. In the legend at the top, in the upper left-hand corner, the bottom of the column it says, it has a cross-hatch pattern and says neighborhood retail.

A Okay.

Q Okay. And I believe your point was you were trying to tell us where Cabin Branch used the term neighborhood retail. What I don't see is I don't see anywhere where that cross-hatch pattern is found anywhere in figure 26.

A That actually has been interpreted by Park and Planning. That cross-hatch pattern is that black dot in the middle of the diagram and I believe what has happened is that graphically, the cross-hatching is condensed to a black dot or black circle just south of Clarksburg Road on that diagram.

Q And you say Park and Planning has interpreted it that way. What's the foundation for that?

A Discussions with staff.

Q So we have a very clear exhibit that has a very clear legend reference and yet, it doesn't appear anywhere on this unless you say a black dot, which isn't defined anywhere on this legend, is supposed to replace that.

A Um, hopefully, I can clarify that. If you go to the fold-out, can I have the black and white fold out?

Q Why don't we use the colored one that we gave the Hearing Examiner instead.

A Let me see if these are the same.

MS. ROBESON: Well, there is -- okay.

MR. KLINE: The record should reflect that we're looking for --

MS. ROBESON: Wait. I have it.

MR. KLINE: -- land use plan side, the fold-out plan that you marked as Exhibit No. 80, is that correct?

MS. ROBESON: No, 60A.

MR. KLINE: Sixty, okay.

MS. ROBESON: Is the master plan. Let me separately mark this as exhibit -- oh, it is marked. It should be marked as Exhibit 60B, so that's the fold-out map.

THE WITNESS: In the legend, red is neighborhood retail. The circle that is red is neighborhood retail.

BY MR. KLINE:

Q I understand. Thank you. So there is a, it is correct there is a discrepancy between what's in the plan and what's on here.

MS. ROBESON: Although the neighborhood retail on Exhibit 60B is in the residential portion of the site.

BY MR. KLINE:

Q Mr. Unterberg, do you want to explain why that's the case?

A Um, this goes back to the discussion with what would be allowed under RMX. RMX requires a specific location and number recommended in the master plan for retail. If this was to go forward as RMX, which it didn't, then this location, general location and the 120,000 is what you could do in RMX under the optional method.

Q So Exhibit 60A is essentially just the same thing that we're seeing on page 66 of the plan for your 27 where we have something called retail corps. Those are essentially supposed to be equivalents?

MS. ROBESON: Sixty-five in the --

THE WITNESS: This is equivalent to 65 but if you turn the page to 66 --

MS. ROBESON: Oh, I'm sorry.

THE WITNESS: -- there is a more detailed, and the retail --

MS. ROBESON: I see.

THE WITNESS: The retail corps corresponds to the neighborhood retail shown on that exhibit.

BY MR. KLINE:

Q Mr. Unterberg, could you put up the drawing you've got that says the north district on it?

A This is, this is part of the, this is a slide from the Power Point that was previously submitted, and I have to go back a few days to find the exhibit number.

Q Well, I don't have my glasses with me but that one says in the upper left-hand corner Cabin Branch, correct?

A Correct.

Q Do you have one with you here today that says north district?

A I do not, but that is included in the Power Point. I think I have the 8.5 x 11 version of that.

Q Yes. It's obviously better if we can all be looking at it at the same time, and it's probably too --

MS. ROBESON: Could it have been Exhibit 45?

BY MR. KLINE:

Q Yes. It's an excerpt in Exhibit 45, but is it a big production to set up the Power Point so we can all see it simultaneously? Do you have that capability today?

A I do not. Can we speak from this slide or are you, can we speak from this slide or do you want to -- this

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

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

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

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

how the development plan was set up in 2003, the same boxes, A, B, C and D and I'll pick B for instance as residential detached, attached multi-family and the total and the range. In this case, 275 to 750. Also has employment and under that has office, retail and the total. In this case, office ranges from 0 to 300,000. Retail, 0 to 150,000. Total range of 0 to 450,000. If you add A, B, C and D up in the higher the range, you're way over what has been approved.

The chart on the middle of the drawing underneath the charts A, B, C and D has a maximum. It's called MXPD yield summary and this has the, the grand total or the number not to exceed. In this case, particularly with employment and retail, we have, under employment, we have office not to exceed 1,936,000, retail not to exceed 484,000, which is 20 percent of the grant total not to exceed 2,420,000. That's the overriding number or cap that we're tracking on the development plan.

BY MR. KLINE:

Q Since there is no alternative scenario described in the development plan or I'm sorry, the applicant's justification statement, then I presume this justification statement represents the preference and the likely form of development.

A That's, I'd say that's a scenario. It may change as the plan goes forward. Probably generally within those

parameters. The as noted on A, the majority of the retail is in between A and B with lesser retail in C but again, as it goes forward through the preliminary plan amendment or site plan for those particular areas, that will all be tracked and it cannot exceed the 2,420,000 with either the cap on the retail or the office.

Q Does not the statement of 450,000 square feet of employment-based retail represent what the applicant feels is the, what's the critical mass necessary to have an effective premier outlet center?

A I do not know if that's that critical mass or not. That is in the statement though, the 450,000 square feet.

Q Did you have a hand in constructing this statement?

A Partially but particularly, you have a question with?

Q I just asked if you had reviewed it and had participated in its formulation.

A I have reviewed it, yes.

Q Am I not correct in characterizing it as the preference of the applicant?

MR. HARRIS: Objection. He answered that question.

MS. ROBESON: Sustained. He did answer it.

BY MR. KLINE:

Q Of the 484,000 that would be of retail that would be permitted in the plan, 8,600 of it, as you told us, would be the Gosnell property that would be located across the road, correct?

MS. ROBESON: Across Maryland, north of Maryland 121?

THE WITNESS: That is correct. There's an approved site plan north of Maryland 121, Gosnell property, SMTM, a partnership that is approved for 8,600 square feet of retail.

BY MR. KLINE:

Q The justification statement, Exhibit 20, talks about over the longer term as build-out occurs, approximately 66,000 square feet of entertainment uses will be added. You heard my questions to Mr. Bogorad about that. I'm sorry, Mr. Kaplan. What is that and where is it going?

A Entertainment, again, we're capped at the 484,000 for retail and if it falls under retail, we're within that cap that we have to work with. If it falls under employment, and entertainment is a broad definition I believe at this time, that would be an employment use. I believe part of that discussion would be either could be future density or square footage within this northern area or northern district but again, it would have to work within the parameters of what's set on the development plan.

Q Can you give us an example of an entertainment use that would be considered an employment use and not a retail use?

A Let me give you, give you one of each, and these would be, again, subject to checking with the Zoning Ordinance and/or working within the parameters of that 484,000 square feet. There could be a movie theater as entertainment for that probably retail use. And again, we'd have to work within those parameters. There's other entertainment venues such as a amphitheater. Well, a theater or an indoor convention use is probably an employment use that could be used for entertainment. So depending on how the definitions were, you can have an entertainment for employment or entertainment for retail.

MS. ROBESON: What definition?

THE WITNESS: I would defer to the Zoning Ordinance and how they would define, we define that.

BY MR. KLINE:

Q Before I move on, I'm just having difficulty understanding why there's, in the justification statement, there is no suggestion that there is any other alternative. I understand why you would put ranges but the ranges you seem to be suggesting are greater than I would have expected. So why are we not alluding in the justification statement to there being maybe as little as 350,000 square

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q Well, I'm trying --

A Give me a little bit more softball explanation.

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

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

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

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

MS. ROBESON: And --

MR. HARRIS: I thought he --

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

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

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

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

MS. ROBESON: Like the restaurants.

THE WITNESS: Like the restaurants.

MS. ROBESON: And that kind of stuff.

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

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

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

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

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

overall purpose of the MXPD, that helps to accomplish that for the overall project.

MS. ROBESON: Mr. Kline.

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

BY MR. KLINE:

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

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

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

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

MR. KLINE: Yes.

BY MR. KLINE:

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

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

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

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

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

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

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

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

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

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

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

line, beginning of the fourth line after the number 153. Neighborhood retail uses. Would you agree that a retail center was proposed in the town center, recommended for the town center to achieve neighborhood retail services for the residents?

A Can you repeat that again? I was distracted for a second.

Q Okay. I dropped -- yes. I was drawing your attention to page 46, the fourth paragraph down. There is a third line talking about the 153,000 square feet, which you corrected me to say is really 150,000 based on the bullet at the bottom of the page, of neighborhood retail uses. So the plan is recommending that much square footage to serve the neighborhood, correct?

A What are you defining as the neighborhood? If it talks about neighborhood uses, yes, and that is for this particular neighborhood in the master plan.

Q Well, actually, here right now we're talking about the town center so that's not really classified as a neighborhood, is it?

A But the town center is within the town center neighborhood or town center district.

Q Well, how about if I draw your attention over to page 40 where we have a distinct difference between Newcut and Cabin Branch as neighborhoods and the town center as a

district. And in fact, doesn't figure 18 on page 41 suggest a hierarchy of the neighborhoods relative to the town center?

A Can you say that again with your --

Q Okay, sure. Well, let me break it down.

MS. ROBESON: Let me interject.

MR. KLINE: Pardon me?

MS. ROBESON: Where are you going with this? I'm not clear on where you're going. I'm following. I'm not clear.

MR. KLINE: Sure.

MS. ROBESON: Can you --

MR. KLINE: May I proffer?

MS. ROBESON: Huh?

MR. KLINE: May I proffer?

MS. ROBESON: Yes.

MR. KLINE: Yes, sure. Essentially, I would like to just get nothing more than a confirmation that there are numbers suggested in the plan for the two neighborhoods and the town center that suggest the amount of neighborhoods serving retail or appropriate for each of those uses, 120 in Cabin Branch, 109 in Newcut, 150 in the town center, basically suggesting the hierarchy of those two different, those three different areas. And two, what the plan felt was the critical mass necessary to create an effective

neighborhood retailing area.

MS. ROBESON: Well, I would suggest getting that out of your own expert rather than Mr. Unterberg because that's an interpretation of the plan. I'll give you some leeway to do it but, and why do you -- oh, I see where you're going now.

MR. KLINE: Well, and part, part of the reason it seems a little out of whack is it was, these questions were to be had been preceded by other questions about what's going to go on in that town square that's on the exhibit --

MS. ROBESON: Yes.

MR. KLINE: -- that I don't have in front of me. If I had that, I would have been a little more logical in the way I'm doing this.

MS. ROBESON: Yes.

MR. KLINE: Because again, as a proffer, if I may, I wanted to demonstrate that whereas the plan thought there would be discreet neighborhood centers now in Cabin Branch, they are fragmented and that what's going to occur in front of the outlet center, is going to be much different than what the plan had contemplated was going to occur in a neighborhood orient.

MS. ROBESON: Yes. And again, I think you're better off doing that, unless you want to -- you've asked him several times what uses are neighborhood uses in, on the

development plan and where they're located. I understand your thought and I share the same concern but that may be something, rather than trying to get at it through him, to have your own witness bring in.

MR. KLINE: I'm not trying to ask trick questions. I'm trying to --

MS. ROBESON: I know.

MR. KLINE: -- kind of put it all together. I'll basically, I'll wrap it up at that and reserve the right to go in a little bit more with better precision on Friday.

MS. ROBESON: Okay.

MR. KLINE: When I have that other exhibit in front of me.

MR. CHEN: Can we have a break if we're not going to break for lunch? We've been going since 9:40 this morning and now it's after 12:00.

MS. ROBESON: We can break for lunch for 45 minutes, so we'll be back at 12:45. Now, I do have -- if anyone is uncomfortable, I can move us to the Board of Appeals room.

MR. HARRIS: This is fine.

MR. KLINE: This is fine.

MR. HARRIS: This is better.

MS. ROBESON: Okay. All right.

MR. HARRIS: Excuse me. Mr. Kline, are you

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

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

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

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

to begin.
MR. HARRIS: Before we do that, I have copies and I've provided copies to opposing counsel, copies of the Gaithersburg Vicinity Map to the plan that we referenced.
MS. ROBESON: You mean the excerpts that you referenced?
MR. HARRIS: Yes. Correct.
MS. ROBESON: Okay.
MR. HARRIS: As well as the Zoning Hearing Examiner decision and the staff report on the Washingtonian case --
MS. ROBESON: Okay.
MR. HARRIS: -- that Mr. Unterberg referenced. And then lastly, the resolution on the Seneca Meadows case that he also made reference.
MS. ROBESON: Okay. Thank you. What is this MXPD to --
MR. HARRIS: That is the Zoning Hearing Examiner report. That was one of Mr. Klauber's specials where he put a cover sheet on it with a poem.
MS. ROBESON: Okay. So Exhibit 82 will be the Planning Board's resolution for Preliminary Plan No. 11998004A which is --
MR. CHEN: Could you give, I apologize, that number slowly?

MS. ROBESON: Preliminary Plan Number. Well, let me do it this way instead. Exhibit 82 will be Planning Board resolution 10-156, and that will be Seneca Meadows preliminary plan.
(Exhibit No. 82 was marked for identification.)
MS. ROBESON: And then Exhibit 83 will be the Planning Board recommendation in G-8439.
MR. CHEN: G-8349?
MS. ROBESON: No. I apologize. It's G-439.
(Exhibit No. 83 was marked for identification.)
MR. HARRIS: Washingtonian.
MR. CHEN: Is that the Washingtonian?
MR. HARRIS: Yes.
MS. ROBESON: Then Exhibit 84 will be the Hearing Examiner's report and recommendation in LMA G-439.
(Exhibit No. 84 was marked for identification.)
MR. CHEN: LMA G-349. Thank you.
MS. ROBESON: And Exhibit 85 will be an excerpt from the Gaithersburg and Vicinity Master Plan. I guess I'll have to --
MR. ROBINS: I think that's already marked as --
MR. HARRIS: No. The map.

MR. ROBINS: No, but I thought we also had the one page that was marked.
MR. HARRIS: No. That's one page from Germantown.
MS. ROBESON: Yes. So this will be, 85 will be excerpts from the Gaithersburg and Vicinity Master Plan.
(Exhibit No. 85 was marked for identification.)
MS. ROBESON: All right. Anything else? Okay. Mr. Kline, I believe you are continuing your cross-examination of Mr. Unterberg.
MR. KLINE: Thank you.
BY MR. KLINE:
Q Mr. Unterberg, were you provided a copy of the Hearing Examiner's transmittal to Mr. Harris on the 26th of August dealing with a request to have Mr. Carter testify at the hearing? Did you see a copy of that?
A I did see a copy.
Q Okay. The last sentence says, in communicating to Mr. Harris, does not intend to preclude you from making a broader argument that while the overall goals of the master plan should be adhered to, specific recommendations may be considered flexible over time which is the position technical staff adopted. And I presume that that is a position that you would adopt as well?
A I've discussed how the master plan is flexible,

yes.
Q We've had various allusions to the 2011 master plan amendment titled the limited amendment to 1994 Clarksburg Master Plan. I believe that you anticipate its being made an exhibit in the record of the case.
MS. ROBESON: If you have it, I will take it.
MR. KLINE: I have copies for everybody.
MS. ROBESON: I think he has a copy. Thank you, Mr. Chen. So this will be 86.
MR. KLINE: And it's got, I should add that on the back, it's actually got Council resolution of adoption as well.
MS. ROBESON: Okay. So 86 will be the limited amendment to the Clarksburg Master Plan, or 2011 limited amendment to the Clarksburg Master Plan.
(Exhibit No. 86 was marked for identification.)
MS. ROBESON: All right. Thank you. Are you ready to proceed?
MR. KLINE: Yes, ma'am.
MS. ROBESON: Okay.
BY MR. KLINE:
Q By way of background to the Exhibit 86, Mr. Unterberg, would you please take a look at page 190 of the Clarksburg Master Plan of 1994?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A Other than testimony provided, no.

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

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

Q Meaning it shouldn't be given any weight.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A It's a guideline.

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

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

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

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

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

in substantial conformance, change that, is not in conformance with the master plan at least on that limited issue?
A Restate that question.
Q Do you agree with me that the plan recommends there should be a grocery store in Cabin Branch?
A That question I do not. There's a guideline there should be a grocery store but again, it's not an absolute that there will be one.
Q All right. So you're telling me that the bullet on page 68 is not a recommendation, it's a guideline that is less binding than a recommendation?
A It says the following guidelines for the transit and pedestrian serviceability.
Q But you say guideline does not have the same meaning and weight and bearing as a recommendation?
A Correct.
Q I'm sorry. Did you answer that?
A Correct.
Q So then you conclusion is that on that subject of a grocery store, it's still in substantial compliance notwithstanding the fact you're not providing something that is specifically referred to in the master plan.
A It is in substantial compliance, and the guideline for the grocery store is not an absolute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A That I don't know.
Q Well, then how did you come up with 120,000 square feet, which you say is all you could do on the property, if we don't even have any development standards for the zoning?
A That's what was preceded at the time, to do a neighborhood center 120,000 square feet.
Q Okay. Let me try one more time. All right. You've told us that you could only import 120,000 square feet to the MXPD Zone because that's all that you were allowed to do in the RMX Zone existing on the property, correct?
A I don't believe I said that.
Q Okay. Would you please correct me and say it the way you'd like to say it.
A Well, the plan was approved with 120,000 square feet neighborhood center within the MXPD in 2003.
Q This is circular.
MR. HARRIS: Madam Examiner.
BY MR. KLINE:
Q You've told us that before.
MS. ROBESON: Okay.
MR. HARRIS: Madam Examiner, may I object here and make a point? Mr. Kline is not even reading the correct section of the Zoning Ordinance here. If you look at 10.3.4, it says clearly, the dense, under maximum commercial

density. The density of development approved by the Planning Board must not exceed the density shown on the approved and adopted master plan. The same provision is in 59-C-10.2.2. That's what limits it to the 120,000. This chart has nothing to do with the question.
MS. ROBESON: I guess my concern is where is, where are, if you're going to make an argument about the RMX Zone, where is the zone defined? And -- well, I do have the RMX.
MR. HARRIS: I don't know whether it's zoned RMX-1, 2 or whatever.
MS. ROBESON: Well, I'm looking --
MR. HARRIS: But I do know that the --
MS. ROBESON: -- at the existing zone.
MR. HARRIS: The RMX Zone says in 59-C-10.3.4 that the maximum density of commercial is what the master plan says. Our argument all along has been that that's a different standard that in the MXPD Zone and because of that specific language in there and the language in the master plan of 120,000 square feet of neighborhood retail, that was the limit if it remained RMX Zoning.
MS. ROBESON: Okay. Well, that's an argument that you can make. Right now, I think you've gotten as much -- I'm going to turn to the cross-examination. I think you've gotten as much as you can. I understand your point, and

let's move on to another point. You can renew that argument but this is not the time for a substantive argument although I am looking, just for the, I am looking on page 70, I mean I'm sorry, 97 of the master plan and I don't see, I don't see, all that's shown is a recommendation for an MXPD but even on the graph or the table, all I see is RMX-1/TDR and RMX-2/TDR. I understand your argument, that neither one is, that that isn't applicable, that, because of the limitation in the other section.
MR. HARRIS: It doesn't matter which RMX Zone it is.
MS. ROBESON: Yes, but if you're going to make an argument on the RMX Zone, then it would be helpful to me to know exactly which zone we're talking about so I can review it myself and see what it is, all right?
MR. HARRIS: Personally, I think it's RMX-1/TDR. That's what the plan at page 97 indicates. I don't have the official Zoning Ordinance with, or zoning map with me.
MS. ROBESON: Well, see. I don't see that. I see MXPD.
MR. HARRIS: No.
MS. ROBESON: I see --
MR. HARRIS: On the left, the triangle. RMX-1/TDR.
MS. ROBESON: I see that, but I see right next

to --
MR. HARRIS: The zoning, see the area --
MS. ROBESON: Okay. That's -- just a second.
MR. HARRIS: Okay.
MS. ROBESON: I don't want to get into this now. You can present it and clarify it for me at a later time. I want to get through cross-examination.
MR. HARRIS: I do as well. Thank you.
MR. KLINE: I just hate to leave this though because it's --
MS. ROBESON: You need to leave it.
MR. KLINE: Okay.
MS. ROBESON: Or you can wrap it -- how many more questions because I think you've gotten what you've gotten out of him and I, you've tried five ways from Sunday to get him to a place and I think you're pretty much there so --
MR. KLINE: Would you allow us to reserve a 10 minute --
MS. ROBESON: No.
MR. KLINE: -- cross-examination on Friday on the subject?
MS. ROBESON: No. No. We're not reserving anymore except on the documents. You can ask, you can ask your one more question. Is it one more question?
MR. KLINE: I guess it better be.

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

Q The 1994 plan had the 120,000 square feet in it so that number had to come from a source, and I'm asking you what was the source of that number? I'm asking you essentially what came before the plan that made you --
A The '94 plan and why it was in there? That, offhand, I can't answer.
Q You can't answer why the 120,000 square feet is a limitation in the, in the plan?
MR. HARRIS: That wasn't the question.
MR. ROBINS: That wasn't the question.
THE WIT: That wasn't --
MR. KLINE: I'm sorry. I'm sorry. You're right.
MR. HARRIS: That was --
MS. ROBESON: I thought it was the question.
MR. HARRIS: -- not the question. He asked where the 120 came from.
THE WITNESS: Yeah.
MS. ROBESON: Well, I was --
MR. HARRIS: He just answered why it's a limit.
MS. ROBESON: Okay. Just a second. You ask again and you answer. Ask it again.
BY MR. KLINE:
Q The 120,000 square feet that's a binding element in the development plan came from what source?
A That 120,000 came from the master plan.

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

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

the other question was, which I presume alludes before the master plan how they came to that number and/or how they came to other specifics. That's what I'm saying I don't know what predates or what the discussions were that --

MS. ROBESON: I'll go back through that.

THE WITNESS: -- predates the master plan.

MS. ROBESON: All right. All right. I'll go back through the transcript.

MR. HARRIS: Madam Examiner, it has to do with the effect of the number. What he has been saying is the effect of the number is that it is a cap. The cause, why the number was 120 versus not 119 or 121, he said he doesn't know, but the effect of the number, whatever the number was, he has been consistent in saying it's a cap because of the section he just cited in the Zoning Ordinance.

MS. ROBESON: Okay. I'm still missing the connection of why they would designate it MXPD and keep the cap in the master plan. Why would they do that?

MR. HARRIS: Because the, the MXPD was a recommendation, not a mandate.

MS. ROBESON: Okay. Well, I, we --

MR. HARRIS: They didn't know whether the MXPD would ever be applied or not.

MS. ROBESON: And then I have the further -- don't answer now. I'm giving you my thoughts because I want to

give you the opportunity to respond because I don't want to get into argument, legal argument now. But what I'm saying is if it was a cap, why did you have it in the MXPD plan too? Just --

MR. HARRIS: Okay. We'll answer that again.

MS. ROBESON: Well, I'm not clear on --

MR. HARRIS: I can understand.

MS. ROBESON: I'll be honest. When I read this, and particularly like Policy 7 which is pedestrian, transit and pedestrian oriented neighborhoods, and I know you've got all these greenways but when you put all, all the things together with regard to the neighborhood centers, just without a lot of, I think you could make an argument that these were just supposed to be neighborhood serving retail and not a regional retail outlet. Now, whether you can argue in a broader sense that it's going to serve the plan, but I think that that's where Mr. Kline's questions were going because when you read the town center section and you read the various neighborhood center sections, I think that you could certainly make an argument that they were contemplating a much smaller scale retail.

And I don't want to argue it now. I'm telling you what my thoughts are so that you can address it through testimony either on rebuttal or whenever it's appropriate in this hearing.

MR. CHEN: They haven't finished yet. They're still in their case.

MS. ROBESON: I know that. That's why I said redirect. So I'm just saying that. And I think you could also make an argument that for the MXD, the 120 is in there because that's what the master plan said regardless of whether the property was going to be RMX or MXPD. You can make an argument that your binding element is in there because it was supposed to be a neighborhood retail and they just accepted that, so that's why I'm telling you what, what my thoughts are.

And especially on Policy 7. I think policy, when I read the 2011 master plan limited amendment, what it incorporates is pages 16 through 34 which are those overall policies. If you look at page 11 of the limited amendment, it retains the plan's overall land use policies and objectives, and those are those larger policies on page 16, Policy 1, 2, 3, 4, 5, which includes that pedestrian oriented and they keep using pedestrian scale, whatever that means. So you may want to address the regional outlet center is not just -- I'm not, by any chance, making, saying which way. I am listening to every piece of evidence. All I'm saying is it doesn't suggest to me the pedestrian oriented retail.

So now, with that, Mr. Chen.

MR. CHEN: Okay.

MS. ROBESON: Would you like to do this, Mr. Chen? Would you like to put Mr. Soltesz on now because you only have 20 minutes?

MR. CHEN: I don't even have that, but that might make sense.

MS. ROBESON: And then you can come back and have a more continuous --

MR. CHEN: Mr. Kline would like to put Mr. Soltesz on.

MS. ROBESON: And are you agreeable with that?

MR. CHEN: Yes. Yes.

MS. ROBESON: Okay.

MR. CHEN: In fact --

MS. ROBESON: Mr. Harris, are you agreeable with that?

MR. HARRIS: Sure.

MS. ROBESON: Okay. Come on, Mr. Soltesz.

MR. SOLTESZ: Where should I sit, in the middle?

MR. HARRIS: Yes. That's fine.

MR. SOLTESZ: All right.

MS. ROBESON: Good morning, or good afternoon.

MR. SOLTESZ: Good afternoon. It's been a long one.

MS. ROBESON: Please raise your right hand.

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

noted.
MS. ROBESON: This is page, Exhibit 89. Resume of James Soltesz.
(Exhibit No. 89 was marked for identification.)
MR. HARRIS: I don't object to it but I would note that I would disagree with the fourth paragraph stating his expertise in the local land use market and entitlements. He is a civil engineer. I certainly appreciate that and but in any respect.
MS. ROBESON: Okay. Well, that is objection is noted but he's not here to --
MR. HARRIS: Correct.
MS. ROBESON: -- opine on that. All right. Mr. Kline.

DIRECT EXAMINATION

BY MR. KLINE:
Q MR. Soltesz, would you please state and spell your name and give us your business address?
A It's Jim Soltesz, S-O-L-T-E-S-Z. I handed my business card in. And my office is 2 Research Place, Rockville, Maryland.
Q I guess I can't ask you your profession but what do you do for a living?
A I am a civil engineer and have practiced civil

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

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

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

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

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

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

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

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

color.
MS. ROBESON: Okay.
THE WITNESS: So that is --
MS. ROBESON: The lighter red.
THE WITNESS: Yeah. This is -- yeah. The lighter red.
MS. ROBESON: That's red and the other is brown.
THE WITNESS: Close. Yeah. Right there.
BY MR. KLINE:
Q And that's, what we call in the master plan Newcut is now Clarksburg Village.
A No. That --
Q Okay. That's the town center?
MS. ROBESON: Okay. Let him testify.
THE WITNESS: It gets confusing so. The town center, the Newcut Road area, I hate to go back and forth.
MS. ROBESON: Go back.
THE WITNESS: Okay. That's probably good. Newcut Road area, Newcut Road neighborhood.
MS. ROBESON: Looking at Exhibit 90.
THE WITNESS: Back to 90. Newcut Road is a neighborhood within the Clarksburg planning area which is part of the master plan, okay? That's right here. Newcut Road.
MS. ROBESON: Right.

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

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

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

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

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

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

Now, going back to 91 --

MS. ROBESON: Exhibit 91.

THE WITNESS: I'm sorry. Exhibit 91.

MS. ROBESON: It's all right.

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

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

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

MS. ROBESON: Mr. Kline?

THE WITNESS: Um --

BY MR. KLINE:

Q Let me -- go ahead.

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

MR. KLINE: Yes.

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

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

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

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

THE WITNESS: Correct. They have to finish --

MS. ROBESON: Amendment.

THE WITNESS: Right. They have to finish the

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

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

MS. ROBESON: Okay. All right. So you've done some preliminary engineering. You've done some preliminary forest conservation plans and have some preliminary layouts but no zoning. Do you have a preliminary plan approval?

THE WITNESS: No. We can't file it until the, until --

MS. ROBESON: Until the master plan amendment.

THE WITNESS: Yeah.

MS. ROBESON: Okay.

THE WITNESS: I would say that the work that we've done, in your terminology of preliminary, we're well beyond that. The site's been, the site has been designed, graded, utilities laid out, water quality devices. There's actually been an RIFSD repaired although not filed but, yeah. There's been a lot of work done on this site.

MS. ROBESON: And a number of people have come and said well, Miles Coppola development is going to pay for sewer coming to the historic district. They're not going to pay for the individual system. What are they referring to?

THE WITNESS: Yeah. It's a good question. WSS -- the master plan said that in order for stage 4 to proceed, there was a requirement for a facility study for the entire Ten Mile Creek watershed which we did. Any property within Ten Mile Creek, you are required to provide a design to provide sanitary, public sanitary service.

The historic area, and we know this because we've done extensive environmental, the historic area has failing septic fields. When those were installed back at the turn of the century, the standards were nowhere near what they are. I'll just say there probably weren't any standards back then. And so the historic area has a number of old structures with failing septic fields and quite frankly, the waste, believe it or not, from those failing septic fields, we've taken samples of water in the head waters of Ten Mile Creek and we found feces in that.

So to answer your question, when WSSC required a facility study, we were required to figure out how we provide sanitary sewer service. Now, to answer your specific questions, the way it's been set up, which is very standard, we would run sanitary sewer gravity surface, gravity sewer. There were discussions previously about having all these people pay for little individual pump systems which is hugely expensive. Plus, it's a maintenance nightmare, plus, WSSC hates even though they're privately-owned.

MS. ROBESON: Right.

THE WITNESS: You know that, I mean, because if the power goes off, you're out of luck. But what we did was we went in there and we laid out sanitary sewer lines, trunk line extended and they would service the historic area.

Now, the individual -- it's like, it's like in a subdivision. If you have a sanitary sewer line in the road, you pay for the house connection which is the pipe from the main up to the house. So the running of the sanitary sewer up through this area and into the public right-of-way or through dedicated easements would be paid for by the Peterson, Tanger Company, and then those folks could hook up to it with the connection. The other thing that was --

MS. ROBESON: You're taking the connection past the property line?

THE WITNESS: No. You take it up to the rear of the property line or the front. Whatever the --

MS. ROBESON: No, no, no. No. Where are you putting the line?

THE WITNESS: It comes up through here to --

MS. ROBESON: Okay. When you say through here --

THE WITNESS: I'm sorry. There are, there are reaches up through the Miles Coppola property which are Stream Valleys. Now, we're not going through the Stream Valleys but the sanitary, gravity sanitary sewer lines will in fact proceed to the northeast up to 355, down 355 and down along the future right-of-way of Observation Drive. Those gravity lines will be butted up to the properties and those, either they've got a shop there or a house, whatever it is, then all they've got to do is come out, disconnect

their septic drain and connect it into the sewer line.

The other thing too I failed to mention is this is where the proposed fire station is which Montgomery County decided, they believe they need there. And that, right now, is set up to have a pump system for gravity because there was no gravity for sewer so we would, Miles Coppola would include in their hookup the provision for the fire station as well as the historic area.

BY MR. KLINE:

Q So next Tuesday evening, you're going to be testifying before the Planning Board on the staff's recommendations for land use recommendations for the properties in Ten Mile Creek.

A Correct. Yes. That's right.

Q Can you describe for the Hearing Examiner what the staff's recommendations is today for the Miles Coppola property?

A Uh-huh. It's for a mixed-use project. It also makes mention of specialty retail, i.e., the Tanger proposal for, I think it's 250, 400,000 square feet of specialty outlet retail. It makes mention of residential as part of the mixed-use and it also makes a recommendation on office or hotel. It's all part of the overall mixed-use concept and so after working with staff intensely over the master plan process, and to get through that in 12 months which is

what the Council wanted to have happen, I can tell you, you know, we got through it. It was a lot of effort but we're pretty much near the end. And so the recommendations on land use are very suitable and pretty much right in line with what Peterson and Tanger had asked for which was their outlet center with the mixed-use retail, residential.

The only other, the little bit of a nuance was that the county, the Park and Planning staff wanted to integrate -- this is future Observation Drive. Let me be real with this. This is also referred to -- this is one of those nomenclatures that change. This is, I call it the 355 Bypass, and the 355 Bypass is so that people -- you can't widen through the historic area because the porches sit about this far from the right-of-way and so they wanted us to make certain that we incorporated into the planning work that we had done, was required for the master plan, that we incorporated in there Observation Drive with the CCT. And tell you, you know --

MS. ROBESON: But you're reserving that. You're not paying for it.

THE WITNESS: Well, that is to be decided. Peterson and Tanger have offered, they don't control all the right-of-way but they control enough that they can get through the property to actually build it. And the answer is that we've done some alternative layouts that the entire

Observation Drive, the 355 Bypass, can be built and the, although obviously, we're in the master plan process but the Tanger and Peterson Group have offered to build the 355 Bypass.

And one of the important things also was the reservation of land, Madam Examiner, for the transit station too. There was a keen interest way back when Mike Knapp was the District Councilmember, that when I first came to him with this property, he asked me to start the meeting with Secretary Piccard (phonetic sp.). He used to work with us and then he was at the state. And Cari met with Mike Knapp to discuss the feasibility of the transit station because we were starting to make suggestions on moving ahead with the project and so I sponsored a couple meetings because I, you know, I knew both individuals, gentlemen.

And so we did some studies on placement of the transit center there and, you know, Mr. Knapp wanted to be certain at the time that accommodations were in place in terms of land use and in terms of right-of-way and in terms of the transportation to be certain that the CCT station, transit station was not preempted by anything that we were doing in this area. And so that was the other part of the discussions that we had early on with Miles Coppola. And since that time, we've obviously carried on with that plan in order to have it accommodated.

BY MR. KLINE:

Q Let me take you back to the staff recommendations, and the staff had an alternative recommendation, didn't it?

A Uh-huh.

Q Would you just explain what that was and how it plays into this property, the Miles Coppola property?

A Yeah. They also -- the master plan, the master plan's overall vision was that the town, town center, town center district remain as sort of the epicenter of Clarksburg and so the interesting -- when I started to read the master plan back in '03, the MXPD was the highest recommended density in the town center district and so it also made mention of heights and densities and the like. And so the, there's two alternatives that the Park and Planning put forward. Both of them were relatively high-density mixed-use projects. One had a heavier residential and the other one basically mirrors the proposal for the Tanger outlets, and those were the two that in fact will be discussed and those were in the draft staff report that was issued by the Commission and voted on as to be presented for public hearing. And so both of those in fact are there which, you know, I think recognize the importance of the MXPD Miles Coppola, Tanger, Peterson site in the greater scheme of the town center district.

MS. ROBESON: Okay. That gives me the background

that I was looking for. Do you have further questions?

MR. KLINE: Well, I will ask him some questions because he does have familiarity with Cabin Branch also. I do have a couple questions about that.

MS. ROBESON: What -- all right. Go ahead.

BY MR. KLINE:

Q Mr. Soltesz, have you ever worked on an application for retail development within the Cabin Branch neighborhood?

A Yes, we did.

Q Could you please describe for the Hearing Examiner what that was?

A We worked for a friend of mine. He's a client, he's also a friend, Will Collins. I think he traded his Concordia. And Will actually owned the neighborhood center which was in Cabin Branch and so we did numerous layouts, had numerous meetings.

Q And when was this?

A Oh, gosh. He lost the property I think in like '08 or '09, probably six, seven, something like that. But he was the one who purchased the property and he is a great guy. He lost the property, I believe, and I'm not, I believe that Winchester purchased the property, but he was the one who was proposing the town center, a little core retail area with retail shops. He was very proud that he

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

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

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

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

A It says 470,000 square feet in the town center district.
Q Okay. And that's referring to the Miles Coppola portion of the town center district I believe, is that correct?
MS. ROBESON: I'm sorry. What page are you on?
MR. HARRIS: Page 44, fifth line down.
THE WITNESS: Miles Coppola is in the town center district.
MS. ROBESON: Oh, okay.
BY MR. HARRIS:
Q Okay. And would you agree with me that the 470,000 square foot recommendation here is for employment use at the Miles Coppola property?
A Employment -- no. I wouldn't agree. I think I said it, Bob. 470,000 square feet is the, recommends employment site up to 470,000 square feet in the town center district of which Miles Coppola was part of the town center district.
Q Okay. So the 470,000 applies to all of what's in the town center district there which includes the Miles Coppola property. Is that what you're saying?
A The recommendation recommends, correct.
Q So some subset of 470 is what the Miles Coppola would be entitled to, is that right?

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

Q -- and 20 percent of that is only --
A Is --
Q Is less, isn't it?
A Is employment, Bob, is that retail, is that office, is that R&D? I don't know.
Q Well --
A It says employment. I mean, I always think of employment, honestly, as R&D and office, and I think of retail as retail.
Q Okay.
A And so if it says 470,000 square feet of employment, then I think of that as 470,000 square feet of office or R&D in the town center district.
Q So is there anywhere in the master plan that recommends retail on that property?
A In what property?
Q The Miles Coppola property. Anywhere in the 1994 master plan that retail is recommended on the Miles Coppola property?
A I think it recommends MXPD.
Q Okay. And MXPD is part of the 470,000 you said, right?
A MXPD -- no, Bob. What I said was the Miles Coppola property is part of the town center district recommended for MXPD. You said that the 470,000 square feet

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

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

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

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

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

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

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

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

Q That hasn't --

A I hope you're not.

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

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

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

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

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

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

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

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

Q Well, have they done one?

A I don't know.

Q You don't know.

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

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

MR. KLINE: Objection.

THE WITNESS: I --

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

THE WITNESS: I am not --

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

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

MR. HARRIS: Okay.

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

here is whether your development meets the master plan.

MR. HARRIS: Thank you.

BY MR. HARRIS:

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

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

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

THE WITNESS: I, I don't know.

MS. ROBESON: You can't answer.

THE WITNESS: I mean, I --

MS. ROBESON: All right.

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

BY MR. HARRIS:

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

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

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

THE WITNESS: Okay. Everything I've done supports

that.
BY MR. HARRIS:
Q You were talking about, I'm going to approach the exhibit over here, Exhibit --
MS. ROBESON: Ninety-one?
THE WITNESS: It's over in the left corner.
BY MR. HARRIS:
Q You were talking about where the sewer line would go.
A Uh-huh.
Q If I remember correctly, you said it would start basically on the Miles Coppola property.
A Uh-huh.
Q And then go towards Observation Drive and 355, is that correct?
A Correct. It would proceed to the northeast, correct.
Q Northeast corner of the Miles Coppola property?
A Well, it would proceed through the Miles Coppola property further to the north and the east.
Q All the way up to 355?
A It depends if -- some of the properties in the historic area may sewer the other way. The bulk of them sewer, because of the ridgeline, back toward 270.
Q Well, first I want to understand the Miles Coppola

sewer line. It would come up from southwest to northeast.
A Correct.
Q Up to 355?
A It depends, Bob. You know, if there is, if the topography, the ridgeline, Bob, sort of jogs along sometimes northeast of 355 and sometimes south. It's not, it's not a straight line.
Q 355 though, more or less, is the high point.
A In some places, it is, yes. Yeah, yeah.
Q Between 270 and 355.
A Anything that falls, Bob, within the Ten Mile Creek sewer basin would in fact be sewered by the proposed sewer line extensions that are being offered by Miles Coppola, Peterson, Tanger.
Q Not the Pulte property.
A Pulte is separate, Bob.
Q That's in the Ten Mile Creek Basin though.
A No. It's --
Q It's not?
A It is.
Q Okay. So it --
A Do you want me to stand up?
MS. ROBESON: Do you need to explain or can --
THE WITNESS: It would be helpful.
MR. HARRIS: Okay.

MS. ROBESON: Okay. Go ahead.
THE WITNESS: As I said, one of the conditions of the master plan of the master plan's staging was to put forth a sewer facility study for all of stage 4. We ran three or four scenarios probably seven, eight years ago via WSSC. The old way, drag the sewer line up the Stream Valley, would take down a bazillion trees. We knew that wasn't going to work. So what we did, Bob, was we filed a report that included all the Ten Mile Creek properties, included the historic area, Egan, the whole thing. It included the county properties which is where the bus depot was going to go. Remember that deal?
MS. ROBESON: No. Where the fire station is?
THE WITNESS: No.
MS. ROBESON: No.
THE WITNESS: Different. Different.
MS. ROBESON: How are you going to I guess, what's the proposal that you're, where is the sewer line that you're proposing going to run and who's it, who's it going to serve?
THE WITNESS: There's two options. There's a pump station here or a pump station here.
MS. ROBESON: Okay.
MR. KLINE: You need to tell us where on this exhibit.

THE WITNESS: I'm sorry. There's a pump station either on the west side of 270, which would be close to the county detention facility, or there will be a pump station generally over in the Miles Coppola property site.
MS. ROBESON: Okay.
THE WITNESS: Okay. Either one works. Bob's question was what happens to Pulte.
BY MR. HARRIS:
Q Forget that question. I really wanted to understand exactly the same thing that the Hearing Examiner --
A Should I sit down?
Q Where exactly is the sewer line going to run that will serve the Peterson project?
A The exact location, I don't have it engineered. The studies we've done bring the sewer line up through this property, up through this property -- I'm sorry. I keep saying up through. It goes through the Miles Coppola property, Bob.
MS. ROBESON: So it would begin at the --
THE WITNESS: Down at the low point.
MS. ROBESON: -- one of the two pumping stations, proceed northeast generally.
THE WITNESS: From the, from the proposed pumping stations, thank you, geography's right, proceeding north and

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

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

take a property in the historic district at the corner of 355 and this shows Stringtown Road there. I think it's technically Gateway Center Drive in this place, isn't it?
A No. That's not -- no, Bob. That's not Gateway. Gateway Center Drive is down --
Q Is this?
A No. No, Bob.
Q Okay. Which, is this --
MS. ROBESON: Let him answer.
BY MR. HARRIS:
Q Is this Spring --
MS. ROBESON: Let him answer.
BY MR. HARRIS:
Q Is this Stringtown Road?
A Let me give you --
Q Okay.
A Counselor, sit down. Let me give you a civil engineering lesson.
Q What's the name of that road? That's not civil engineering.
A This, this is Stringtown Road, Bob.
Q All the way to 355? I mean all the way to 270?
A Yeah. That's -- there was old 121, remember?
Q Correct.
A In the old days, we'd drive up through here, 121,

okay?
Q Okay.
A Then this road is not in great shape so then they put in Stringtown Road, right, and that ought to be 121 to be honest.
Q Right.
A Gateway Center Drive is, is here.
Q Okay.
A And this is Observation Drive.
Q Okay. So then let's take the property at the corner of 355 and Stringtown Road.
A Uh-huh.
Q Okay. In the historic district.
A Right.
Q Now, for that property to connect to the sewer line that you were just discussing, you're saying a sewer line has to run from that property over to the Miles Coppola property, connect to the gravity sewer that's being built there.
A No. That's not what I said.
Q Okay. Well, then tell me, tell me how this property at the corner would be sewered.
A Miles Coppola property would extend sanitary gravity lines through their property either north, south on Observation Drive or at Clarksburg Road or southeast down

through the future right-of-way of the transit way Observation Drive. Now, Bob, then once those gravity lines are in the ground, the property owners can go and disconnect their septic --

Q No. I don't want to go there yet. I just want to understand where the line was. So you're saying Miles Coppola will connect, will construct a gravity sewer line that will connect the house at the corner of 355 and Stringtown Road to the gravity system that's over in the Miles Coppola?

A That's not what I said.

Q Well, then where, where will that, I'm trying to understand where the gravity system line from that house will go.

A You're not listening to what I say.

Q You're not answering the question.

MS. ROBESON: Wait. Just a second.

THE WITNESS: He --

MS. ROBESON: Okay.

THE WITNESS: I said to him --

MS. ROBESON: Okay. I don't want to hear what you said.

THE WITNESS: Okay.

MS. ROBESON: What I want you to do is if there's a house in the historic district at the corner of Stringtown

Road and 355, is that going to be served by the sewer that Miles Coppola is putting in?

THE WITNESS: Any houses, structures within the historic area that fall within the Ten Mile Creek Shed will have. Not all the historic area flows into the Ten Mile Creek Shed.

MS. ROBESON: Okay. Before you go, what part of the historic district flows into the Ten Mile Creek Watershed, or sewage basin?

THE WITNESS: It's a mixed bag. I'd be happy to submit, for the record, the layout of which properties. There's no topo lines on here. I'd be happy to submit, if it's appropriate, the sanitary sewer line that will service those are for those structures located within the Ten Mile Creek Drainage Shed. Some of the pieces --

MS. ROBESON: Can you give me an idea?

THE WITNESS: Yeah. Generally --

MS. ROBESON: Is it --

THE WITNESS: Generally, I think it's pretty much right through here. It may not go all the way to the south but it's pretty much right through here.

MS. ROBESON: And when you say through here, that would be, I can't see what that road is.

THE WITNESS: That's, that's, 355.

MS. ROBESON: I know 355 but what's the, not

Stringtown but the next one.

THE WITNESS: Clarksburg.

MS. ROBESON: No, no. To the north. To the south of Clarksburg. There's a bold --

BY MR. HARRIS:

Q Right below the transit center.

MS. ROBESON: That one.

THE WITNESS: Redgrave.

MS. ROBESON: Redgrave.

THE WITNESS: Yeah.

MS. ROBESON: Okay. So roughly from Redgrave up to --

THE WITNESS: I think --

MS. ROBESON: -- the yellow.

THE WITNESS: I think this property goes this direction, this may not. Most of these do, this definitely does.

MS. ROBESON: Okay. So --

THE WITNESS: The --

MS. ROBESON: Okay. Hold on one second. How are those, where are you going to run your gravity line? You'll have the pumping station but where are you bringing the gravity line? How far to the northeast are you bringing the gravity sewer line?

THE WITNESS: To the north and to east?

MS. ROBESON: To the northeast. Generally, how close to the historic district are you bringing the gravity line?

THE WITNESS: To the historic district. To the historic district.

MS. ROBESON: To 355?

THE WITNESS: In some cases, depending on the topography, yes. Madam Examiner, the sanitary sewer service is based on the topography of the site.

MS. ROBESON: Right.

THE WITNESS: And where that topography of the site dictates within the historic district as well as the fire station. Those properties which should drain into the Ten Mile Creek Basin, they will be provided sanitary public sewer accessibility.

MS. ROBESON: Okay. Mr. Harris.

BY MR. HARRIS:

Q And they will not have to construct anything other than the sewer line on their own property to connect to that?

A The answer is that right now, they'll have to make their own connections which I said, yes.

Q The sewer will be brought to their front property line or rear property line.

A Rear, yeah.

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

weight I'm going to give it but I'm going to let him ask questions on it.
BY MR. HARRIS:
Q Okay. So Observation Drive begins down in Germantown I guess.
A I don't know where it begins.
Q Okay.
MS. ROBESON: Do you need to sit, Mr. Soltesz? If there --
THE WITNESS: It depends how many more questions he has.
BY MR. HARRIS:
Q Okay.
A I'm fine.
Q Let's take piece of Observation Drive between Stringtown Road and 355, okay?
A Uh-huh.
Q Yes. From there. Okay. Part of that's on the Miles Coppola property, part of it is not, is that correct?
A That is correct. Some of it is on school property, yes.
Q Okay.
A Correct.
Q So let's deal first with even a subset. Are you saying that the Peterson project will pay for 100 percent of

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

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

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

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

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

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

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

THE WITNESS: I can tell you that it has been suggested to Peterson, Tanger.
MS. ROBESON: No. Just answer my question. Do you, you --
THE WITNESS: Yes.
MS. ROBESON: -- know for sure what the funding is?
THE WITNESS: The funding? Okay. The funding, in my opinion --
MS. ROBESON: No. Do you know for sure? You're a fact witness.
THE WITNESS: Yes. There's no, there's no CIP project. There are impact fees in Clarksburg for roads and those roads, which is what Cabin Branch did --
MS. ROBESON: Yes what? Yes, they are going to pay for it or no, they aren't going to pay for it?
THE WITNESS: My guess is they'll pay for a significant part of it, either in the form of direct contributions or the possibility of using the impact fees which are required to pay for transportation. That's the whole idea behind those transportation impact fees. So the answer is that there's a strong -- my personal opinion, because this --
MS. ROBESON: But you're here as a fact witness so I can't get into your opinion.

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

BY MR. HARRIS:
Q Money that comes out of the county budget. Are you expecting the county to pay for part of that road construction?
A I'm not counting on it, no.
Q And you're not asking them to pay for it?
A I'm not counting on it.
Q Are you asking them to pay for it?
A We haven't asked anybody for --
Q So you haven't asked the state whether they'll pay for part of it, have you?
A It's not a state road, Bob. I doubt the state would give any money.
Q Okay.
A Why would they?
Q Have you asked them?
A I would not ask the state for a contribution to build a county road.
Q Okay. I understand. Have you asked them?
A No.
Q Okay. Have you asked the state for a contribution for any of the infrastructure?
A No.
Q Have you asked the county for a contribution for any of the infrastructure?

A No.
Q Let's go to timing a minute. You observed that you worked on the Cabin Branch project for a number of years and certainly, we've worked together in many different respects. Would you agree with me that many aspects of that project --
MS. ROBESON: Just a --
MR. KLINE: No, no. That's okay. We'll let him finish the question and then I'd like to say something.
MR. HARRIS: Okay.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q Would you agree with me that many aspects of that project, from site plans to infrastructure site plans to water quality plans, have taken a considerable amount of time to get approval?
A The development approval process takes a long time.
Q Was the timing of those approvals at Cabin Branch normal in your mind or did it take you longer to get those approvals than normal?
A It was normal.
Q Normal. Okay. So if we took those same processes and applied them to the Peterson project, we would assume the normal time periods would apply.

A Uh-huh. We hope.
Q Sure.
MR. HARRIS: Can you hear?
(Discussion off the record.)
BY MR. HARRIS:
Q So in terms of the process that the Peterson project would have to go through, you already talked about the master plan amendment.
A Uh-huh.
Q If I recall correctly, I'm seeing that the Council is hoping to adopt a master plan amendment by January 2014. Is that your understanding as well?
A Close, yes. I assume, yeah.
Q Okay.
A I don't disagree with that
Q And I think I saw that any sectional map amendment that would come out of that they are anticipating adopting by I think May of 2014.
A And I, their schedule is obviously up to them. The master plan schedule I believe says that. It could be earlier, it could be later but, yes. That's generally what it says.
Q Okay. And then you have to get a water and sewer category change approved, is that correct?
A Yes.

Q And doesn't it take between six months and a year to get a water sewer category change approved?
A No. I sent you a memo on this a couple days ago, Bob. Matter of fact --
Q Normally. Normally.
A -- it might have gone out today.
Q Normally.
A The way we -- those applications have been filed for about five years. Now, we have discussed with them and, Bob, because you represent Pulte, I sent you an e-mail, I think it went out yesterday or today, that said there's been discussions among Pulte and Brookfield and Egan and Tanger and Peterson that since this application had filed for five years, the answer is there's a, there is a meeting set up -- is there any conflict here with anything?
Q No. You don't have to --
MS. ROBESON: Yes. I don't think --
THE WITNESS: The answer is --
BY MR. HARRIS:
Q I'm aware of the e-mail and I wasn't --
A Okay.
Q -- going to go there. I was --
MS. ROBESON: I think he
BY MR. HARRIS:
Q -- asking you just a normal time period.

MS. ROBESON: I think he's just asking you in a normal situation.
MR. HARRIS: Right.
MS. ROBESON: And not about this particular.
THE WITNESS: The desire would be to commence with the actual formal application, which has been in hiatus for five years, as in now so that the approval of the category change, Bob, would come out more or less when the master plan and the zoning is decided.
BY MR. HARRIS:
Q So it's my experience that, that category changes can only approve, be approved once the zoning is in place. Is that your experience as well?
A Approval, yes. Process, the request is going to be that they start the processing. Since we, I guess, and you'd be familiar with this because I am, because you're working on the case, that because of the draft which is coming out with the master plans and the recommendations, that after waiting five years, that we start processing the water and sewer category change and that's the request.
Q Okay. So --
A We've got a meeting set up on the 19th and you're going to be there.
Q Let's assume the master plan gets adopted, we don't know about that, let's assume it recommends the kind

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

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

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

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

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

Q Okay. So how long does a preliminary plan normally take?
A To go through? Maybe, maybe six months, maybe nine months, maybe twelve months.
Q Six to twelve months for a preliminary plan normally.
A Uh-huh.
Q Okay. And you would also have to go through the site plan process here, is that correct?
A Uh-huh.
Q So how long does the site plan normally take?
A It depends --
MR. KLINE: Objection because that would, that would assume, I'm sorry, that would assume a -- we don't know the zone in which the property is going to be developed so we don't know whether it has a site plan requirement.
THE WITNESS: The question becomes again --
MR. KLINE: Just let the Hearing Examiner rule.
MS. ROBESON: Assuming there's a site plan requirement, how long would that take?
THE WITNESS: The question is can you run it concurrently with the preliminary plan or subdivision so, you know, if you can run them concurrently --
BY MR. HARRIS:
Q So maybe that's a simultaneous six to twelve

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

Q For that road.
A What road?
Q Observation Drive.
A No. Today, construction plans don't exist.
Q So it takes about a year to do construction plans, doesn't it?
A Um, construction plans take a year if you need the access or you don't need the access. You may need the road. You may need the road for access, you may not need the road for access. We've actually looked at it without having to have that road in place.
Q Okay.
A As a temporary issue.
Q And the road would take at least a year to build I would assume because it's got a bridge, doesn't it?
A No. It's got culverts.
Q A culvert. Okay. I would estimate it to take about a year to build.
A I am not going to venture a guess in how long it would take.
Q Okay.
MS. ROBESON: Okay. I think you're getting to your five.
MR. HARRIS: Okay. I'm getting to the point.
BY MR. HARRIS:

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

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

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

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

A I think it's the same on, on the Simon piece right?
Q I don't know what that acreage is.
MS. ROBESON: I couldn't hear what you said.
THE WITNESS: I said it's probably the same acreage on the, on the Simon piece. Gary may know. I don't know.
MS. ROBESON: Okay. You can't ask questions and Gary, whoever he is --
THE WITNESS: Whatever that is.
MS. ROBESON: -- isn't on the stand so.
BY MR. HARRIS:
Q Under the second option, aren't they calling for a townhouse floating zone? Isn't that what it says in that paragraph?
A Yeah. Townhouse floating zone.
Q Townhouse floating zone. Townhouse floating zone does not allow outlet retail, does it?
A I don't know. I doubt it.
Q Okay.
MR. HARRIS: I think that's it.
MS. ROBESON: I think that's --
THE WITNESS: What about Steve? He hasn't --
MR. HARRIS: No, no, no.
MR. ROBINS: We don't want that.

MS. ROBESON: No.
MR. HARRIS: They double-teamed but we haven't.
MS. ROBESON: No. Okay. Redirect, Mr. Kline.
MR. KLINE: I think in light of Mr. Harris' questions, I think I can do it now with one question.
REDIRECT EXAMINATION
BY MR. KLINE:
Q Peterson and Tanger do not expect to develop the property in accordance with the MXPD Zone, correct?
A That's correct.
MS. ROBESON: Wait.
THE WITNESS: That --
MS. ROBESON: I couldn't -- for some reason, I can't, I'm having trouble hearing.
BY MR. KLINE:
Q My question was Peterson and Tanger do not anticipate that they will develop the property, the Miles Coppola property under the MXPD Zone, is that correct?
A That's correct. I mean they, which is part of the reason that a master plan process was undertaken, as you guys all know, was to address environmental issues and land use issues. And if in fact --
MS. ROBESON: Well, I don't know.
THE WITNESS: Well, that was in the order or recommendation or proposal.

MS. ROBESON: For the Ten Mile Creek plan.
THE WITNESS: For the master plan.
MS. ROBESON: Wait. Which master plan, the Clarksburg one or the Ten Mile Creek amendment?
THE WITNESS: Well, the Clarksburg Ten Mile Creek Master Plan Amendment.
MS. ROBESON: Okay.
THE WITNESS: Ten Mile Creek Master Plan Amendment which is underway and should be wrapped at the end of the year.
MS. ROBESON: So that includes not just environmental but land use recommendations.
THE WITNESS: Correct. That's absolutely. Mr. Harris read the land use recommendations and, Madam Hearing Examiner, those options are there as part of the proposed draft sent out, is it public hearing? I always get that confused.
MR. HARRIS: Public hearing.
THE WITNESS: For public hearing.
MS. ROBESON: Okay. Mr. Kline, any other questions?
MR. KLINE: No further questions.
MS. ROBESON: Mr. Chen, any questions?
MR. CHEN: No, ma'am.
RECROSS-EXAMINATION

BY MR. HARRIS:
Q If not the MXPD Zone --
MS. ROBESON: Okay. Go ahead.
BY MR. HARRIS:
Q -- what zone are you anticipating?
A What's in the report?
Q It doesn't recommend --
MS. ROBESON: No, no. Just --
BY MR. HARRIS:
Q Do you know?
MS. ROBESON: If you know, you say, answer the question. If you don't know, just say you don't know.
THE WITNESS: I would, I don't know. I'd ask Mr. Harris to refer to the draft.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q If it's the CR Zone, would you agree with me that the CR Zone requires a sketch plan in addition to those various development approvals about which we were speaking before?
A I think, Bob. It depends whether they're optional or not, right?
MS. ROBESON: No, no.
MR. HARRIS: Okay.
MS. ROBESON: Just say what you know. Don't ask

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q No, no. I apologize. Wasn't there a application, a development plan to develop this property under the MXPD Zone --
A Correct.
Q -- prior to this application?
A There's an approved development plan from 2003.
Q Okay. Did you hear the testimony of the prior witness, sir?
MR. HARRIS: Which witness?
MR. CHEN: The prior witness.
MR. HARRIS: The immediately previous witness?
MR. CHEN: Yes. Yes. Mr. Soltesz.
BY MR. CHEN:
Q Did you hear --
A Yes. Mr. Soltesz, yes. I was here.
Q Okay. During the course of his testimony, he described a project that he was involved with for the Cabin Branch area including the retail area. Do you recall that testimony?
A Yes.
Q And as I recollect his testimony, he explained that that project failed, is that right?
A There are several parts. Which specifically are you speaking to?
Q Okay. You recall his testimony that he spoke

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

located in the Cabin Branch neighborhood where up to 2.3 million square feet of office type uses could occur. This plan recommends the development occur as part of, as part of a mixed-use concept to allow the opportunity for housing. Our mixed zoning will be the base zoning for the northern portion of the site and I-3 Zone for the southern portion with an MXPD option over the entire area to allow for comprehensive planning of these mixed uses.

Q Do you see the last, the last five letters in that paragraph? Can you read them?

A The --

MR. HARRIS: Last five letters?

MR. CHEN: I apologize.

THE WITNESS: The word uses?

BY MR. CHEN:

Q It's getting late. The last five words.

A Let me count here.

Q Yes. I know. I did the same thing.

MS. ROBESON: I think it begins with comprehensive.

THE WITNESS: Comprehensive planning of these mixed uses.

BY MR. CHEN:

Q You see the words these mixed uses?

A Yes.

Q What are those words referring to?

A Well, prior to that, it talks about the MXPD option and under MXPD, there are multiple options and mixes that are allowed for that zone.

Q Do you see there, the first sentence in that paragraph where it talks about office type uses?

A Yes. Where it says office type uses.

Q And do you see in the second paragraph where it says mixed use concept to allow the opportunity for housing? Do you see that, sir?

A Yes.

Q Do you see any other reference to any other types of uses in the paragraph other than office and housing?

A Specifically, no.

Q Okay.

MR. CHEN: Now, Madam Examiner, Mr. Kline took a lot of my area so if this gets choppy it's because I don't think you want to hear me repeat questions.

MS. ROBESON: No.

MR. CHEN: So just bear with me.

MS. ROBESON: I'll bear with you.

MR. CHEN: Thank you.

BY MR. CHEN:

Q Sticking with the master plan, would you please go to page 70?

A Okay. I'm at page 70.

Q Thank you, sir. Do you see the, I guess it's the first bullet on that page.

A Yes.

Q Could you read the bullet and the paragraph below it?

MR. CHEN: Madam Examiner, do you have that page?

MS. ROBESON: Yes. Thank you.

THE WITNESS: Create a strong neighborhood focal point by concentrating public and retail uses in the same general area. This area should have a strong neighborhood orientation. The scale of the development is large enough to support a variety of nonresidential uses, so important to creating a central place. These uses should not be only retail but civic and public places as well. This plan supports the concentration of these uses and one central area to strengthen the neighborhood center concept.

BY MR. CHEN:

Q Now, do you see that the bullet there provides that the plan supports for a concentration of these uses in one central area to strengthen the neighborhood center concept? Do you see that, sir?

A Yes.

Q And I take it it's your opinion that the DPA pending before the District Council that is proceeding does

strengthen the neighborhood center concept.

A The -- can you rephrase that?

Q Sure. Does the pending DPA support strengthening the neighborhood center concept provided for in the master plan for the Cabin Branch community?

A I believe it does.

Q How?

A Let's walk through the one exhibit.

Q Okay. What exhibit is that, sir?

MS. ROBESON: That is a slide from Exhibit 45 with the word Cabin Branch at the top.

MR. CHEN: Is there an exhibit number on it?

MS. ROBESON: It did not have a separate exhibit number because it's part of 45.

THE WITNESS: It's included in 45.

MS. ROBESON: Now, we can add it as a separate exhibit. Were you going to mark on it or anything?

MR. CHEN: No. I just want -- I think it should be an exhibit though.

MS. ROBESON: I agree with that. If he's going to testify to it, it should be a separate exhibit and then we know. Ninety-two will be there, what is it, large --

MR. HARRIS: Blow-up of what's it say, Cabin Branch?

THE WITNESS: It says Cabin Branch. It's a slide,

slide from the Power Point for the --
MS. ROBESON: Okay. A blow-up of Cabin Branch slide from Exhibit 45.
(Exhibit No. 92 was marked for identification.)
MS. ROBESON: Okay. Do you have 92 marked on there, Mr. Unterberg?
THE WITNESS: I do not.
MS. ROBESON: Do you mind crossing that out and putting 92 on?
MR. HARRIS: Good eyes.
MS. ROBESON: They're aging fast.
THE WITNESS: I wrote 45 on there before.
MS. ROBESON: Okay.
THE WITNESS: Where are we?
BY MR. CHEN:
Q You were going to explain, sir, how, and utilizing Exhibit 92, the basis for your opinion that the DPA strengthens the neighborhood center concept for the master, for the Cabin Branch community.
A We talked previously how with our northern district, which is this northern area, how the majority of the retail is concentrated in that location, includes the majority of the neighborhood retail. And within the mixed uses, particularly within the parameters of the MXPD in the

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

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

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

spoke about. Between Cabin Branch, Wellspring, Golden Eye to the --

Q Cabin Branch -- I apologize. Between Cabin Branch.

A Wellspring, Golden Eye, 121 to the north. Wellspring continues to the east, and that will also overlap and mix with uses from the neighborhood and blend with the specialty retail.

Q And approximately how many square feet of retail will be in the neighborhood center?

A In this specific location?

Q I understand that's where the neighborhood center is going to be.

A We've talked previously in the staff report, the staff report talks about 50 to 120,000 square feet of neighborhood retail. The majority of that will be within these two areas that I have just described.

Q Yes. Cabin Branch, Wellspring, Golden Eye and 121 to the north.

A Uh-huh.

Q And so that area will not be a, a retail outlet area.

A The majority of that retail will not, although, it does mix and overlap into the specialty retail. It also mixes and overlaps with the employment and the office.

Q Okay. And it's your opinion that that area that you've just defined for us satisfies the requirement under the master plan for a neighborhood center.

A Yes, it does.

Q But there will be no grocery store in that area.

A There will be no grocery or large scale full grocery store as previously testified.

Q Okay. And I think you answered this question under, question for Mr. Kline but I didn't write the number down. The area further to the south, I think there's another retail area in the --

A In the middle of area C on the development plan?

Q Yes. What is the range of square footage there for retail?

A That I believe -- it's been a little while. See if I say the same range. Again, these are ranges and they're going to vary as the plan goes forward. This is 25 to 50,000 square feet but that also overlaps with the range of office, neighborhood office and services.

Q As I understand your testimony, again, I don't want to put words in your mouth, that area, that retail component in Area C of, ranging from 25 to 50,000 square feet, that would not be considered a neighborhood center, is that right, sir?

A It would not be a center but it would include neighborhood retail.

Q Yes. Yes. I understand that.

MR. CHEN: We've got about five minutes.

MS. ROBESON: I know. I'm letting you get -- do you have one?

MR. CHEN: One.

MS. ROBESON: Well, if you don't, we can, we can end now.

MR. CHEN: Well, maybe this will give Mr. Harris and Mr. Robins, we probably can't get an answer to it today but I'll telegraph where I'm going to be fair.

MS. ROBESON: Yes.

MR. CHEN: Because this witness has been allowed to testify about compliance with the Zoning Ordinance, including the development plan provisions of the Zoning Ordinance --

MS. ROBESON: Yes.

MR. CHEN: -- as well as the master plan --

MS. ROBESON: Yes.

MR. CHEN: -- I will be asking him how the DPA complies with Section 59-D-1.3(c)(7) and how the DPA complies with 59-D-1.3(h)(2)(3). That may just save some argument the next time around but it gives Counsel --

MS. ROBESON: What are those provisions dealing with?

MR. CHEN: Well, the first one, 59-D-1.3(c)(7), deals with a preliminary forest conservation plan. As I understand the evidence of record, you have a preliminary forest conservation plan at Exhibit 13. It is my understanding that under the requirements of the development plan section of the Zoning Ordinance, that the application must contain a preliminary forest conservation plan. What I think you've got at 13, and Counsel can let me know if I'm mistaken, but it is my belief that Exhibit 13 is the preliminary forest conservation plan used for the original base development plan and I don't think they can do that. I think they've got to bring in a preliminary forest conservation plan reflecting the proposed amendment to the DPA.

The other section, 59-D-1.3(h)(2)(3), deal with the requirements, again, for a diagram showing the general building, it says build, and height of the principal buildings and their relationship to each other and to adjacent areas. That's sub 2. And sub 3 is the gross floor area of buildings by type of use and the FAR. I believe that any DPA amendment must include those matters and I'm sure Counsel will disagree with me and I'm giving everybody fair notice so that they're prepared.

MS. ROBESON: Okay. Thank you. I had one question too. You mentioned on the general requirements for

a DPA, you mentioned that the maintenance, there is a provision, I don't have 59-D in front of me, but there is a provision saying how common areas are going to be maintained and I think you were relying on whatever was filed with the original development plan.

But I guess my question is is it different now that a specialty outlet is coming because I do think to make a finding on that, it would be helpful to have something like that in the record as well because I, I don't have the original development plan before me and I don't know if it's what you wrote or what it says or if it's still applicable so I was going to mention that as a housekeeping matter.

All right. It being 5:30 --

MR. HARRIS: Ms. Robeson, one question I should have asked earlier and it dawned on me now. Actually, Mr. Robins reminded me. We had asked for John Carter to be called as a witness and I understand he is willing to be called. You declined to do that and, as I recall, your e-mail had said at this time. I might renew that request because I believe that much of the cross-examination went to the issue of what did the master plan intend.

I suspect that much of the testimony that will be offered by Mr. Noonan and by Mr. Ferguson will attempt to address that as well and it would seem appropriate to me to invite Mr. Carter in to, to discuss that, he being one of

the authors of the master plan.

MS. ROBESON: I will consider it after I hear Mr. Noonan's but I'll be honest, I have had experts come in here before who worked on the master plan and tell me it really means this and I haven't found their testimony -- really, it's what the adopting agencies say and not someone's interpretation of what the adopting agencies did. So if, if you want to renew it, you know, I didn't foreclose it because, you know, I was really waiting to, to hear why 120,000 is unclear. I've let you put in the testimony about it had to say that because it might not have been zoned MXPD but I'm going to reserve on that until I hear how far Mr. Noonan or, I'm sorry, I don't recall the name.

MR. CHEN: Ferguson.

MS. ROBESON: Until I hear what they have to say. I'm not going to anticipate it.

MR. HARRIS: Okay. Thank you.

MS. ROBESON: All right. With that, Mr. Chen, you're going to check on possibly another date, and we will continue this case to 8:45 on Friday, September 6th. Yes, sir.

MR. CHEN: I'm hoping to hear something tomorrow and I'll call your office.

MS. ROBESON: That would be wonderful.

MR. CHEN: Yes.

MS. ROBESON: And we can get an e-mail out. Mr. Robins?

MR. ROBINS: I just wanted to ask one question related to the John Carter matter and that is on September 6th, our goal, given that we're starting early and maybe going late, is to try to finish that day.

MS. ROBESON: Yes.

MR. ROBINS: And I understand what your ruling is is that you're still considering whether he would be allowed to testify. It seems to me it might make sense to alert him that he might be called on Friday or allow him to come?

MS. ROBESON: If he comes, I'm not going to call him on Friday. I can't -- that's not enough notice. I have to actually -- well, I guess I could request him but --

MR. HARRIS: He indicated he would come without a subpoena.

MR. ROBINS: Yes.

MS. ROBESON: That's what I was just thinking.

MR. HARRIS: Yes. He is not requiring to be subpoenaed. He is willing to come, and I think he was willing to come on Friday so it seems to me if we're going to try to finish, that might make sense.

MS. ROBESON: Well, I would like to hear what you did today with the background documents. I find, frankly, more persuasive than somebody coming and saying well, Betty

Ann Kranke did this and said this and, you know, so I would really, at this -- I'll send him an e-mail with copies to the parties but I'm very reluctant to have him come in, especially as I haven't even heard the other experts. That --

MR. HARRIS: Maybe suggest if he wants to come in the afternoon, he may or may not be called? I don't know.

MS. ROBESON: No. He can -- he's a half hour away. He can get here.

MR. HARRIS: Okay. Okay. That's fine.

MR. CHEN: Well, if I may.

MS. ROBESON: Yes.

MR. CHEN: Two things. This is their case. I mean, if Mr. Carter is going to be called, he's part of their case and should be treated as an applicant's witness. That's number one. Number two, I just want everybody to hear, I've put them on fair notice about the subjects of the ordinance I'm going to be getting into on Friday. I don't want anybody squawking that, you know, this is the wrong witness or anything like that, that the areas that I -- and I think I've been very fair about disclosing so that people are on notice. Okay.

MS. ROBESON: My real feeling is if at all possible, I think we're going to need a full other day so I am waiting. I am really hoping, Mr. Chen, that we can do,

do another day. I will send something to Mr. Carter but again, I've had, you won't believe the testimony I've had from staff, former staff members and --

MR. HARRIS: Please.

MS. ROBESON: So --

MR. HARRIS: You've got my position. You've got my letter on that subject. I'm just saying --

MS. ROBESON: Yes, I did. So I, again, I'll send something to him but I don't want to subpoena or I don't want to request him to be here until I feel like it's necessary and right now, I don't know what their experts are going to say.

MR. HARRIS: Okay.

MS. ROBESON: And I'll be honest with you. The drafts and the resolutions are more persuasive to me than having some, even as eminent a staff member as Mr. Carter come in and say this is what we really meant.

MR. HARRIS: Okay. Fair enough.

MS. ROBESON: All right. With that, we're going to be adjourned until 8:45 on September 6th.

MR. CHEN: I've got, in anticipation of Mr. Noonan, I'm handing Mr. Harris some excerpts. It's not a report. There is some discussion about Leesburg from his witnesses and I've got an excerpt from their master plan and some photographs that I'm giving to Mr. Harris.

MR. HARRIS: Thank you.

(Whereupon, at 5:33 p.m., the hearing was concluded.)

C E R T I F I C A T E

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

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

DPA 13-12

By:

Josephine Hayes, Transcriber

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OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

FOR MONTGOMERY COUNTY

APPLICATION OF ADVENTIST HEALTHCARE & CABIN BRANCH COMMONS	:	**DPA 13-02**

A hearing in the above-entitled matter was held on August 14, 2013, commencing at 9:35 a.m., at the Office of Zoning and Administrative Hearings, 100 Maryland Avenue, Rita Davidson Memorial Hearing Room, Rockville, Maryland 20850 before:

Lynn A. Robeson

Hearing Examiner

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C O N T E N T S

Witnesses:	Direct	Cross	Redirect	Recross
Leonard Bogorad				
By Mr. Kline:		82		
By Mr. Chen		138		
Gary Unterberg				
By Mr. Harris:	221			

E X H I B I T S

Exhibit No.		Marked/Received
60A	Approved and Adopted Master Plan	7
60B	Technical Addendum	7
61	Green space exhibit Seneca Meadows Corporate Center	127
62	Detail of Exhibit 61	128
63	Sectional Map split zoning	263

APPEARANCES:

Tatiana Franklin	12
Sandra Barrier	52
Melane Hoffmann	62
Paul Whit Cobb	168
Boa Zhu Wei	218

P R O C E E D I N G S

MS. ROBESON: This is a continuation of a public hearing in the application of Adventist Healthcare, Inc. and Cabin Branch Commons, Inc. This is an amendment to the development plan approved by the District Council on September 9, 2003, in LMAD 806. Are there any preliminary matters?

MR. HARRIS: Yes, Madam Examiner. You talked about the Clarksburg Master Plan last time. I understand you did find yours, but I think you asked that we submit one for the record in this.

MS. ROBESON: Okay. That's fine.

MR. HARRIS: It was the end of July.

MS. ROBESON: Well, the only thing is if I did find it in our library, there is some red underlining on it, I don't know why, and there are some penciled in notes that relate to the exhibits in this case, I think, because it's one of those, the notes are 106f. The red underlining is on page 2. I didn't put it there.

MR. HARRIS: We don't have 106 exhibits. You said 106?

MS. ROBESON: Well, then it relates to -- that's right. It relates to a different case. So if -- I can take official notice and you can keep your copy. I can show you the red underlining.

MR. CHEN: Madam Examiner?
MS. ROBESON: Yes?
MR. CHEN: If I may?
MS. ROBESON: Yes.
MR. CHEN: I think that you are certainly well enough able to distinguish underlining and notes of a different case with a copy of the, a hard copy of the Master Plan that you're going to use. So I, on behalf of my client, we don't have any objection to you using the document you've got. However, with regard to Mr. Harris's offer of making an exhibit, the hard copy, we would request, we think it is appropriate that the hard copy of the Master Plan be made an exhibit in these proceedings.
MS. ROBESON: All right. All right. I agree because I have a have feeling this is going to, well, it would help any appeal, I know a hard copy.
MR. HARRIS: So is that Exhibit 60 then?
MS. ROBESON: Yes.
MR. HARRIS: And you have both the body of the Master Plan and I provided the technical appendix with it. Are they both Exhibit 60?
MS. ROBESON: Oh, yes, I'll make 60A the approved and adopted Master Plan and 60B will be the technical addendum.
(Exhibit Nos. 60A and 60B were

marked for identification.)
MS. ROBESON: I've got them right out at the moment, it will have the full title, I'm just not going to write it out. All right. Anything else?
MR. HARRIS: Second, Ms. Robeson, we talked about another hearing date with two additional hearing dates if for some reason we don't finish today. My goal would still be to finish today, but if that doesn't happen I have talked with opposing counsel and I understand, and they can answer for themselves, that September 4 date you proposed as the next hearing date is available. It is okay with us as well as the applicant.
MS. ROBESON: Okay. Any other -- is that fine with everyone else?
(No audible response.)
MS. ROBESON: Okay. That's good. I was hoping to finish. Out of an abundance of caution so that we have a date, we have this other case going that's hogging all our dates. So the 4th will be in this room.
MR. HARRIS: Okay. And then I think --
MS. ROBESON: I think it will be the --
MR. HARRIS: Excuse me. I believe that you also had held, put a hold on September 6th, heaven forbid we go that long, but --
MS. ROBESON: We will strive not to.

MR. HARRIS: Okay.
MR. CHEN: Madam Examiner.
MS. ROBESON: Yes?
MR. CHEN: I apologize on one aspect of this. And I think this came up too at the hearing before last. The 4th is very much up in the air for Mr., my client, Mr. Cobb, because if you recall, there was another previously scheduled obligation involving a family member.
MS. ROBESON: Right.
MR. CHEN: Possibly the way we can handle this is provide that Ms., that he would testify today at some -- probably towards the end of the day or wherever we are in the afternoon in the probability that he would not be able to be present on the 4th. You know, I, my calendar is clear and I am available, as I said, and this was noted before my --
MS. ROBESON: Do you have an objection to that, Mr. Harris?
MR. HARRIS: No, that would be okay with us.
MS. ROBESON: All right. Then we still have cross-examination and then Mr. Unterberg has to finish his testimony and cross-examination. So let's try to get through them and then, and then we can take Mr. Chen's client. Do you have an objection to that?
MR. HARRIS: I don't have an objection to that,

but let me add to the complexity a little bit. I understand there is another witness here who would like to speak at some point this morning in opposition to this and then I believe there also are a couple of additional community members coming to testify in support. So it might be a little bit, you know --
MS. ROBESON: We'll get it all in.
MR. HARRIS: Okay. Yes.
MS. ROBESON: We're going to get it all in. Do you wish to take the opposition witness now so then they don't have to --
MR. CHEN: That would be fine.
MR. HARRIS: That would be fine.
MS. ROBESON: What I'd like to do is sort of get your case-in-chief continuing.
MR. HARRIS: Defer to that and so --
MS. ROBESON: Well, it's helpful to me to have it in one piece. So if we can get the community witnesses in without too much delay and then I realize we're going to have to make time. So you guys may have to limit your cross-examination. Well, actually I'm not being serious for the record.
MR. KLINE: With regard to the person Mr. Harris referenced, my understanding is she'd like to kind of understand how the flow of this works just to overcome a

little bit of uneasiness about testifying. I suggest that after Mr. Bogorad's cross-examination, if we could go back to Mr. Unterberg. I don't know if it's mandatory, but that would be her preference just to give a level of comfort.

MS. ROBESON: Well, I've got to run the hearing and I've got to get through the hearing in the best way to get a decision out for me. And so I would like her to go first with all due deference and we can be very nice. So we will try to be easy on her. Is she your witness or an independent witness?

MR. KLINE: I have talked to her, but she came independently in terms of, as Mr. Harris said in support of the application, I'm sorry, in opposition.

MS. ROBESON: Okay. Well, I would like to take her first and then we can get that out of the way. All right. Just does this person who has been unnamed, but does she, can she come forward?

MS. FRANKLIN: Good morning.

MS. ROBESON: Good morning. We will try to be easy on you.

MS. FRANKLIN: Thank you.

MS. ROBESON: Let me just explain a few things before we get into the formalities. Your testimony will be under oath and I'm going to swear you in as soon as I finish talking. And you can say what you want to say. You will

get -- your testimony is subject to cross-examination, which means the parties can ask you questions about your testimony if they feel it's not accurate, that type of thing. So that's just to prepare you. And so if you could kindly raise your right hand?

(Witness sworn.)

MS. ROBESON: And please state your name and address for the record.

MS. FRANKLIN: My name is Tatiana Franklin and I live at 22620 Clarksburg Road --

MS. ROBESON: Okay.

MS. FRANKLIN: -- in Boyds, Maryland. The zip is 20841.

MS. ROBESON: Okay. Now we have a sign-in sheet. Sometimes we have to contact the parties after the hearing. Have you signed the sign-in sheet and put your e-mail address?

MS. FRANKLIN: I can do that.

MS. ROBESON: Okay. I would appreciate that --

MS. FRANKLIN: Sure.

MS. ROBESON: -- because you will get notices of different things after this hearing concludes, all right? Okay, Ms. Franklin, what would you like to say?

MS. FRANKLIN: Well, first of all, I'll tell you just a little bit about myself. I bought a house in, on

Clarksburg Road about 10 years ago and my house is directly across the street from the Cabin Branch project. And I am also a business owner. I do business in Clarksburg and the surrounding areas and I'm also the co-president of the Clarksburg Town Center Farmer's Market, which at this time is located in the historic district of Clarksburg. And I've been volunteering for the Clarksburg Farmer's Market for the last six years now.

If I can show you where my house is up here on the map? Is that possible?

MS. ROBESON: It would be --

MR. KLINE: This is what, Exhibit 59.

MS. ROBESON: Exhibit 59? Okay. That's fine. Why don't you do that?

MR. KLINE: Ms. Franklin, you're going to have to speak up so the microphones can pick you up.

MS. FRANKLIN: Thank you. Okay. This would be my house right here.

MR. KLINE: Can you describe where you're pointing?

MS. FRANKLIN: Right here is going to be the west side of 270 and this is Clarksburg Road. And across the street, this is going to be the new Clarksburg Road. I believe this is Gosnell Adventist Concordia Daycare.

MS. ROBESON: Okay. You mean the Gosnell

development?

MS. FRANKLIN: The retail center is right here.

MS. ROBESON: Okay. So --

MS. FRANKLIN: -- and then you have Adventist where they're proposing to put the outlets.

MS. ROBESON: Okay. So A in the blue is the outlets, then the triangle directly to the east of you --

MS. FRANKLIN: Right here. That's all like a little strip mall.

MS. ROBESON: -- the red area?

MS. FRANKLIN: Uh-huh.

MS. ROBESON: The pink/red area? Okay. And you are on Old Clarksburg Road?

MS. FRANKLIN: We're on Old Clarksburg Road and the three homes that are here --

MS. ROBESON: On the west side?

MS. FRANKLIN: Right next -- on the west side of Clarksburg Road that are together, the first person, the owners live in California, so it's a renter. The other side of me, the owner is Frederick County and his house is a decking company. So there's only somebody there from 9:00 to 5:00, you know, Monday through Friday.

MS. ROBESON: Okay.

MS. FRANKLIN: So really I'm like the closest resident to what's going on that actually owns a home there.

MS. ROBESON: Okay. All right.
MS. FRANKLIN: So I just wanted to point out where I am. And in the last, say, eight, nine years, I've received plats from what's going on across the street and I look at them very carefully. I have a magnifying lens that I actually study it. We know where the retail is going in. My husband and I have been, you know, looking at this for a long time. Behind my house is the Pulte thing. And so we've also been looking at that. So we're very aware of what's going on.
And then I get this notice for the development plan amendment which takes the retail space from 120,000 square feet to 484 square feet and that I wasn't okay with and there's many reasons why I'm not okay with that. It would allow the outlets to actually continue to be built across the street from our house. Once everything is done, if it all gets approved and they build everything on this side of 270, which would be the west side of 270, it kind of takes the heart away of the Clarksburg historic district which I am very proud to have supported for so many years.
The Master Plan wasn't designed that way. I was around when Newland was trying to do their thing. After all that, Elm Street came in. So I've been really paying attention. I talked to a lot of the residents that come to the, for farmer's market. I kind of give up 22 weeks of a

year every Sunday from June until October to run the farmer's market and I'll listen a lot and I'll listen to people and I hear what they have to say.
The historic district is faltering. The septic systems are horrible. And to take all the town center amenities and put them on the west side of 270 would literally kill the center of Clarksburg which is the historic district area. The Master Plan always said that you're building the new, you take the old with it. You put it together. It has to flow together.
Well, if I walk outside my house and I walk across the street, Clarksburg Road, I can be at the outlets in no time at all. I can be at the retail. I can be at the new town center because that's exactly what's going to happen. If I were to walk over 270 and walk down a mile, I would get to the historic district, which absolutely would be desolate. There would be nothing there.
I network a lot in Clarksburg, so I know a lot of business owners in Clarksburg. I know some big companies that have actually left Clarksburg because there's no amenities over there for them. However, they are willing to come back and they'll go right down the street, right down the corridor to Germantown, but there's nothing up in Clarksburg for their visitors that come in. So we're losing business.

So the historic district was supposed to be vibrant. It was supposed to be -- somebody was supposed to not leave it behind and that's exactly what's happened. And this is just going to get worse and worse if this continues. So basically that's what I'm here to say. I'm here to support the historic district. I would like this development plan amendment to be denied. I cannot see that amount of retail space being quadrupled and put across the street from my house, not to mention how I feel about all the lights and losing my sky and everything else. Yes.
But I'm not against development. I've kind of signed off on everything that's been sent to me. I have a folder this thick of plats and letters and hearings and pretty much I've kind of signed off, said, okay, all right, we moved in here, we signed on the dotted line, we knew what we were getting into, we knew there was going to be development across the street, development behind our house, we're okay with that. But I'm not okay with this and that's the reason I'm here today.
MS. ROBESON: Okay. Thank you for coming.
MS. FRANKLIN: Thank you.
MS. ROBESON: I'm going to let Mr. Kline and Mr. Chen ask any follow-up questions so you can base your cross-examination on their follow-up questions. Do you have any questions for Ms. Franklin?

BY MR. KLINE:
Q Well, Ms. Franklin, just to kind of get the parties straight for the Hearing Examiner, you mentioned the name Newland and Elm Street. Can you give us a little bit more precise detail about who those people were and what their role was in the town center so she understands who the players are?
A Sure. Newland Communities as a developer from Virginia that came in and they had plans, they had a vision to build the town center and they built it. They wanted to streamline it in with the historic district so it would all be together. However, there was some infractions and the residents raised arms about certain infractions that were done by the developer by building some of the homes too tall, taller than the steeple of the church because really what it was about was keeping it, you know, downtowning it a little bit from the historic district, however, making paths for everybody to come through. Well, after the years, Newland pulled out because everything that they proposed got denied. So they actually pulled out and they sold all this portion of land over there to Elm Street Development for $1.
And the reason I have ties in with Newland and Elm Street is because with Clarksburg Farmer's Market was originally put in the location in a field where the farmer's market was supposed to be built for the town center. They

were going to pave it first. They were going to put awnings, everything. That was supposed to be the gathering place for everybody. So the idea was to get people used to going there before it was even built. But then all that went away, so then I had to deal with Elm Street Development to see, well, can we still use your land, you know, can we still have our farmer's market there? And they said pretty much you can do whatever you want because we're not doing anything with that piece of land for a long time. We paid $1 for it and we're not going to do anything until we get ready to do something. Again, the historic district gets left behind. So that's my dealings with Elm Street and with Newland.

Q Were you aware that the applicant of this development plan amendment is proposing not to include a grocery store within the Cabin Branch retail capacity?

A Yeah, and I think there was some type of amendment done to the Master Plan just so that we could get a grocery store in Clarksburg at all on the east side of 270.

Q Do you feel that the loss of a grocery store in the Cabin Branch community would be a detraction from you in terms of the neighborhood-oriented services you expected would be delivered by the original development plan approval?

A I think for me personally it would be a detraction

because that's been one of the problems that they've had on the east side of 270 is they really didn't need something like that.

Q Well, would you have been capable of walking to the grocery store from your house through Cabin Branch itself?

A Oh, yeah, absolutely.

Q And now you'll at best, I guess, be driving across I-270 to whatever gets built on the east side of I-270?

A Exactly.

Q Were there any other neighborhood services that you expected to be delivered as part of the development plan amendment that may not occur because it had been usurped by the regional outlet mall?

A Well, I didn't have any problems with the hospital being there, you know, and what I had, what I had problems with is the amount of retail space that is now being proposed to go in there and it's not the type of amenities that I'm looking for personally.

Q Okay. And you say amenities, but the services that you would need from a neighborhood-oriented retail operation?

A Uh-huh.

Q You have to, unfortunately --

A Yes. Yes.

Q -- it's transcribed. Okay.

A It doesn't translate well, yes.

Q The last question is you sound like you're really close to the farmer's market and --

A Oh, yes.

Q -- can you explain --

A -- lots --

Q -- is it serving the function? The Master Plan talks about the town center as being the focal point of the community and having some of the civic activities. Does the farmer's market represent one of those kind of things in terms of animating the town center and do you see a risk of it not being able to survive if the proposal is approved with more retail development on the west side of I-270?

A Oh, absolutely. The Clarksburg Farmer's Market is the only place that the residents get to come and bring their dogs, their kids, listen to music. There's no amphitheaters in Clarksburg. There's nothing. It's, you know, there needs to be and one day I hope to see it there, but there's nothing over there right now and so the Clarksburg Farmer's Market is the only place. We moved it to the historic district for that reason to try to attract more people to come to the historic district, to spend some money, spend some time and then hopefully get other people interested in that area and help it become something good

again, help it thrive and all. So, yes, the answer to your question I do see that there would be a problem. We probably would lose the farmer's market at that point if nothing is done in the historic district.

Q Thank you very much.

MR. KLINE: No further questions.

MS. ROBESON: Mr. Chen?

MR. CHEN: One or two questions please.

BY MR. CHEN:

Q Good morning, ma'am.

A Good morning.

Q Did I -- your testimony was that your property where you reside is literally right across the street from this proposed development plan amendment?

A Correct.

Q And you are aware that the proposal is to develop an outlet center, are you aware of that?

A Oh, very, very so, yes, very much so.

Q And what is your understanding as to how close the actual outlet center part of the development will be to your home?

A What did my what? I'm sorry.

Q How close, if you --

A It's extremely close. I could walk there in less than a couple minutes.

Q Are you aware of the outlet center at Hagerstown?
A Yes.
Q How about the outlet center in Queenstown?
A Yes.
Q Have you been to the outlet center in Leesburg?
A Yes.
Q Are you aware that the owner of those three outlets is Simon Properties, will also be the owner or the developer at the outlet center in Clarksburg?
A Correct. The Simon Properties are the ones that are built in the Premium Outlets.
Q So you are aware of the nature of an outlet center?
A Absolutely. I woke up one morning to see big, white circus tents across the street from my house and I went over there with my husband to check it out and it's basically they were passing out brochures and food and drink and all and showing us where the outlets are going to be and where the homes are going to be and I said, what outlets? They said, oh, the ones -- I said, well, when where they approved? Oh, they were approved. Yes, we're building outlets. And I was like going home going like oh my God, you know. It's like, yeah, I'm very aware about it and I know who is building them and --
Q So that when you appeared before the examiner and

you expressed your concerns about that form of development so close to your home, you are familiar with that type of development?
A Absolutely. They're going to be nice outlets. They do, zoning does a wonderful job, but they're going to be high-end, they're going to be absolutely gorgeous and beautiful. That itself is not so much the problem as, I mean I, personally I have a problem because it's across the street from my house. But my main focus is, again, the historic district being left behind. Now this outlet area with amphitheaters and everything, it's going to transfer the heart of Clarksburg to the west side of 270, completely transfer it. It's going to leave nothing on the east side. That's my biggest issue.
Q Am I correct in understanding, and you may have not, I apologize, I'm asking you to repeat something, but I'm not sure that you did. When you testified a little bit ago about purchasing your home with your husband --
A Uh-huh.
Q -- I took it you were aware of the Clarksburg Master Plan?
A Yes.
Q Okay. You were aware that you were in the Cabin Branch community?
A Correct.

Q And at that point in time the Master Plan was --
MR. HARRIS: Objection. These are leading questions. I think it would be appropriate to ask a more open question than a leading question like that. It's not an adverse to this gentleman.
MS. ROBESON: That is true.
MR. CHEN: Okay. I think I can handle that.
BY MR. CHEN:
Q Ma'am, what was your understanding of the form of development that would occur in the Cabin Branch community?
A Oh, homes, a little bit of retail, schools, hospital. I even joked with my mom, you know, we've got to get you a place across the street, you know, there's going to be services for senior citizens and all; school, you know; and I looked at all the plats that came over. I saw from where it started with nothing and grew.
Q That's all I've got. Thank you very much, ma'am.
A Uh-huh.
MS. ROBESON: Okay. Mr. Harris.
MR. HARRIS: Okay. Thank you.
CROSS-EXAMINATION
BY MR. HARRIS:
Q Ms. Franklin, a few questions for you. The -- you indicate that you've been aware of the Cabin Branch project from the time you purchased your house?

A Uh-huh.
Q And you did not oppose any of the multiple applications for development at Cabin Branch?
A Uhn-huh.
Q And are you aware that the Cabin Branch project --
MS. ROBESON: What did you say?
THE WITNESS: No, I'm sorry.
MR. HARRIS: I'm sorry.
MS. ROBESON: Mr. Robins pointed out you can't say, uh-huh --
THE WITNESS: Yes.
MS. ROBESON: -- because the transcript --
THE WITNESS: I just remembered.
MS. ROBESON: -- won't know. So you --
MR. HARRIS: Thank you, Steve. Thank you. All right. So let me make sure the record is clear.
BY MR. HARRIS:
Q Are you aware of the Cabin Branch project?
A From the beginning, then I started receiving all the literature and facts, yes.
Q And were you aware of the Cabin Branch project when you purchased your home?
A Yes. I was not aware of the Cabin Branch --
Q Not what's proposed here, but what's approved today?

A Right. I was aware that there was going to be development across the street. I didn't know whether it was Cabin -- I didn't even know names or anything. I just knew there was going to be development across the street from me and development behind my house. It wasn't until, you know, a year down the road that we started finding out who was going to be developing over there, who was purchasing the land.

Q Okay. You said that you bought your house 10 years ago.

A Uh-huh.

Q Is it correct then to say that was in 2013 that you bought the house or what year was it?

A 2013? You mean --

Q I mean 2003.

A 2003?

Q Bad math.

A Yeah. So 10 years ago, about 2003, and I think the first plats we started getting or anything was like, well, the first letters we started getting was 2004, around 2004 but, you know, I could be wrong. We got letters from everybody, Mr. Gosnell, et cetera, just letting us know that things were going to be happening.

Q Are you aware that when you bought your house the Cabin Branch project had already been approved?

A No.

Q You did not look at any development approvals across the street from you when you bought your house?

A No, not when we purchased our house, no.

Q Later on, though, you became aware of the Cabin Branch project?

A Oh, yeah, uh-huh.

Q And are you aware that the Cabin Branch project has approval for 1,886 homes?

A Not the exact number, but I know that they have approval for single-family homes, plus the town homes.

Q And a large number of single-family homes?

A A large number of single-family homes. It goes all the way down to West Old Baltimore Road.

Q Yes, correct. And that didn't bother you?

A That did not bother me.

Q And are you aware that it also has approval for 2,420,000 square feet of non-residential development there?

A No. Whose property? The non-residential development? You mean like Gosnell, the retail center?

Q Part on the Gosnell, part on Adventist Healthcare property --

A Yes.

Q -- are you aware of that?

A I was fine with that and I'm not against

development.

Q And you are not, you have no problem with the hotel and the retail that's approved on the Gosnell property directly across the street from you?

A It was approved prior to what this amendment is, yeah, I'm aware of that.

Q And you have no problem with that?

A I have no problem with that.

Q You mentioned that you received this mailing that you have in your hand here from us. Do you remember when that was?

A No, because if I go and I show you a file of all these things that get sent to me, all of them, and I went through this with my husband last night. We tried to find dates. There are no dates when any of these get sent out. So it's really hard to see --

MS. ROBESON: On the second page there's no page, no page --

THE WITNESS: It will give you a date of --

MS. ROBESON: -- on page 2?

THE WITNESS: -- something that's going on in a --

MS. ROBESON: Well, there should be --

THE WITNESS: -- future date.

MS. ROBESON: There should be an issue date.

THE WITNESS: But --

MS. ROBESON: What is that paper?

THE WITNESS: This is the one for the development plan amendment that tells us that there's going to be a hearing for the development plan.

MR. HARRIS: It's probably an exhibit in the file --

MS. ROBESON: Is it a notice of public hearing?

MR. HARRIS: -- from your office.

THE WITNESS: Yes, notice of public hearing, yeah.

MS. ROBESON: The second page should have an issue date on it.

THE WITNESS: And then when I go back to them, we weren't able to find, you know, dates on them either. So it was kind of hard to tell when I was trying to do a time line of when we got them as to, and then it says you're going to receive within 10 days of the hearing, you know, them telling you where it's going to be and we'd never get a follow-up on that, so we always took the initiative to call and find out and all.

BY MR. HARRIS:

Q The, was the first you found out about the outlet retail from a notice from the applicant or was it from someone with either the Peterson Company or somewhere else?

A The first time I found out about the outlets, I woke up, I looked across the street. There's tents across

the street from my house and I went over there to find out myself. And then I started inquiring and then we got this later on, but I did a lot of inquiring after that to find out, you know, what was going on because I didn't know.

Q Have you ever contacted Streetscape Partners, New England Development or the Simon Property Group?

A Contacted them for what?

Q About what was planned there?

A I've talked to some of them, absolutely.

Q To whom did you speak?

A I've talked to the Peterson Companies and also the, not what's going across the street too, but also with Pulte because we do, at the Clarksburg Farmer's Market, we do take sponsors and stream, the Peterson Company is one of our sponsors and so is Pulte and I like what their company is proposing on that side of 270 because I think that's the only developer that has actually stepped up to the plate and said, hey, you know what, I'm going to pledge to do this for the historic district. And I'm all for that, 100 percent all for that.

Q Okay. So you've talked with Peterson multiple times?

A Yes, I see him at the farmer's market here and there. I see Susan Singer-Bart as well representing Pulte through her PR firm all the time.

Q Okay. So you've talked with them, but I didn't hear you say that you've ever spoken with anyone from the Simon Property Group, New England Development or --

A Cabin Branch I have. I've called over there to complain about the dynamite blasting. I don't have her name with me, but I have it in my files at home because I have a home-based business and sitting on the phones with clients and there is dynamite blasting, so I did call to say, hey, how about some warning here, you know, if this is going to be going on. At least give us an idea of what hours.

So I have called and also I have been contacted by Cabin Branch several times to find out throughout the years, you know, is things going well. Like Greg Gosnell sent me a letter, can we talk? And like I said, I've been okay with the development. I've signed off on it. I've been okay with it.

Q I appreciate that, but I still am trying to determine, you've mentioned a lot of people's names, none of whom have you indicated is employed by Streetscape Partners, New England Development or the Simon Property Group who are the developers of this outlet mall. So I am going to assume, unless you can indicate otherwise, that you've never had a discussion with any of the people from the people who are going to operate this outlet center.

MR. CHEN: Objection

MR. KLINE: Objection. You can go first.

MR. CHEN: The lady testified that she was across the street when the, I guess it was Simon, had their tents up and she walked over to find out what was going on and talk to people there about the development. So I think the characterization is just misleading.

MR. KLINE: Well, and my comment was going to be so what's the relevance? Did she have an obligation to go talk to them? Maybe there's a question to follow that --

MS. ROBESON: No, I think it goes to impeachment. That's, well, Mr. Harris?

MR. HARRIS: I mean --

MS. ROBESON: I think it --

MR. HARRIS: Yes.

MS. ROBESON: -- in my -- I'm going to let it in because in my opinion it goes to the basis for her assertions and it is valid impeachment.

THE WITNESS: Could you explain to me what that means?

MS. ROBESON: That means that perhaps you have not, your opinions may not be valid balanced because you have had all these simple discussions with other competing developers, particularly the Peterson Company, but not with the applicant.

THE WITNESS: Well, to be fair --

MS. ROBESON: Okay.

THE WITNESS: -- I'm also involved in the CBRT, which is Clarksburg Business Referral Team, and we asked Clarksburg Business Referral Team to ask Cabin Branch to come out and bring a representative and talk to our group and show us what their vision was. We asked Pulte to come out and share their vision with us so that everybody is on the same frame. We asked the Peterson Companies to come out. We asked all three developers to come out and speak to Clarksburg Business Referral Team so that everybody, business owners in Clarksburg, would understand what's happening.

Everybody was allowed to speak. It was very fair all the way around for all the developers. So it's not like it's just one --

MS. ROBESON: Did Simon Properties speak or --

THE WITNESS: They sent out a representative from Cabin Branch to let us know what was going on.

MS. ROBESON: Okay. Could you explain for the record what this CBRT does?

THE WITNESS: Clarksburg Business Referral Team is pretty much where a lot of businesses get together and give each other referrals and pretty much the mission is to try to be the go to team in Clarksburg. If you're looking for somebody in Clarksburg, whether it be a plumber, whether it

be a travel agency, whether it be restaurants, and maybe we will get some, then you would come to CBRT and ask and we'd be able to refer you to somebody. In the meanwhile, it's a great networking way that we, you know, give business to each other and help other businesses get referrals.

MS. ROBESON: Okay.

THE WITNESS: So there's a lot of people that pay attention in Clarksburg that are with, the Clarksburg Business Referral Team, and all three developers were asked to come out and share their vision with us.

MS. ROBESON: Okay. Mr. Harris.

BY MR. HARRIS:

Q And so did Mr. Kaplan come to that meeting?

A I'm not sure because that's the meeting I missed and I'm sorry, but I was at --

Q All right.

A -- I was at the beach.

Q Okay.

A And I know you guys miss things too as well sometimes when you've had previous plans, but I did make the Pulte and I did make the Peterson Group --

Q Okay.

A -- meeting.

Q So if the record will ultimately show that the Streetscape Simon Property, New England Development people

did come to the business referral meeting and you weren't there and they spoke, you have no disagreement with that?

A Disagreement with what?

Q With that they came, but you weren't there?

A Well, I didn't disagree that they came. I actually was, you know, good with them coming and sharing the vision --

Q Okay.

A -- with everyone else. I see in the group, CBRT, there's a couple people that really know what's going on in the area, but there's a lot of people that had no clue whatsoever and it was really important for them to hear all three sides, all three visions.

Q Are you aware that other members of the CBRT have supported this proposal?

A 100 percent and I'm friends with them.

Q And is it my understanding, is my understanding correct that the farmer's market has disallowed the Streetscape, New England Development, Simon Property team from presenting at the farmer's market the way the Peterson Company has been allowed?

A That must have been that PR firm that called me and wouldn't tell me who the client was, but they called and they said that they had one more developer that wanted to come on board and be a sponsor for the Clarksburg Farmer's

Market. We have it in writing for the Clarksburg Farmer's Market that we only allow two businesses, two real estate agents, two this, two that. We've got to cut it off someplace. So we said we already had our two developers, however, in the same conversation that I had, and this woman that called me was from a PR firm, but she wouldn't tell me who the client was which to me, it was like, okay, I know it's probably, you know, you know, over from --

MS. ROBESON: Did you say you probably know?

THE WITNESS: To myself.

MS. ROBESON: Oh.

THE WITNESS: But, and then I said, well, is it a developer? And she said, yes. And I said, well, I'm sorry, we already have two developers. I said, however, I said I can hook you up with someone over at CBRT, which I know you know Ibi Sofillas and she can go ahead and arrange everything, what you might need for you to present your vision at CBRT. I said I'd be more than happy to do that for you and that was my conversation with -- and I don't recall her name, but I'm sure you probably know who it is.

BY MR. HARRIS:

Q Okay. So I'm concluding that Streetscape Partners, New England Development, Simon Property Group has been, has not been allowed to present at the farmer's market?

A Has not been allowed to present their vision at the farmer's market, correct.

Q Correct. And so your information, it sounds to me as if you haven't talked with anybody from the applicant team about the project. They've not been allowed to come to the farmer's market, but you have talked multiple times with the Peterson Company about their project. So am I correct in concluding that your information about this project comes in part from your discussions with the Peterson Company?

A No, that's not -- that's not true. When I'm at the farmer's market, they sent their representative just like Pulte does. Peterson Company sends a representative, and this is once a month, just like Pulte does and they do their thing. I'm all the way on the other side. They do their thing. They talk to people. They show them what their vision is and all and I'm on the other side of the market. I'm market manager. I'm running around sweating all day putting up tons of tents and talking to other people, trying to get the music going, this mad -- we have a lot of vendors that come out, you know, and we're really business. It's a very, yes, it's a very, you know, small committee. We're a handful of girls that do this and I don't have time to sit over there and listen to --

Q Fair enough. Would you --

A -- what they're talking about.

Q -- consider altering your policy to allow Simon Property Group and their people to sponsor the farmer's market?
A I would have to, well, I'll tell you one thing, if you're the first one knocking on the door next year, we would have to look at it, you know, as a committee and vote on it. It's not just me that decides. I also had the Livable Coalition that wanted to come on board and we have other rules against, you know, coalitions or, you know, et cetera, could be in the market. So, you know, unfortunately we had to say we couldn't go that route either. But it's not my decision. I --
Q Does sponsorship involve money?
A Sponsorship involves money.
Q So you're telling me that the farmer's market is struggling, but you're declining to have sponsorships? That puzzles me.
A Well, no, it shouldn't puzzle you at all because why would you want to, a place where people come to be able to relax, bring their dogs, bring their kids and all that and now you've got everything but farmers there? I mean to have a farmer's market in Montgomery County you need at least three farmers because, you know what, it's about the agriculture. It's about the farmers. It's about the people. It's not about having three and four developers

there and RE/MAX and this and that and -- it's not about that. It's mainly about the food. That's why we only do that once a month. We allow them to come in and do that once a month, along with CBRT. We don't accept businesses unless you're under the CBRT umbrella and the reason being is, A, we don't have the room; and, B, it takes away from what the farmer's market is about.
Q You indicated that the historic district is faltering, that there are not amenities there and nothing really to bring people there. Do you remember that testimony?
A Yes, I do.
Q And so I'm puzzled. You say that building an outlet mall at Cabin Branch is going to take away that when there seems to be nothing there today. What would it be taking away that exists today?
A Well, if you were able to go ahead and build the outlets on your side of 270, that will kind of also knock the Peterson Companies off kilter and we all know there's not going to be two sets of outlets in Clarksburg. That's just not going to happen. So outlets on the Peterson side would not be built and I've already said in my testimony that they seem to me as the only developers that would step up to the plate and pledge to do something for the historic district. If they did something for the historic district,

it could become vibrant again. We could get more, you know, back to the Master Plan of incorporating --
MS. ROBESON: I don't understand the --
THE WITNESS: -- the town center.
MS. ROBESON: I'm sorry.
THE WITNESS: Uh-huh.
MS. ROBESON: I don't understand what you mean by step up to the plate. Are they promising something?
THE WITNESS: They're pledging.
MS. ROBESON: Pledging what?
THE WITNESS: They're pledging to go ahead and fix the septic systems --
MS. ROBESON: All right.
THE WITNESS: -- the failing septic systems in the Clarksburg historic district, also to put in a new road to take away the congestion on 355, build a new road.
MS. ROBESON: Build the --
THE WITNESS: Right, the bypass.
MS. ROBESON: -- the town bypass. I've heard references --
THE WITNESS: Right.
MS. ROBESON: -- to a bypass.
THE WITNESS: And then also pathways that will go from their retail center to the Clarksburg historic district. And like I said, whether they build the outlets

or whether you build the outlets, they're going to be pristine. They're going to be very, very nice outlets. But if that is all taken away, there's nothing left over on the east side of 270. What's left there?
MR. HARRIS: So it sounds --
THE WITNESS: What would you propose to --
THE WITNESS: Well --
THE WITNESS: -- do for them then? Would you fix the civic center?
MR. HARRIS: I would --
MR. KLINE: That's the solution to the whole thing I would decide.
MR. HARRIS: I would support the Cabin Branch outlet mall without exception.
MS. ROBESON: Well, no, no, no. This is not your time to ask questions.
THE WITNESS: Okay.
MS. ROBESON: Unfortunately, this is your time to answer. So do you have any more questions?
MR. HARRIS: A couple more please.
BY MR. HARRIS:
Q It would seem to me that if an outlet mall were built, frankly, either at the Peterson site or at Cabin Branch, it would bring people into the Clarksburg area who might then use the historic district and support it and

might use the farmer's market. Wouldn't that seem logical to you as well?
A No.
Q Okay.
A I would not seem logical. It would seem like it would take away from the historic district of where the town center really should be. A lot of times when people go to outlets, they don't take the exit going away from the outlets, they take the exit going towards the outlets. It's going to be a self-contained community over on the west side of 270 and you're going to have your outlets, you're going to have your home, you're going to have everything on the west side of 270. There won't be anything happening on the east side of 270.
Q The -- you say you're in support of the town center retail in Clarksburg?
A The town center retail on the --
Q The proposed retail.
A The proposed retail on the east side?
Q Yes. Are you aware of the Elm Street development proposal?
A Oh, yeah.
Q And are you in support of that?
A In support of them finally building something for the residents? Yes. I would like to see that happen. It's

not going to happen anytime soon. It's way, way down the road, but I am in support of that because those people have been waiting for something for a long time and there's nothing over there for them.
Q How far down the road do you believe the Peterson outlet proposal is?
A From where?
Q From today. You said the town center retail is way, way, way down the road.
A A lot further than the Peterson and I guess --
Q Why --
A -- that all depends on you guys how far that is.
Q Can you explain why you believe the town center, doesn't the town center retail already have its zoning in place?
A They were zoned before, but everything has been stopped.
Q But they have their zoning in place?
A They have their zoning in place.
Q Are you aware that the Peterson property is zoned for single-family residential, not for commercial use?
A Well, they're working on that.
Q They're working on that?
A And that's why you send me all those little things explaining that.

Q So they have to get their property rezoned, you're aware of that?
A Uh-huh.
Q Yes?
A Uh-huh. So you're saying it's going to be a long time down the road for all that to happen?
Q That's my, that's my contention.
A That's your -- but you know that. I'm sorry.
Q Pardon?
MS. ROBESON: No.
BY MR. HARRIS:
Q No. Do you believe it's going to be a long time down the road for the Peterson project?
A Not as long as you believe.
Q How long do you believe it is?
A Probably around no more than 2006 if things go really bad.
Q 2000 what?
A 2006 if things go really --
Q 2006?
A If things go really bad and --
Q I think --
MS. ROBESON: I think what he's saying is it's 2013 --
THE WITNESS: 2013, yeah.

MS. ROBESON: -- so when you say 2016, is that what you're --
THE WITNESS: Three years from now, yes.
MR. HARRIS: Three?
MS. ROBESON: We keep losing if that date is right.
THE WITNESS: I know.
MR. HARRIS: I started it.
MS. ROBESON: You started it.
MR. HARRIS: I started it and --
THE WITNESS: He started it.
MS. ROBESON: You didn't start it. It's your fault.
BY MR. HARRIS:
Q Are you aware that the developer of the town center retail has said that were a grocery store to be built at Cabin Branch, they would not be able to go forward with the town center retail because they need a grocery and there's not enough capacity for two?
A No.
Q Would you rather see a grocery store at Cabin Branch than at the town center retail or vice versa?
A Well, I would rather see it over at the, on the east side of 270 because those are the people that have been waiting the longest for it. However, I wouldn't mind having

a grocery store across the street from my house.
Q Okay. I don't think I have any further questions.
MS. ROBESON: Okay. I am going to allow you some follow-up questions, but I would like them not to be leading questions.
MR. KLINE: We'll be brief. Sure. And they will be brief.

REDIRECT EXAMINATION

BY MR. KLINE:

Q Ms. Franklin, this is going to be sort of a memory test question.
A All right.
Q I'm showing you a copy of Exhibit 5 in the record of the case which is the resolution approving the rezoning of the Cabin Branch property. I mean you can see that that occurred on September 9th of 2003. So the question is do you recall when you bought your property, because you were asked when you bought your property did you know that the Cabin Branch property had been rezoned? And so my question is did you buy it before or after September 9, 2003?
A I bought it before September 9, 2003.
Q So you bought it before the property --
A I bought it in July of that year. Does anybody remember the year the jail was actually opened? That was the year that I bought it because our house was actually the

field office for the jail. So Montgomery County was renting out our house when we bought it. We had to wait until they got out of there before we could rebuild it.
Q You assume the people in this room know more than you do and that's not the case. You know, when you were talking about the pile of materials you got, I thought you were probably talking about notices that applicants have to send out dealing with plans submitted to the Park and Planning Commission.
A Uh-huh.
Q But I just realized based on something you said a minute ago, you have received correspondence from the Cabin Branch combined about events to attend or news releases or status reports, am I correct on that?
A Uh-huh.
Q Okay. Just describe a little bit what those are. Are they letters telling you what the status of their plans are and what they're going to process?
A Yeah. We have received letters giving us the status and comparisons of what they are in comparison to the Peterson Group. And I'm sorry if I don't have all my mirrors correct on as to what I've read as far as when they plan to be, you know, operational or be able to build if everything gets approved, but it's just a lot of dates and it's a lot of like if this happens, if that happens, if this

happens, if that happens. And being a resident, I mean I know what I believe and that's the reason we're here, but I don't know all the little details that everybody is asking me. But we have been receiving from the very beginning all the plats and the notices and --
Q Well, I prematurely --
A -- literature.
Q -- objected to a question that Mr. Harris asked you and I realize when the Hearing Examiner kind of pointed out why. I guess there was a possibility that all of your information about the Cabin Branch project was formulated based on talking to someone --
MS. ROBESON: Okay.
MR. HARRIS: Objection.
MS. ROBESON: Is this a leading --
MR. KLINE: No. Okay. I --
MS. ROBESON: Just --
MR. HARRIS: It's a --
MS. ROBESON: Is that your objection, Mr. Harris?
MR. HARRIS: My objection is that that's a statement and a leading question that at the minimum --
MS. ROBESON: Why don't you just ask her where her information --
MR. KLINE: I appreciate your --
MS. ROBESON: -- came from?

MR. KLINE: -- the caveat.
THE WITNESS: I did a lot of homework. That's where my information came from. I talked to a lot of residents. I talked to a lot of store owners. The one thing I don't do at the farmer's market is I don't talk to residents and tell them what my vision is or what my views are. That's a place where people can come and talk and vent and believe me you have good and bad from the beginning with the Newland community even. But I don't express my feelings there. I found out and I'm sorry that my husband couldn't be here this morning to testify as well because he would, even though he's not as outspoken as I am, he believes in a lot of this as well. So --
MS. ROBESON: Okay.
BY MR. KLINE:
Q My specific question is there are other sources of information other than talking --
MR. HARRIS: Objection.
MS. ROBESON: Yes. It is leading.
MR. HARRIS: Another statement.
THE WITNESS: Oh, yeah, I, you know --
MR. HARRIS: Are there?
MR. KLINE: Yes, thank you.
THE WITNESS: There's a lot of PR firms that have been hired, you know, by everybody here, the developers, and

they're all making phone calls. I make phone calls. I get literature dropped off at my house. I get literature mailed to my house. So, yeah, I've been hearing from quite a few and it's not just from one developer, but pretty much from all the developers.

MS. ROBESON: Okay. Mr. Chen?

MR. CHEN: I have no questions. Thank you.

MS. ROBESON: Any recross?

MR. HARRIS: No, ma'am.

MS. ROBESON: Okay.

MR. HARRIS: Thank you, Ms. Franklin.

MS. ROBESON: Thank you, Ms. Franklin, for coming out and you may be excused. I am going to take a 5-minute break and we will get to, if there are any citizens here, we will get to them.

(Recess.)

MS. ROBESON: We are back on the record. And are there any other individuals who wish to testify at this time? I see two hands. Okay. Is there any objection to them going forward?

(No audible response.)

MS. ROBESON: All right. Why don't -- is, now is this anybody, any of the attorney's witnesses?

MR. HARRIS: No, ma'am.

MS. ROBESON: Okay. So you're testifying

independently?

MS. BARRIER: Yes, I am.

MS. ROBESON: Did you sign the sign-up sheet --

MS. BARRIER: Over here?

MS. ROBESON: -- and put your e-mail on it?

MS. BARRIER: I did.

MS. ROBESON: Okay.

MS. BARRIER: I did.

MS. ROBESON: Because you will be entitled to notices after this hearing concludes. Okay.

MS. BARRIER: That's your blanket. Where's mine?

MS. ROBESON: Please raise your right hand.

(Witness sworn.)

MS. ROBESON: Okay. Please state your name and address for the record.

MS. BARRIER: I'm Sandra Barrier. I live at 23720 Bennett Chase Drive in Clarksburg, Maryland 20871.

MS. ROBESON: Okay. Can you spell Barrier?

MS. BARRIER: It's B, as in boy, A-R-R-I-E-R.

MS. ROBESON: All right. And what would you like to say?

MS. BARRIER: This is what I'm going to do, is I'm going to read the letter that I actually wrote to you --

MS. ROBESON: Okay.

MS. BARRIER: Which kind of gives you an overview

of how I feel about the project and --

MS. ROBESON: Okay.

MS. BARRIER: -- what's going on in Clarksburg.

MR. KLINE: Could I ask a question of clarification? This is a letter that's in the record?

MS. BARRIER: I would, yes, I did send it to Mrs. Robeson.

MR. KLINE: Okay. Fine.

MS. BARRIER: So absolutely. It says,

"I'm a homeowner in Clarksburg. I have lived in the Boyds/Clarksburg area all of my life. Lately I have been concerned about the future of Clarksburg. I think the residents here have waited patiently for a proposed walkable town center village.

''I feel Phase 3, the Cabin Branch area, will be an asset to the community. Specifically, I feel like the Clarksburg Premium Outlets at Cabin Branch will benefit my community in a huge way. I know there is another outlet center proposed in Clarksburg. I feel like the other project will be compromising to the land along, with the Ten Mile Creek. However, the outlet center at Cabin Branch will not have an environmental impact on Ten Mile Creek and surrounding areas.

''I have been told that there will be changes in access to the Clarksburg Premium Outlet Center. We will be able to access the shops using a widened off-ramp from I-270 and a new ramp onto I-270. This will help to migrate traffic impacts on the neighborhoods and Route 355. In fact, the developers of the outlet center have said that they will be investing 15 million in transportation improvements, including widening Route 121. Many of the improvements are already happening today and are expected to be completed before the opening of the outlet center.

''I travel on I-270 on a regular basis and see how bad traffic is in this area, so I'm happy to see the outlet center's plan include traffic mitigation. The facts also stand strong that the plans of Clarksburg Premium Outlets are basically ready to go, more than the other proposed project in my community. Many of the approvals have been completed for the site, including zoning, infrastructure and sewer, so they are ahead of the process.

''I feel confident that this project will be done with great care and respect for Clarksburg and our residences. Clarksburg deserves the

opportunity to flourish. I respectfully ask a recommended approval of the outlet center at Cabin Branch. Our community is ready, is more than ready for this opportunity."

MS. ROBESON: Thank you, Ms. Barrier. And just for the record, I believe the letter is Exhibit 38MM. Mr. Kline, any questions?

MR. KLINE: I thought you'd probably give Mr. Harris the same courtesy you gave me in the sense of she's in support, so he can go first.

MS. ROBESON: Oh, okay. Mr. Harris.

MR. HARRIS: That is fine. I have no questions.

MS. ROBESON: Okay. There you go.

MS. BARRIER: Yay.

MS. ROBESON: Mr. Kline?

MR. KLINE: And I have no questions.

MS. ROBESON: Okay. Mr. Chen?

MR. CHEN: Thank you.

CROSS-EXAMINATION

BY MR. CHEN:

Q Good morning, Ms. Barrier.

A Good morning.

Q Wasn't your testimony, I couldn't help but note that you said to the examiner that you were aware of the other outlet project on the east side of 270, is that right?

A Correct, the Peterson Outlet?

Q Yes.

A Yes.

Q And your testimony, as I recall, said that you supported this outlet because the other outlet would have an impact, in your opinion, on Ten Mile Creek, is that correct?

A Absolutely.

Q Okay. And you also stated that, by the way, as I understand it, and I have no connection to that project at all, I represent an individual, they would still, any possible impact will be regulated --

MR. HARRIS: Objection.

MR. CHEN: I'll throw that question.

BY MR. CHEN:

Q Are you aware that there are regulations that are applicable to any development that would have any connection to the Ten Mile Creek area?

A I'm going to be honest with you, I'm not any kind of, I don't know a lot about that, so I do realize there probably are regulations and I know that -- but in terms of being an expert, I wouldn't know anything about that --

Q Okay.

A -- in terms of being an expert on that.

Q I also believe you testified and I, please, I --

A No, that's fine.

Q -- if I make a statement about what I understood your testimony was, you correct me if I'm not accurate.

A Okay.

Q I believe you said that you also supported the development plan amendment in this case because, quote, it's ready to go, end quote. Is that right?

A The Cabin Branch?

Q Yes.

A Yes, the zoning and everything is in place.

Q Okay. And that it was, quote, ahead of the other projects, end quote, is that correct also?

A Correct.

Q Have you done any comparison of what the Master Plan provides for in Cabin Branch, the Cabin Branch community for this area?

A I'm not clear on what your question is.

Q Do you know what the Master Plan proposed is for the Cabin Branch community?

A The Phase 3 Master Plan?

Q Yes.

A I'm aware of it to the point of what I have seen basically with brochures and talking to Dana and Ellen Bagage (phonetic sp.), so I'm very --

MS. ROBESON: Can you just explain who Dana and Ellen Bagage are?

MS. BARRIER: They work with Cabin Branch, so I have --

MS. ROBESON: Okay.

MS. BARRIER: -- I have asked questions and tried to get some more information from them regarding what's going on there. I do believe that we are going to get some sort of development over there and I'm in the dealings that I would rather have a nice, well-developed center in Cabin Branch center than some ugly strip mall which is what's going to happen, not to mention I believe it will bring in business as well. Business has a tendency to want to migrate to areas that have some sort of pull to the community and right now we're all getting in our cars and we're driving east or, you know, north or south to get anything that we need for the most part. So I am highly for the Cabin Branch and I am really, I am highly opposed to the Peterson project at this point.

BY MR. CHEN:

Q Who told you there would be a strip development?

A Nobody did.

Q Okay.

A I'm just saying as a, as looking outside the box, if this did not get approved and we did not get a nice, nicely developed Simon Streetscape community, if something is going to go over there and we're going to end up with an

ugly outlet mall if we're not -- I mean not an outlet, we're going to get an ugly strip center if we're not careful. So I would rather have something that's well-designed, well, that's going to support the community and it's going to be an asset to the community.

Q Are you saying that the Master Plan calls for an ugly strip center --

A No, I'm not saying that.

Q -- on the west side?

A I just don't want one, so that's all I'm saying. I have no idea what's, you know, what would happen if this didn't go through. I just know that that could be a possibility because it is zoned for retail I would imagine at this point, so I'm not an expert obviously.

Q Based upon what you just said, is my, correct in understanding that you are not aware of what the Master Plan currently calls for for this area?

A And for, in generality, for everything, no, I have not looked into every single thing. I'm just, I'm just for, basically I just came here to state that I am for the Cabin Branch mall, I am not for the Peterson mall, and that's basically why I'm here.

Q The two individuals that you mentioned, the first names, who are they again?

A Dana Davidson and Ellen Bagage.

Q And how do you know Dana and Ellen?

A I've been to different meetings and they've done a dozen meetings as well. Basically they hold community meetings in Clarksburg and I'm --

MS. ROBESON: Who is they?

MS. BARRIER: Well, we've been to, I'm going to say the commission meetings. I've been to a couple at, I've been to one at Little Bennett Elementary School.

MS. ROBESON: Okay.

MS. BARRIER: And I can't remember who held the meetings. It wasn't us holding the meetings.

MS. ROBESON: Oh, okay.

MS. BARRIER: It was the community meetings basically, so I had one with, and basically they're at those meetings as well and so is Peterson at the meetings. So basically it's just conversations that have taken place and letting them know that I am for their development. So that's how those relationships have transpired.

BY MR. CHEN:

Q The relationships that you have with Dana and Ellen, they arise out of these meetings that you've attended?

A Just, yeah, through conversation, yes, getting to know -- where, I'm part of livable Clarksburg, which is another organization that is a group of homeowners in

Clarksburg and our basic theme is we are against the Peterson project. So I've already -- that's basically why they come to us.

MS. ROBESON: Are you testifying on their behalf or as an individual?

MS. BARRIER: As an individual.

MS. ROBESON: All right.

MS. BARRIER: Absolutely. Yes.

BY MR. CHEN:

Q Do you know who Dana works with?

A She works for Cabin Branch I'm sure.

Q When you say Cabin Branch, are you talking about the applicant in this proceeding?

A I'm not sure exactly. I just know she's one of the representatives for, because I see her at the meetings also.

Q Who does Ellen work for?

A I believe she works for them as well.

Q And who have you spoken to who represents the Peterson Group?

A I haven't, I've only met a couple of the gentlemen at the meetings and I haven't formally spoken to any of them to know their name.

Q Are you, are you --

A I know I've spoken to Kent Miles, that's it.

Q Who is that?

A I think he's one of the property owners.

Q Have you read any part of the Master Plan dealing with the Clarksburg Town Center?

A No.

Q Have you read any parts of the Master Plan as to its provisions for the Cabin Branch community?

A No, I have not personally read the Master Plan, no.

Q Thank you.

A I -- yeah.

MR. CHEN: That's all I have.

MS. ROBESON: Mr. Harris.

MR. HARRIS: No further questions. Thank you so much.

MS. ROBESON: All right. Thank you for coming.

MS. BARRIER: Uh-huh.

MR. HARRIS: Thank you.

MS. HOFFMANN: Good morning.

MS. ROBESON: Good morning.

MS. HOFFMANN: I'm jealous of your shawl.

MS. ROBESON: Please raise your right hand.

(Witness sworn.)

MS. ROBESON: Please state your name and address for the record.

MS. HOFFMANN: Melane Kinney Hoffmann, and that's M-E-L-A-N-E, Kinney Hoffmann, H-O-F-F-M-A-N-N, 23801 Peachtree Road, Clarksburg 20871.

MS. ROBESON: Thank you. And did you sign the sign-in sheet and put your e-mail on there?

MS. HOFFMANN: I did.

MS. ROBESON: Thank you.

MS. HOFFMANN: I also will give you copies of my testimony, which also has my address on it afterwards if you would like.

MS. ROBESON: Well, we have to take it in as an exhibit.

MS. HOFFMANN: Okay.

MS. ROBESON: So if you sent your -- I don't think we need it if you're going to put it in the record verbally.

MS. HOFFMANN: Okay.

MS. ROBESON: Okay?

MS. HOFFMANN: Okay. Well, thank you for the opportunity share my views today. I have lived in Clarksburg for 19 years since it was just a rural crossroads and my husband and I very, we're very active in the original process of citizen input on the 1994 Master Plan and we expressly moved to Clarksburg with two very small children and a third on the way expecting and hoping for this Master Plan vision that would combine the best of both worlds,

preserving the rural nature and historic nature of Clarksburg with a new village concept that would provide really nice, basic services and create a sense of community.

And we jumped in full bore and we actively volunteered and took leadership roles in the Clarksburg schools from Clarksburg Elementary to Rocky Hill Middle School to Clarksburg High School. We were involved in scouts and sports and we helped build Clarksburg's fledgling annual Relay for Life, among other things. And, unfortunately, we've also spent way too much time immersing ourselves in the excruciating details relating to the dysfunctional build-out of Clarksburg. And, yes, I have read the entire Master Plan. I have not memorized it, but I have read it cover to cover several times.

Through the years we've been repeatedly disappointed by the lack of the promised amenities and developers, specifically developers, repeatedly failing to deliver on their promises while they maximize their profits at the expense of the community. And now we finally have a chance to get, see some real material, some real amenities materialize sooner rather than later and it's about time. So I'm here in very strong support of the proposal for a retail center from Streetscape Partners and Simon and New England Development on the Cabin Branch parcel.

I and many of my neighbors unwaveringly support

this development plan amendment to build an outlet mall and mixed retail and office use and mixed use on that site. We all know that a very upscale mall will not only provide some basic amenities that we all want locally and will dramatically improve our quality of life, but it also will attract desirable eating places which will be so nice and other businesses in the planned office space, including the high-tech jobs we all hope for eventually.

And you've heard so many different views and excruciating technicalities, so I'm just going to boil it down to a few basic points that I think are most important to the community and that I keep hearing over and over. Number one is traffic. Our traffic nightmares cannot be understated. We never got the promise to transit that our density was based on and that transit still is going to be a long time coming.

This proposal for an outlet mall on the Cabin Branch parcel is the only possible location in Clarksburg that won't multiply the traffic disaster. With its direct access ramps on and off 270, the traffic congestion for an outlet mall would be minimized on our local thoroughfares which are Clarksburg 121 and 355 by the road. Even the road widening and the construction itself, that process would be contained west of 270 instead of bleeding over into our regular, every-day traffic. So even if for nothing else,

approve this proposal because it reduces our traffic misery. We deserve a break on traffic.

Number two, Ten Mile Creek. The Cabin Branch proposal does no damage to Ten Mile Creek, zip, none, no damage. It doesn't need the maximum pushing the envelope environmental site design to protect Ten Mile Creek that anything on the other side needs. And the creek is critically important. It's not just that it's fragile that we need to protect it, it's important. It's our last clear, clean stream in Montgomery County and it supplies the reservoir which we have tapped into in the last few droughts.

Ten-mile creek is important and we keep hearing, oh, people in Clarksburg don't really care about Ten Mile Creek, but they really do. And if you look at the report that the Planning Staff prepared for the Planning Board, there were, in the attachments to that there were 60 odd letters. Well more than half of those mention Ten Mile Creek.

Number three, it's almost ready and we waited so long. As part of this stage three of the Master Plan, this proposal is very close to the coming of reality for us. If this plan is approved, we'll have much needed retail within two or three years. If it's denied, we'll have to wait another five years or more for all the approvals needed for

a rehash of that site or a rehash of anything else and we've waited long enough.

We have a great proposal in front of us from a team of developers who are known to develop and deliver on high-quality. How could we possibly justify letting this opportunity pass us by? We just see it as a great opportunity we need to take advantage of.

And I have one closing thought. I think it's very interesting and it's extremely unusual that we have a competing developer who has gone so negative on this proposal. Are they concerned about our community getting our amenities too soon? Are they concerned that we might reduce the risk to Ten Mile Creek? Are they concerned about fairness in the process that Stage 3, a proposal for Stage 3 might be proposed before a proposal for Stage 4? Are they concerned that the Planning Board who unanimously approved this proposal was somehow misguided? I think you have to ask yourself that and I think it's fairly obvious why they're pulling out all the stops to hold up this proposal and it's not to benefit the people of Clarksburg.

Clarksburg gains significantly from the Cabin Branch proposal, so I ask you to please ignore that distraction and just focus on the basic needs of Clarksburg and the proposal before us. So I urge you to approve the zoning adjustments that will allow the Cabin Branch proposal

to go forward. Clarksburg really deserves this development now. Thank you very much.

MS. ROBESON: Thank you. Mr. Harris?

MR. HARRIS: No questions. Thank you.

MS. ROBESON: Mr. Kline.

CROSS-EXAMINATION

BY MR. KLINE:

Q Ms. Hoffmann, if I recall I've seen you down at the Planning Board with the various discussions on the Ten Mile Creek Master Plan. Are you not comfortable that anything that were to occur on the east side of I-270 would occur in accordance with whatever that plan determines is appropriate development scale for that property?

A I'm not sure I understand your question. Are you saying do I believe --

MS. ROBESON: Well, let him, let him rephrase it --

MR. KLINE: Sure.

MS. HOFFMANN: Okay.

MS. ROBESON: -- in a --

BY MR. KLINE:

Q You're concerned about Ten Mile Creek and its water quality?

A Uh-huh.

Q There is a Master Plan going on now reviewing the

Ten Mile Creek.

A Right.

Q And --

A And the amendment, right.

Q Right. And it will determine development potential of properties within the Ten Mile Creek area?

A Right and that's under review at the Planning Board now.

MS. ROBESON: Those are questions, Mr. Kline, right?

MR. KLINE: Yes.

MS. ROBESON: Yes.

MR. KLINE: I'm sorry.

MS. HOFFMANN: Yes, you're asking me if I'm aware of that?

MR. KLINE: Yes.

MS. HOFFMANN: Yes, I'm aware and that's under review at the Planning Board now, right. I'm aware.

BY MR. KLINE:

Q So when the Planning Board finally adopts the Ten Mile Creek Master Plan, development in accordance with that plan would be environmentally sensitive, would it not?

A Well, that's a very good question. We've seen a lot of proposals about what environmental site design, ESD features, would be utilized and, frankly, I don't think some

of them are credible. I, if you look at the slopes of that land, if you know how it's got three streams on it.

Q And for the Hearing Examiner, when you say that land, you probably need to clarify --

A I'm sorry.

Q -- what property you're speaking of.

A I think you're talking about the Peterson Miles Coppola property, right. Right. I understand that, yes, the, what will be approved will be required to meet standards, but what we know often happens, and it's happened all over this county, as the development goes forward it doesn't happen the way it's supposed to and the damage is done and then it's too late.

Q So you are skeptical that the process of the Ten Mile Creek plan will still result in potential development that may not, that might hurt the Ten Mile Creek?

A Absolutely. I think that is possible.

Q Okay. You made a comment about traffic and maybe my geography is not good, but don't you live on the west side of I-270?

A Uh-huh. Uh-huh.

Q All right. So aren't you actually going to be closer to where all the traffic is coming if you have the Cabin Branch development and why are you, therefore, concerned about what's happened on the east side?

A No, because if you know anything about the, no to the first part, yes to the second. If you know anything about the geography of Clarksburg, yes, I live on the west side of 270, but because of the way it's laid out, everything happens on the 355 thoroughfare.
Q Uh-huh.
A We've got a little bit of traffic relief now with Snowden Farm Parkway, but to get to the grocery store, to get to my kids' schools, to get to where all of my friends live, to get to the drycleaner, to get to anything, I have to go down 355 and cross 121. So, and to get on 270 and go south and north, you have to go on 121.
Q Okay.
A So if where that Cabin Branch development is now, it's kind of contained in a corner between 121 and 270 that doesn't interfere with the traffic in the town and where the historic town is.
Q Okay.
MR. KLINE: Could I use the exhibit over here? Maybe I can get a little bit more clarification?
MS. ROBESON: 59?
MR. KLINE: Yes.
BY MR. KLINE:
Q So this is basically the development plan put out by the applicants in Exhibit 59 and what you were talking

basically about, 121 and I-270, I pointed that when you are going from your home to do whatever your errands or whatever you were just talking about, do you have to go through this intersection to get to those locations?
A No.
Q No? How do you get to them?
A I usually go Comus Road. I mean it depends, but I used to go Comus Road to 355.
Q And then it comes out on 355?
A Uh-huh. Right, south on 355.
Q So whatever happens here in terms of traffic there doesn't bother you, doesn't affect you at all because you just want to be transit?
A Getting on 270 it does and getting to that parcel when it's developed, I expect that I'll be using it.
Q Sure.
A Yeah.
Q Well, and using it to do the errands you were just talking about, the grocery store and the --
A Well, I don't think there will be -- there's not a grocery store proposed for that. So, no, the grocery store wouldn't be possible.
Q So you would be going to the fashion retail locations then?
A Not fashion, but maybe the --

Q Whatever the tenant --
A -- dining.
Q Oh, okay. All right. Okay. All right. Yes, okay.
MS. ROBESON: She looks pretty fashionable right now, so she doesn't need them.
MS. HOFFMANN: I just shop online.
MR. KLINE: I have no further questions.
MS. ROBESON: Okay. Mr. Chen.
MR. CHEN: Thank you.
BY MR. CHEN:
Q Ms. Hoffmann, my name is Bill Chen and I'm an attorney and I represent an individual who has a small business on the east side in the historic district.
A Uh-huh.
Q That's who I represent and that is, this gentleman is named Whit Cobb and he's my client.
A Uh-huh. What's his business?
Q He has a --
MS. ROBESON: Okay.
MS. HOFFMANN: I'm not allowed to ask questions?
MS. ROBESON: No.
MS. HOFFMANN: Okay.
MS. ROBESON: And you're essentially testifying. I know you're setting a basis, but can you ask a question?

MR. CHEN: Yes.
BY MR. CHEN:
Q I just want to make it very clear, your latest concern about who is representing whom from her comments. Ma'am, looking at Exhibit 59, is your residence located on that map?
A No.
Q Can you give the Examiner, would you go up to the map and give the Examiner an idea of where your residence would be even though it's off the map?
A My residence? Yeah, I would also say I'm here as an individual, but I've been a person who has really worked hard in this community and I'm here representing a lot of people in the community who care about this.
Q Well, excuse me, just, ma'am --
A I know --
Q If you were going to draw a line --
MS. ROBESON: Just.
MS. HOFFMANN: -- I would be sort of up there.
MS. ROBESON: Okay. Can you, can you stop?
MS. HOFFMANN: If you put, if somebody has a copy of the Master Plan --
MS. ROBESON: Can you stop one minute please?
MS. HOFFMANN: Uh-huh.
MS. ROBESON: Okay. Your job now is to answer the

questions he asks, okay?
MS. HOFFMANN: It's up here. If you have a copy of the Master Plan, I could show you where it is on the map.
MS. ROBESON: Now when you say up here, you're pointing generally northwest?
MS. HOFFMANN: Yes, exactly. If 270 goes up here and Comus Road would run right about like that and I live just right around here, the corner of the intersection of Comus and Peachtree.
MS. ROBESON: Okay. But it's not shown on the map?
MS. HOFFMANN: No.
MS. ROBESON: Okay.
MS. HOFFMANN: This stops at 121.
MR. CHEN: Thank you very much, ma'am.
MS. HOFFMANN: Uh-huh.
MS. ROBESON: Mr. Harris. Oh, I thought you were finished.
MR. CHEN: I was, no, ma'am.
MS. ROBESON: Oh, you were inviting her to take a seat? I'm sorry. I thought you were inviting Mr. Harris to ask her questions. Go ahead.
MR. CHEN: Thank you very much.
BY MR. CHEN:
Q As I understand, therefore, your testimony just

now where your residence is located, if this project goes forward and I think your characterization of your testimony was it's almost ready and you've waited so long, is that correct, ma'am?
A Uh-huh, I said that.
Q And if this project, therefore, were approved, you would have retail within two to three years?
A Uh-huh.
Q And you live on the west side of 270?
A Uh-huh.
Q And you've described to the Examiner, I believe, in your testimony that where you presently have to go and the route you have to presently take, which is over to 355 --
A Uh-huh.
Q -- which is on the east side --
A Uh-huh.
Q -- so that if this project goes forward, you would no longer have to do that, you could stay on the west side and go down to the outlets that are being proposed by this development plan amendment, is that right?
A Actually, no.
Q Oh, you wouldn't go to the outlets?
A I still would, most of what I need to do is get to my kids' school and grocery store and drycleaner and that

kind of thing. But even still I would have to go out to 355 because the only way to get to that parcel would be through Ten Mile Creek which has a fjord in it and I don't like to drive through the creek unless absolutely necessary.
Q But there is a road through the creek? There is a road there? You choose not to take that road, but there still is a road?
A If you get the fjord in the stream, you have to be in a 4-wheel drive vehicle --
Q In, no --
A -- because it's up pretty high. You could go down to West Old Baltimore if that's what you mean.
Q Excuse me.
A I'm sorry, I don't understand (indiscernible).
Q There are public roads on the west side that could take you to this development without having to go to 355, isn't that correct?
A Yeah, they're further. They're out of the way, but they're there.
Q Or it has a fjord you'd have to, or the creek, is that right?
A Yes.
Q So you choose not to use those roads?
A I've had two cars stuck in that creek, so I choose not to use those roads.

MS. ROBESON: Okay.
BY MR. CHEN:
Q Were you driving at the time?
A I was once and my son was driving another time.
Q Okay. Now have you -- I take it because of all your experience that you know what the Master Plan provides for?
A Uh-huh.
Q Yes?
A Yes, I'm sorry, yes, I know.
Q And you are aware then what the Master Plan proposes for the town center?
A Yes.
Q And you also know what the Master Plan currently calls for for the Cabin Branch community?
A Yes.
Q Are you aware that the Master Plan calls for a shop/grocery store in the Cabin Branch community?
A Yes, I'm aware of that, but I know it's not part of the proposal, the current proposal.
Q In fact, under this proposal there would be no grocery store on the west side?
A Correct.
Q And are you aware of the numeric limitations on retail that the Master Plan proposes for the west side in

the Cabin Branch community?
A I am.
Q And are you aware of the increase that would result in the retail on the west side in the Cabin Branch community if this proposal was approved?
A I am.
Q Okay. Have, do you have any concerns about compliance with the Master Plan?
A No, I don't because that parcel was approved for, I think, roughly 2 million square feet of commercial space and it was --
MS. ROBESON: I'm sorry, can I stop you one moment? What is that parcel?
MS. HOFFMANN: I'm sorry, Cabin Branch.
MS. ROBESON: Okay.
MS. HOFFMANN: Which was a mix of hotel and grocery store and retail and office and hospital. And, yes, with the hospital no longer being part of that, it changes things dramatically. They've got to fill up that space some other way and a hospital takes up a lot of space. So that square footage needs to be reused in a different way and I think it's logical and you've got 2 million square feet of commercial space, yes, of course it's going to mean that one of those segments has to increase. So retail makes sense to me.

Q To fill up the space because the hospital won't be there?
A To, yeah, to use the land, exactly.
Q So that, as I understand your testimony, that's a reasonable trade-off for the fact that this development is not recommended in the Master Plan?
MR. HARRIS: Objection.
MS. HOFFMANN: Well, I don't think there's any specific --
MS. ROBESON: Basis?
MR. HARRIS: Objection. He's concluded that this development is not recommended in the Master Plan. There's no premise for that. That's --
MS. ROBESON: Well --
MR. HARRIS: That remains his argument.
MS. ROBESON: Well, I think that -- can you rephrase that? I think there is a basis for that, I mean relevance to that question. Is there a way to rephrase it without characterizing the Master Plan as compliant or non-compliant?
MR. CHEN: Let's do it this way. Let me try it this way. Thank you.
BY MR. CHEN:
Q You are familiar with the Master Plan's proposals for the Cabin Branch community?

A Yes.
Q Now notwithstanding those provisions, as I understand your testimony, you support this development because the hospital will no longer be developed, is that right?
A That's one of the reasons.
Q But that was one of the reasons you talked about for the justification to have the increased retail?
A It was not part of my original testimony, but when you asked me that, yes, and --
Q No, I just want to be clear because you, you do know the amount of retail recommended in the Master Plan for the Cabin Branch community, isn't that right?
A It was originally about 120,000 square feet and now they're proposing something in the neighborhood of 400.
Q Yes, four times as much?
A Yes.
Q Okay. And I'm just trying to get some clarity here. I'm not, it's not a trick question. As I understand your testimony, notwithstanding the Master Plan and that numeric limit of 120,000, as I understood your testimony, and if I'm wrong please tell me, because the hospital would no longer be there, the mound, that big space that won't be there is appropriate, as I understand your testimony, to have the increase in the retail that's proposed by this

development plan amendment?
A Yeah, I think that's, that's accurate. It was originally designed for about, in the Master Plan, for about 2 million square feet of commercial space and that was 1994. That was a long time ago, different time economically. The community as a whole varied differently than the original Master Plan and I don't, the Master Plan was not so specific that it said, you know, six of these and 12 of these and 14 of these. It basically described a general framework and I think this proposal fits within that general framework, particularly with the loss of a hospital which was the huge, you know, no longer an option.
MR. CHEN: No further questions.
MS. ROBESON: Thank you. Mr. Harris.
MR. HARRIS: I have no questions. Thank you.
MS. ROBESON: Thank you.
MS. HOFFMANN: Thank you.
MS. ROBESON: Thank you for coming. You may be excused.
MR. HARRIS: Thank you.
MR. KLINE: Thank you very much.
MS. ROBESON: Is there any other, are there any other individuals that are not represented by any of these attorneys that wish to testify?
(No audible response.)

MS. ROBESON: Okay. Seeing none, we will go to cross-examination of Mr. Bogorad. Did I say that correctly?
MR. BOGORAD: Very well, yes, thank you.
MS. ROBESON: Okay.
MR. BOGORAD: Not many people get that.
MS. ROBESON: All right. Mr. Kline. Well, let, you're still under oath, Mr. Bogorad.
MR. BOGORAD: Yes.
(Discussion off the record.)
MS. ROBESON: Do you need a minute or are you ready?
MR. KLINE: Yes, just 10 seconds please.
MS. ROBESON: Okay. Are you ready? All right. Proceed, Mr. Kline?
BY MR. KLINE:
Q Mr. Bogorad, your publishers probably called you and told you there was a great spike in the interest in your publications that you told us about the other day because all the people in the back of the room rushed out to basically subscribe and get those. And I got my set also and I guess what I'm going to say is we had trouble determining the relevance of a 1982 article in the Handbook for Analysis of the Impacts of New Developments on Older Commercial --
A It was a best seller. I can't imagine.

Q And your 2001 article on successful Master Plan committee town centers. So am I correct in assuming you reference these more to establish your credentials and being able to comment on retail rather than the relevance of these two articles to the premise that a retail outlet center will draw office development?
A I don't believe either one dealt with the issue of office development, correct.
Q You did give us a fiscal analysis that's in the record in writing. And my question there was is there a comparative component to it in the sense that had the plan been developed, had the project been developed as all office and the uses and vision when the MXPD zoning was placed on it, and let me try that again. Is there a comparative component to it comparing what would have occurred and what will occur, or is it just an absolute here's what you're going to get if you approve this plan?
A It just analyzes what's proposed here, but I -- it's quite easy to characterize what the results generally would have been if we had analyzed that. The, obviously, office will be positive fiscally. There is so much office. We only do the analysis for 20 years which we think is as long as would probably reasonably predict things will, what the future will be and even that obviously has its challenges.

But, in any case, over the 20-year period I have no doubt that there would be just as much office and, in fact, I believe as I said Monday it will be more office with the outlet. So you will have the same impact or, in fact, more benefit from office because there would be more during any sort of analysis period of 20 or 30 years. You would have the full outlet impact, which is very positive, which you will not have under the by right or whatever, under the alternative I guess you'd call it, the current alternative. And the outlet being substantially larger than the current retail that's anticipated would have much more positive impact. So no question this would be much more positive than under the original plan, although we did not specifically quantify that.
Q Yes. Well, maybe I didn't phrase it the way I should have. If we are to substitute X amount of square footage from, transferred from office to retail --
A Uh-huh.
Q -- is the net number, are you telling us the net number is greater or higher or lower?
A Right. I understood the question. What I'm saying is that the analysis is only for 20 years and, quite honestly, we did it for 30 years. You would have the same amount -- okay, let's do the two alternatives, keep it simple. We have the proposed alternative and the, what's

called the existing alternative. Under the --
MS. ROBESON: I'm sorry.
THE WITNESS: Okay.
MS. ROBESON: What is -- tell me the existing alternative.
THE WITNESS: Yes. So the existing would be, I believe, 120,000 square feet of retail and --
MS. ROBESON: Okay. I understand.
THE WITNESS: -- all the rest of commercial would be office.
MS. ROBESON: I didn't know if you meant --
THE WITNESS: Yes, sorry to be -- it gets confusing.
MS. ROBESON: I didn't know if you were including the town center in that or what you were including. So --
THE WITNESS: No, no, just on the Cabin Branch site.
MS. ROBESON: So just for the Cabin Branch?
THE WITNESS: Okay. So we'll call existing 120,000 square feet of retail --
MS. ROBESON: I understand.
THE WITNESS: -- which I would assume would be built certainly within this 20-year time period and several million square feet of office, most of which will not be developed certainly without -- retail, most of it would not

be developed under that 20-year period. So if we were doing the analysis, we would be showing some amount of office. We would have to analyze exactly how much but, you know, let's say it's a quarter of the office that would be built. And all these uses are positive, so the more you get, essentially the better for the fiscal intent.

Under the proposed alternative, you would have three, four times as much retail would certainly be within this time period. That would all be very positive as our analysis showed, so having more of that is much more positive than having 120,000.

MS. ROBESON: In terms of revenue to the County?

THE WITNESS: Fiscal impact to the County, yes.

MS. ROBESON: Or in terms of attracting employment? In terms of revenue to the County?

THE WITNESS: The question I'm answering is the revenue of the County. I'm happy to move to the employment also as the same sort of thing.

MS. ROBESON: Okay. No, let's --

THE WITNESS: Yes.

MS. ROBESON: -- I'll stick, I'm sorry, I'm jumping the gun.

MR. KLINE: You've got a right to the floor. We want to have, our whole scheme here is to make you, get educated, so --

THE WITNESS: Yes, no, it's a very good question. Let me try to keep them separate.

MS. ROBESON: So right now --

THE WITNESS: So right now I'm talking about revenues and net fiscal impact after you take account of any expenditures that were required. So --

MS. ROBESON: Okay.

THE WITNESS: So this was, so at least as I, you know, so, okay. So we have the existing plan. It has, let's say for sake of argument five, by the time we get to the end of our 20-year analysis period we have 500,000 square feet of office and 120,000 square feet of retail and there's a lot of land waiting for future development. Okay. So if we were to do the analysis of that, which we did not specifically do, we would have that much development. It would be positive, but only as positive as that development would allow.

Under the proposal, we would have 400 some thousand square feet of retail as we analyze, much more positive from the retail, and at a minimum we would have 500,000 square feet of office because there is absolutely no reason why with several million square feet of capacity, there's no reason why any office would not come because you have taken a relatively small portion of the site and dedicated it to retail. And as I said on Monday and I

believe very strongly, and I'm sure we'll get into this in some of the other questions, the, having the outlet center there, I have no doubt will make it more likely that the site will actually attract office because of the benefits of the retail to competing for office and, therefore, through our 20-year analysis period we would have more office than the 500,000 that I'm hypothesizing and, therefore, more positive impact from office, more positive impact from more retail and in total a much more positive results, you know, 10 years, 20 years, 30 years from now than we would have under the current proposal.

The other thing is that the retail will come much faster than the office in any case, so what we do in our analysis, look at it year by year for 20 years and we see what the cumulative impact is after 10 years and five years and so on and, you know, the outlet center is going to be built in the next, you know, couple of years, two, three, four years, whatever, and that will be benefit to the County much sooner.

Turning to your employment question, the answer is quite similar, but they, because basically office generates employment, retail generates employment. They all --

MS. ROBESON: Okay. What employment, what type of employment does retail generate?

THE WITNESS: Yes. I --

MS. ROBESON: Are you talking about in terms of attracting employment or are you talking like office or R&D or whatever, high technology --

THE WITNESS: Uh-huh.

MS. ROBESON: -- or are you talking in terms of employees of the retail?

THE WITNESS: Yeah, all of the above basically. You have, the retail will certainly have a lot of employees in the stores and some of that is managers and maintenance people and retail clerks and so on, so a range of salary levels, but not, not high-tech in the center itself. The economic activity that occurs there, the money that's being spent by those who are in the, who are working there, some of which will be used to buy services of all types and doctor's, lawyer's insurance, lots of different types of employment, as well as other retail and schools and so on. So a range which is a huge range of salary from, you know, a doctor to minimum wage in the community. So there will be those types of jobs.

And then I think very importantly it will also, having that amenity of the retail there has, you know, been demonstrated over and over again of all different types of retail increases the chances that you are going to be able to attract those office and high-tech companies to this location. And as I said in my direct testimony, there is a

lot of competition for these office and high-tech employers and those jobs and some of them are elsewhere within the County, Germantown, Gaithersburg, some of them are in Frederick, some of them are, quite honestly, Northern Virginia and it's been tough for the County to compete with Northern Virginia and this is, provides a location right on the interstate that has these critical retail amenities which are very important for office users these days and for technology companies. They really do not want to be in an office environment. They want to be in a multi-use environment with that retail amenity and so I, I am confident that there will be much, you know, more opportunity for attracting those types of jobs to Clarksburg if you have this retail built in if you don't.

MS. ROBESON: Okay. I hijacked Mr. Kline's cross-examination and I'm going to give it back.

MR. KLINE: You're doing better than I was.

MS. ROBESON: Mr. Harris, are you -- what I'm hearing, a major issue is the impact of this on the town center's development. Is your, are you at some point, and I know you may want to wait until after you hear the opposition witnesses, but are you at some point going to have a witness to address that?

MR. HARRIS: Mr. Bogorad did address that on Monday, indicating that not only would this not have a

negative impact on the town center, it would have a positive impact on the town center. We also have Mr. Flanagan, the developer of the town center retail, having written a letter --

MS. ROBESON: Yes, I saw that.

MR. HARRIS: -- essentially to the same effect.

MS. ROBESON: Okay.

MR. HARRIS: So, no.

MS. ROBESON: Okay.

THE WITNESS: I would be happy to elaborate on what I said on Monday if that would be helpful.

MS. ROBESON: Well, I guess my concern -- I'm really coming out of order, but I would like to follow-up on some questions that I had in my mind on, after his testimony on Monday and then you can base your cross-examinations on my questions. You -- what I'm hearing at least from some of the individual witnesses is a strong concern that this will detract from the -- Master Plan states that retail is vital to the development of the town center and what I'm hearing at least from the individual witnesses is that this is going to suck the life out of the town center because it, the, it will no longer be able to attract retail if this goes in.

And I remembered your testimony as simply saying you didn't think that this retail would have that effect. Can you elaborate on that?

THE WITNESS: Yes, I'd be happy to because it is an important point and I realize I didn't spend much time on it on Monday.

MS. ROBESON: No, well, that's fine. Go ahead.

THE WITNESS: And I apologize if I take a while, but it is an important, somewhat complicated, not that complicated, but it is, takes a few minutes. The crux of the matter is the following and I have done a lot of analyses of impact on shopping center and another on retail and establishment on what area of downtown, that kind of thing, which was basis for this as well as, you know, my -- this is something I always, we always think about when we analyze the market for a new retail center is what is that going to, you know, what, where do those sales come from? What effect might it have on competitors and so on? So, you know, this is something I specialize in.

The key thing to remember when analyzing this kind of question is, and to focus on, is what other types of retailers and the type of retail that will be in one, in this case in Cabin Branch versus in the planned town center. If those are very much the same types of stores, then they are, they're going to be to some extent competing for the same shopping dollars and you may have potentially a negative impact of one on the other, although that can be outweighed by drawing in more customers from a broader area

which I can get to in a minute. But the, in my view the very clear situation here is that we have very different types of stores that would be going into the outlet center and the town center.

MS. ROBESON: What do you foresee going into the town center?

THE WITNESS: Yeah. So the town center, the absolutely critical aspect of that is that it have a full-size supermarket. It will not, in my view it will not happen if it cannot get a full-size supermarket. And that will be, if you look at town centers and neighborhood centers, which is the industry term for this type of retail, the supermarket is the absolutely critical thing. The average neighborhood center according to the industry publication, Dollars and Cents of Shopping Centers, 66 percent of the sales in a typical neighborhood center are in the supermarket. It just does not happen without that supermarket.

Once you have that supermarket signed up, I would expect a range of stores of the following. You would have independently owned, typically restaurants, both sit down and probably some take-out sorts of things, but in general an occasional exception like a Chick-fil-A or Subway, but in general they will be non-chain restaurants, a lot of different ethnicities typically in this area which makes a

real interesting combination of restaurants that for better or for worse don't generally, don't go, for example, into an outlet center. I'll get to the outlet center mix in a minute.

There would be very limited, if any, apparel type stores. You might have one independently owned children's clothing store or something like that. You might have one independently owned women's clothing store. Very few of those end up even, you know, being around these days, but if they are and they're not part of a chain, they would be interested in going there, but they're, again, that's going to be, you know, on average maybe, well, I don't see, in fact I looked up the data, four percent of sales in a typical neighborhood center are in clothing, apparel, shoes, which is the biggest category by far in the outlet center. So they're not, you're not getting the same kind of stores there at all.

There would be, you know, I mean I have down a list, through this, you know, there might be a frame shop. There might be a radio shack. There might be an independently owned gift shop. There might be a wine store. There might well be a drugstore.

And then a lot of these tend to be personal services really, a weight loss center, a yoga studio, cleaners, barbers, hair salon, optician, nail store, fitness

center, doctor's and dentist offices, real estate agents, banks. So that's, that's what would make for a successful town center in my view. If you can get the supermarket there, you can get the other, the mix of other stores that you need to have the full size and scale town center. And other than the supermarket, probably the biggest component is going to be the independently owned or non-chain restaurants.

Go to the outlet center and you have a totally different mix and I sort of pulled up what Premium Outlets website and the mix of stores there and, you know, designer fashion and --

MS. ROBESON: Where did you, oh, Premium Outlets?

THE WITNESS: Just on the web, yeah. So around the country --

MS. ROBESON: Okay.

THE WITNESS: -- their typical anchor, their typical stores, there are two pages of almost, you know, a page and three-quarters of designer fashions and sportswear which as I said is just not what you get at all in a town center. Their next big category is, well, that doesn't even include children's. That was basically women's clothing. Children's clothing is another, you know, 40 stores. You might possibly have one independent, but these are all going to be chains. You would maybe have one independently owned

children's store if you're lucky.

Shoe store is another half a page. It's very unlikely you'll have a shoe store at the town center. Fine leather and luggage, no likelihood at all. Accessories and jewelry, probably none. And then some restaurants which are generally, they're all, typically all chain restaurants. You would -- and there will be amenities for the area, no question, but they are stores and restaurants that would not ever find themselves into a town center. They would never make that choice and so you're not -- and, you know, quite honestly, you know, there are going to be, there will be fine restaurants. They'll be good for people living there. They'll be good for people in the area, the area desperately needs any, any of this they can get. But they're, you have demand for plenty of restaurants in the area. So that's --

MS. ROBESON: Do you know --

THE WITNESS: -- not going to be competing.

MS. ROBESON: -- how large the types of town center in terms of total retail, how large are they? The Master Plan has, I think, 300 or 153.

THE WITNESS: For the Clarksburg Town Center?

MS. ROBESON: Yes.

THE WITNESS: I don't specifically know the square footage.

MS. ROBESON: Yes.

THE WITNESS: You know, they, I mean they do, they do go from 100 to 300 some thousand, I guess sometimes even a little bit more, but generally in those ranges. But, again, it's going to be the same mix of stores.

MS. ROBESON: Okay.

THE WITNESS: And they really are not competitive with the outlet center stores any, any, you know, to any extent at all and that's, that is one of the two main reasons why I do not think there will -- well, that's probably the main reason why I don't think there will be any negative impact of the outlet center on the town center.

There are also two reasons why I think it will actually have a positive impact, the outlet center and other retail at Cabin Branch as proposed will actually be more positive for the town center than the current plans at Cabin Branch. By far the most important is the commitment to not have a full-size supermarket at Cabin Branch which, as you know, is currently provided for. And that is, as I said, the absolute critical thing for the town center is to get a supermarket.

Now, you know, I think one of the citizens earlier today, reasonably enough as a citizen, said I'd like to have both, you know, I'd want them to have a supermarket but, sure, I'd like one on my side as well. That's, you know, we all would like as much as things we want, but there are

market realities and that's what we're really dealing with in Clarksburg and in many other places is what is realistic from a market perspective. And I'm very concerned that there's not demand for, especially with Wegmans which is, you know, is now going in Germantown as a major draw of supermarket spending.

MS. ROBESON: Right.

THE WITNESS: It's made things, a whole new world in the supermarket business, not to mention Walmart is coming in with supermarkets and so on. So things are much different than they were when the plan was written. And I'm very concerned that there is only room for one more supermarket beyond what's currently underway in Clarksburg in, not room, not room physically, there's room for --

MS. ROBESON: Right.

THE WITNESS: -- several, but from a market perspective and that if a supermarket, first of all, were to be built at Cabin Branch, that that might well be the death now of the town center because they would not be able to get a supermarket and that's not, that development is just not going to happen, that critically needed amenity is not going to occur from a market perspective if you don't have a supermarket and if the supermarket is spoken for at Cabin Branch, that may well be the end of the town center.

And even without building that supermarket, if I

were, the developer, trying to attract a supermarket to get the town center going and I were going to one of the major supermarket chains, I might well find them saying I'm nervous, you know. There may be a supermarket going into Cabin Branch. We're not going to be able to survive if there's a supermarket there. So, sorry, I can't sign my lease. I'm going to go somewhere else. If they know, as they would if this proposal were approved that there's not going to be a supermarket at Cabin Branch, that threat is removed and I believe, and I believe that's probably why the owner of the shopping center is, has come out in favor of the Cabin Branch expansion of retail, is that without that threat it will be substantially easier to get that supermarket that's so critically needed to get that town center going.

MS. ROBESON: Okay.

THE WITNESS: So that's, that's probably the biggest benefit of this change in retail. And the third thing is that having more economic activity is positive for the town center just in terms of demand. You'll have workers over at the, at this Cabin Branch. At the retail you'll have the office workers who I think you have a better chance of getting, as I said, with the retail. So you'll have those workers. And they're going to want to do, get supermarket type shopping done, they're going to want to

go -- sometimes they'll eat at the restaurants in Cabin Branch, sometimes at a lot of, you know, a maybe unique restaurant that's over at the town center. That will add demand to the town center.

And generally, just to put this on the map in terms of a place where, you know, I mean to be honest Clarksburg sort of has a bad reputation at this point in the development community as a place where it's been really tough to get things done and when, you know, you could argue about whose fault it is, and I'm certainly not claiming that it was anybody's fault other than some past developer perhaps but, nevertheless, it's, it has sort of a bad image in the development community and it's, and I think, you know, potential tenants, especially a major tenant of the town center might be saying, you know, they never seem to be able to get anything built there. If this were actually a major 150 million or whatever investment, we're going into the Clarksburg area, I think that would be an additional positive for the town center.

MS. ROBESON: Okay.

THE WITNESS: Sorry for the long-winded answer.

MS. ROBESON: No, I asked. Okay. Mr. Kline, I'm going to hand it back to you.

MR. KLINE: I think both parties would probably encourage you to do just what you just did because you're

kind of getting to the core where we're all sorting around. So I'm going to encourage you to do that all the time. And thank you for the education.

BY MR. KLINE:

Q So let me go back. There is a binding element on the new Exhibit 59 that basically, and I don't believe you were at the Planning Board discussion?

A No, that's correct.

Q Okay. Are you aware of the binding element dealing with this gross square footage of tenant bays within the retail outlet center and what was the purpose for that?

A In general I'm familiar with the element. I'm not, I wouldn't say I know the purpose exactly.

Q All right. Let me read it to you so you can kind of help us out. Binding Element No. 10 was added after the Planning Board's session and it reads,

"No single retail store will have gross core area that is greater than 50,000 square feet."

And do you have an understanding of why the Planning Board recommended that be added to the development plan?

A Not specifically, I could speculate though.

Q Yes. Well, go ahead and speculate then.

A I think I read one reason was to avoid big box stores, that they do not want this to be a power center sort of like Milestone in Germantown and I don't know to what

extent that related to this supermarket commitment, but it could have been related to that.
Q Following up here. Your answer would be consistent with, never mind, let me try to -- that line --
MS. ROBESON: Can I ask one question?
MR. KLINE: Yes, of course.
MS. ROBESON: Does, in my former days I used to represent Giant back when Izzy Cohen -- is 50,000, if the limitation is 50,000, is that in and of itself going to prevent a full-service grocery store or there's nothing in the binding elements that says I'm not going to do a full-service grocery store --
THE WITNESS: Most --
MS. ROBESON: -- if you know?
THE WITNESS: Yes. Most, I mean, yeah, things have changed since, probably since you worked for Giant that most --
MS. ROBESON: Yes.
THE WITNESS: -- full-size supermarkets are more than 50,000 square feet. I suppose it's possible that something could be gotten that would be just under the wire, but if that's, but that's, generally they're more than 50, 50, 50,000 to 60,000 and sometimes a little more.
MS. ROBESON: Now the Planning Board's rationale for the, the stated rationale in their recommendation is

that they say the intent of this condition is to address a concern that if the high-end retail outlet currently planned should not come to pass, the amount of approved square footage could be attractive to larger retailers that would present excessive competition for the nearby Clarksburg Town Center. But what you're saying is -- do you find that valid --
THE WITNESS: Yes, I don't think that's --
MS. ROBESON: -- or not?
THE WITNESS: I don't, well, two parts of it I don't find valid, I guess. I, let's assume for the moment that if you did not have that restriction you would get big box stores, you know, Walmarts and things of that sort. I guess that's three parts I don't find valid. That I don't, I think that's relatively unlikely given the huge concentration of them in Germantown, but let's run with if, in fact, those were to be built if you had, did not have that prohibition, in my view those are also not at all competitive with the retail in the town center and I would not see that as the reason to do it. I see there are other reasons why the Planning Commission might not want to have a big box concentration. The kind of place making that you get with the modern outlet center is much different than what you would get with a so-called power center with a lot of exclusively big box stores. And in my view the kind of

center that's being planned here would be much more likely to help attract office to the site and high-tech employment to the site than another power center would, but --
MS. ROBESON: So what's the difference between a power center and this?
THE WITNESS: Yes. A power center in my, my view, and there are different definitions I suppose floating around, but in general it is a conglomeration of very large, predominantly very large, so-called big box stores. It's challenging to make them attractive, quite honestly. They tend to be difficult to have a nice setting to sit and enjoy the day or get some food outside or things of that sort.
An outlet center in its, you know, and these have changed a lot and I think it's important, it's hard for us to recognize them if we live, spend most of our time in the D.C. area because most of the outlet centers were built many years ago here in Hagerstown, Queenstown, Leesburg and so on and so these, if one goes to other places and sees the more recently built ones, it's a whole different ballgame. They're similar types of stores by and large, but they have much more of a nice place to them. They have a more, better mix of restaurants and so on, you know, they're all going to be chain restaurants, but there is still a better mix of restaurants than you had in the past. And that's the kind of thing that is particularly appealing to a potential

office user. They don't really, you know, it's not necessarily bad to have a Walmart down the street, but what they really want is places where people can go during lunch or after work and sort of see it as a place that has an appeal to it. And a modern outlet center very much fits that bill. Usually a power center doesn't. I mean I think there's one, the new Reston Town Center which you could argue has done a pretty nice job and I can, I can see a few others I've seen around the country, but in general that's not going to fit the bill in terms of being a real attraction to an office user, while I think the outlet center would be.
MS. ROBESON: Okay. Okay. I'm going to try this again. Mr. Kline, can you remember where you were?
MR. KLINE: Yeah. No, no. Well, you came well-prepared because I notice you had all the lists of all the various tenants for the different kinds of situations. So the list you talked about, if I don't, you don't mind me looking over you, town center --
MS. ROBESON: Well, we can introduce that as an exhibit if that's helpful.
MR. KLINE: I don't mean to impose.
THE WITNESS: No.
MR. KLINE: I --
MS. ROBESON: Okay. Go ahead.

MR. KLINE: I don't need it for the question I would like to ask.
MS. ROBESON: Okay.
MR. KLINE: Put it that way. I mean the way he did it was fine for my purposes.
MS. ROBESON: Okay.
BY MR. KLINE:
Q Many of the uses you list on there, which as I understand you said would be appropriate for the town center, were uses that would be appropriate for a neighborhood center in the Cabin Branch neighborhood as well, correct? Probably not as broad, but many of those would approve?
A Yeah, I, because I was taking so long, I didn't get back to that other answer to hers. There, as you know, there will still be neighborhood serving retail plan at the Cabin Branch with the proposal. It, and which will be, I think, helpful and will cover some of these same types of stores. Now, obviously, those would also happen under the current plan, but they would be, be with that major difference of having a supermarket as the anchor. And it's going to be much, they're going, it's going to be much easier to attract a depth of those stores, a variety of those stores and restaurants with a supermarket than without it. And so, again, comparing these two alternatives, if you

have the current mix with only 120,000 square foot of retail at Clarksburg, you will have a supermarket most likely and you will have a good number of these other stores very much competing with the town center and making it even more difficult for that to get built.
Alternatively, if the supermarket is at the town center, that's really going to get the first dibs on a lot of, you know, a lot of these types of stores. I do think there are going to be -- some of these stores will still be available to fill the space at Cabin Branch. It may well take longer. They will tend to be ones that can be supported by the housing and the employment as it gets built at Cabin Branch, not that those residents aren't going to still need to go to a supermarket and when they do, they're going to shop at other stores near there so that they will still be a major source of demand for the town center. But it will not have nearly the same impact on the town center as it would if it had the supermarket.
Q The reduction, there will be a reduction in the neighborhood serving retail on the east, in the Cabin Branch neighborhood if the proposal was accepted, correct?
A I can't remember the exact numbers, but if there is, that's all for the better for the town center, quite honestly.
Q Do you know if the 1994 Clarksburg Master Plan

recommended the grocery store for the town center?
A For the town center?
Q Yes.
A I believe so.
Q Yes. You certainly believe it would be important, if not essential, to the optimum development of the town center?
A Optimum development, maybe even development at all, yeah.
Q What I want to ask you is why doesn't the applicant still reserve the right to build a grocery store in Cabin Branch rather than say we're not going to do it at all because in no less an authority than a 2001 article about Master Plan town centers, you say a lot of this retail doesn't occur until well into the residential development of the community. So if the plan envisioned a grocery store for Cabin Branch and we have yet to have any of the residential development or other development, ultimately there will be a demand for a grocery store there, so why don't we just put it in the staging element and say we'll do it, but we won't do it until we have 2,000 homes or something?
A I mean I, I think you probably should ask them for their motivation. I think it's a very positive move for Clarksburg as a whole, as we've been talking about, because

it does in the, you know, we all know how difficult it's been to get the town center built and the town center is a critical thing that people are, I think, appropriately very eager to have finally done and built as an amenity that they were promised originally. And I'm assuming that the reason that this was offered, and there's no reason to add a restriction to what you can do unless you're trying to help other people or help something else or, you know, hopefully in the process I am assuming that they are making a commitment in the interest of not being damaging to the town center.
Q Yes.
MS. ROBESON: Are you, if you can answer this, is the commitment to no grocery store at all or is the commitment to no full-service grocery or whatever that term is?
THE WITNESS: Full-size, yeah. I mean I'm probably not the definitive person to answer this. My, from what --
MS. ROBESON: -- I mean can there be a High's?
THE WITNESS: From what I had heard, there's, yeah, from what I heard and from a market perspective I think you could certainly have, you could certainly have a convenience store, High's, 7-Eleven. I think you could also have a sort of an alternative type store. You might call

it, you could have, it could be a natural food store that might be 20,000 square feet. There's some of those chains.
MS. ROBESON: Not a Trader Joe's?
THE WITNESS: Mom's or something like that. It could be a Trader Joe's. Those are not, you know, I think supermarkets realize that they are not going to have every segment of the food shopping business covered in their store and they're used to competing with those types of stores and there's a market for those as well, but that's really a different, different thing.
MS. ROBESON: But do you know --
THE WITNESS: So those --
MS. ROBESON: -- exactly, and maybe you can't answer this, do you know exactly what the applicant's proposal is as far as their agreement not to build a grocery store?
THE WITNESS: What I've heard is that it is, the commitment is for the full-size supermarket, to not have that. I don't know what the market reality would be of this mall. I think they can do a convenience store, I'm sure, but I believe there may be a plan for that already in that area. But the, I, you know, my -- I don't, I don't know what the exact plan is for those other alternatives. I do think they would not keep the town center from getting a supermarket and from that supermarket being successful which

is really, I think, the key issue.
MS. ROBESON: Okay, Mr. Kline, I'll give it back to you.
BY MR. KLINE:
Q Well, I'll just go back to -- when we had the, when you testified the other day, you were talking about office development in the corridor could be as much as 20 to 30 years out. Why don't we reserve a space for a grocery store that may not be built for 10 years when there is the population and the office to support it, but still reserve that because the Master Plan suggests that's a good idea? Why not have that in the plan?
A Again, I'm talking from the point-of-view of overall public policy, which is, which I sometimes do. I do revitalization studies and economic development studies as well and I happen to believe it's very important that the town center be built and that it be successful and that, and I also have no doubt that it won't happen without a supermarket. And as I said, I'm concerned that even this threat of a supermarket on the west side being there given the change since the Master Plan was adopted, it was a fine idea when it happened. I think they, as I believe, I believe they actually said you could not build a supermarket until you had one at the town center. They recognized the supermarket was critical to having the town center built,

but they did allow for several other ones after that.
But they had no idea that Wegmans was going to come down from Rochester. They had no idea that a Walmart could possibly have groceries in it. There are a lot of changes in the retail business and in the supermarket business and, you know, I don't know whether I would have advised my client to do this from their perspective, but I think it's a very important gesture for the sake of the town center that they not have this threat of a full-size supermarket on Cabin Branch and I don't see it as a conflict. And I'm not an expert on Master Plans, but it seems to me it's entirely consistent with the character of the development that was planned for.
Q I actually have some more questions in that regard, but I actually want to go back to kind of where I was way at the beginning where I started. And --
MS. ROBESON: That's my fault.
MR. KLINE: Well, no, no, I mean I think we all want to get down to the core of what the issues are. I'll start by sort of making an anecdotal statement and that is when I left your testimony the other day, I thought I better go back and sell all my office REIT stock that have any interest in developing the I-270 corridor because it was kind of a dower discussion of what's going on. You used the phrase, something about in this section of the corridor and

I'd like you to kind of, well, maybe you don't remember the context of what you said, but do we have sections of the corridor that are treated differently from an office perspective?
A Yeah. I mean, first of all, from a data perspective and, secondly, from the perception of tenants, I think we do. And it gets a little confusing in the data. The main data serves, as a mentioned on Monday, as, is CoStar which --
Q Okay.
A -- collects all the office and other types of commercial real estate data. And they, I believe they actually define at one place the I-270 corridor as even including Bethesda/Chevy Chase. So it's, and it certainly includes Rockville, Gaithersburg, Germantown and Clarksburg, and they do separate out each of those areas.
And I would say that, you know, it's been a difficult time for office in general in the country and certainly in Montgomery County. It's probably fair to say it's been less challenging in Bethesda than it has been farther out and that it's been more challenging the farther out you go. And I think a lot of that is the desire of office tenants to be, to be near amenities, retail amenities in particular and to have places where they can tell their employees, you know, you're not going to be stuck here with

no place to go for lunch or you have to get in your car for lunch or whatever.

And then, so then I narrowed in, and I do think beyond that that there is a tendency for office tenants to want to be closer to the downtown, to the Beltway, to NIH, to other drivers of demand and so that's made it more and more, you know, increasingly difficult to get office tenants as you go farther north on I-270, not that any of this is impossible and there certainly are tenants that would choose Clarksburg and would choose Germantown and choose Gaithersburg, but -- and so in any case I do think, I do think tenants make distinctions between these different areas like the data certainly does. The data that I quoted was for the combined area of Germantown and Gaithersburg and Clarksburg and that's what I referred to as that area that had very high vacancy rates and rents that had actually gone down a little bit over the past five years and a low absorption rate.

Q So as a general principle, the further you go, out you go, the more difficult it is to basically attract an office user?

A I mean I hate to over-generalize, but in general --

Q A generalization.

A -- it's (indiscernible).

Q Well, then to kind of get away from the generalizations, could you say, Mr. Kline, there's a ranking and somebody who wants to build, be in an office building or build an office building is going to look at these criteria and the rankings are going to be what five things and where does the amenities, services, the retail component fit into that? Am I not correct in assuming that it's the classic real estate line, location, location, location is probably the highest priority?

A Well, that's, I'd say, an overused term and so let me comment on that for a minute. First of all, there's no question that they're only going to go into locations that have a basic logic to them from an office demand perspective and that's one reason that I think you may have asked one of the other witnesses, you know, why isn't their office near Hagerstown or Queenstown? Those are not, you know, until recently outlet centers were only built in outlying areas and inherently there's no office demand there. So would building retail in Hagerstown get you office? No. No way. But once you have --

Q So concept is sort of an aberration, the concept facility on the east side of I-270, standalone, probably 20 years old, build to suit for a specific user? There may be another one of those out there, but they are few and far between.

A Well, at that point it would certainly, I think, fair to call it an aberration. It was a single, you know, government-type use that decided they just, I don't even know what the basis for going there, but they just, they were way out in the middle of nowhere at that point. The, I think the reality is that whole 270 corridor within Montgomery County is now within the sphere of reasonable office locations. So we now have areas that, you know, every tenant is going to have their own decision-making process. Every government agency or corporation is going to have their own decision-making process. But we are now, and obviously have offices up as far as Frederick, and so that whole area is competing for potential office users and I think has a decent shot at it. I don't think it's crazy to have land planned for office at Cabin Branch or elsewhere in Clarksburg. I do think it will compete for that.

Does it have some disadvantages competitively relative to closer-in areas? Yes. And that relative distance is a factor that office users will consider. But another important factor, once you're in that area that is a reasonable location, it is the amenities that you can offer your employees and how, especially if you're considering going relatively far out, and we see the same thing in Leesburg where it's, you know, in Loudoun County, rather, where, where there are, you know, a lot of users. You know,

AOL went in there. Worldcom went in there years ago and got a lot of flak really from their employees, you know, we're buried here. We have a cafeteria. This is not the kind of place we want to be and that's even become more and more true as millennials basically said we want to be near certain amenities and retail being the prime one, restaurants and so on.

If an office user is interested in going out onto the interstate, and there are a lot of reasons why they might, if they're interested in going relatively far north and it could be as simple as probably going to be a little lower rent than being closer in. They're going to feel very strongly about trying to lease, keep their employees happy enough by having a retail amenity as part of that development and so I do think that we are in the area where we have a reasonable shot of Clarksburg getting this and if you're trying to do an office development in Clarksburg, it would be strongly advisable to do it in the context of a retail concentration like is being proposed for this. So I do think it's an important factor once you're in that general area of acceptability.

Q Going back more to a numbers issue, you had some depressing numbers the other day about the absorption within the corridor. How did you get to the 500,000 square feet of build-out that I heard you mention within 20 years? How was

that built up? What did you use to come up with that number?
Q Yeah. I mean that was hypothetical with the purpose of saying that there was plenty of capacity so that there, you know, 10, 20, even 25, 30 years from now there will still, even with taking some of the land out for retail there will be still office land left in my view at the Cabin Branch and elsewhere in Clarksburg and elsewhere in Germantown and Gaithersburg. I mean it's going to take a long time for all the office land to be absorbed. I did not mean to say that I had come up with a specific forecast for when the office would be developed here.
Q Well, I guess I didn't understand the answer to that. Your 500,000 has to assume a certain amount of absorption build-out, so --
A Right.
Q -- where do you come up with that number?
A As I said, maybe I -- you're talking about the 500,000 that I mentioned today?
Q Yes. Yes.
A Yes. Okay. I think I was clear in saying that was, that was hypothetical. It was, it might be less, it might be more. It's not --
MS. ROBESON: 500,000 of office, right?
THE WITNESS: Right. Yes.

MS. ROBESON: Okay.
THE WITNESS: So what I was, I mean let me clarify the statement since it sounds like that was unclear. What I was saying is that even though I am not forecasting, and it probably would be impossible to forecast exactly how much or even close to how much office will be attracted to Clarksburg or to Cabin Branch in a given year, I'm confident in saying based on my understanding of the office market and so on that there will be, it will take more than 20 to 30 years to absorb all that office land that's currently planned for office. And even if you subtract the land for the outlet center, first of all you will still have, even if you don't need exactly the same amount of office, you would still have office land left over and in my view you would have actually more office buildings with the retail for the reasons we've talked about a number of times than you would without it.
But, you know, is it 500,000 in 20 years? Is it 300,000? Is it 700,000? There are a lot of ways that one could estimate that. Unfortunately, some of them end up being even longer, they could be a hundred years, but there's, you know --
BY MR. KLINE:
Q Well, I understand. My question isn't challenging the economic return to the County that, was really why you

had the fiscalality. It was more to understand how what you thought would be the build-out rate as it is under the Master Plan today and I understand your premise of -- and if you put some services, it's going to make it a little bit better. But I'm trying to determine how realistic is your basic rate of growth. If there's only 74,000 square feet of absorption going on historically a little after three years, then, and we're competing with the places you've mentioned, that seems kind of generous if you think we're going to get that much in Clarksburg within the time frame you're talking about.
A Well, I respectfully would say for this purpose it doesn't matter how much you would get without the retail. You're -- if it's, hypothetically again --
Q Okay.
A -- but if it's 20,000 without the retail and it's 30,000 with the retail, you're getting an impact of the retail in the office. More likely if it's 500,000 without the retail and 600,000 with the retail or 700,000 with the retail or, you know, zero without the retail --
Q Okay.
A -- and 300,000 with the retail, any of those have a different forecast, but they all involve what I'm comfortable saying and testifying to under oath which is that you have a significant likelihood of getting more

office with the additional retail than without it regardless of what the base number is.
Q Yeah. I'm just wondering how you get that first one? That's --
A Respectfully, I don't see why that is relevant to the --
Q Well, it is.
MS. ROBESON: Well --
MR. KLINE: Go ahead.
MS. ROBESON: It's your time to ask questions, so --
MR. KLINE: Well, actually if, to find something, well, go right ahead and ask your question.
MS. ROBESON: All right.
THE WITNESS: Did you have a question you want --
MS. ROBESON: No, no, I was --
THE WITNESS: Yes. I mean I would just say --
MS. ROBESON: I -- hold on until you have a question on the floor.
THE WITNESS: No, I just wanted to -- okay.
MR. KLINE: Well, there is and I say --
MS. ROBESON: Mr. Harris will get a chance to ask.
THE WITNESS: That's fine.
BY MR. KLINE:
Q The reason I say it's relevant is because page 9

of the applicant's justification statement says the fashion center employment retail proposed to the EPA will be a catalyst for the development and there is a proven track record that the fashion center will stimulate office development. Your phrase, and I believe I wrote it down correctly, it's an untested proposition that the outlet will stimulate development. So I'm saying how will the outlet bring that first office building there? I understand that it probably makes it a little bit more attractive, but I don't see the jump to what's the stimulus to suddenly say I'm going to be in Clarksburg because I can go shop at Coach.

A Okay. If I could answer that, and I did take the occasion of the last two days to dig into that issue a little bit more, so I would like to elaborate on what I said on Monday. What I think I said, or at least meant to say, was that it's, and I'm going to amend this somewhat, but I, at that point I could not think of any examples of an outlet center that had been a catalyst for office development. I very much believe that retail in general has been proven over and over and over again to be a catalyst for office development and in my professional view the types of things that are going to be done at this outlet center, in a modern sort of outlet center with the outdoor seating, with the square, with the fountains, with the restaurants and so on

has the types of things that have been proven over and over again to make it easier to get office development with that retail than without it.

Now I did, I did take the occasion of the break between my direct testimony and indirect and cross to survey basically the other members of my firm around the country and see, because I could not think of any examples in the D.C. area, but whether there were any other examples that I was missing and actually did, did find out that I had been, you know, mistaken in saying that there were no, there was no track record. It's still limited. The reason why it's limited, quite honestly, is that the, as I said, most of the outlet centers until recently have not been in areas with which could have office at all. There's no market.

But Round Rock Premium Outlets, which was also developed by Simon, opened northeast of Austin, Texas, in 2006 and it's one of the earliest examples of these outlet centers being built in locations that are sort of outer suburban as opposed to more rural or small town. And a hospital opened at about the same time, followed by some more retail, another hospital and a 135,000 square foot office building that opened in 2009. And from what my colleague in Austin says, the outlet center is being given a lot of credit for attracting and helping to sort of attract these other types of employment generating development

within the office. So we are not seeing this kind of example of this amenity being helpful in attracting office.

It turns out there's actually an example of -- to some extent from way back, which I had forgotten about, but back in 1990, Trammell Crowe, a major developer, developed a project called Citadel and really in the city of Los Angeles, east of downtown Los Angeles. And it's hard to parse out the timing because they did it all at once, but they build an outlet center, five office buildings, food courts and a hotel all back around that time. And these have all complimented each other very much since then. If you look at the listing for the office, any vacant office space there touting the outlet center as being one of the key amenities and so there's clearly a lot of complimentary, they complement each other very well and they do seem to be helping each other, you know, stay full and so on.

It's early to see, but there's another example in the Salt Lake City area, the outlets at Traverse Mountain has just opened recently, another outlet developer. It's new and existing adobe office buildings south of Salt Lake City. So there was already office there, but there's more spec office that's going up and my colleague that works in Salt Lake City believes that that's, the outlet center is helping to synergize more office that well, that might otherwise have occurred.

And the last thing that these outlet centers have done in some cases, and I should have thought of it before, but in the D.C. area even, Arundel Mills in Anne Arundel County, because of that there was more infrastructure built, highway improvements and things like that and they have attracted quite a bit of office development around there and I think part of that is due to the fact that there were this, was this infrastructure improvement that would not have occurred most likely without that large outlet center if you want to call it an outlet center.

So I think there is, to amend what I said on Monday, some track record even of outlet centers catalyzing office development. But I still think by far the most critical point is that the type of retail that we're talking about is as well as various other types of retail have been critical elements in catalyzing office development. Even more so these days office developers are very reluctant and tenants very reluctant to go into office settings where you don't have retail. And the retail that's going to catalyze the officer here has to have a market support for it and the only type of retail other than the town center retail, which I don't think we would want to compete with directly, is outlet that's really feasible here.

MR. KLINE: I just wanted to check, how are we doing here?

MS. ROBESON: We, I think we're going to break at 12:30 --
MR. KLINE: Okay.
MS. ROBESON: -- for lunch.
MR. KLINE: I think that just about works for me. Taking a cue from the witness, I'm passing it around --
(Discussion off the record.)
MS. ROBESON: Okay. Can you -- thank you, Mr. Chen. Can you describe what these are? Are these in the record or --
MR. KLINE: Can I get a little organized here, Madam? They are not in the record and I'll describe, first of all, in response to Mr. Bogorad's comment about their little sketch, you need to blame --
THE WITNESS: Smudgy isn't it?
MR. KLINE: You need to blame Mr. Unterberg since they were taken from his firm's website. The one that's labeled down at the bottom, Seneca Meadows Corporate Center green space exhibit, is basically a layout of the corporate center park at Seneca Meadows which is the home for the Wegmans which Mr. Bogorad mentioned. And the second drawing, which down at the lower left says Lot 8, is actually a blow-up of just -- on the first page is on the left-hand side in browns and taupes and greens.
MS. ROBESON: Wait.

THE WITNESS: Wait, I'm sorry, what was the blow-up?
MR. KLINE: The blow-up --
MS. ROBESON: Where is the blow-up from?
MR. KLINE: Sure. The blow-up is on the left-hand side of the corporate center drawing. There are --
MS. ROBESON: Wait. Wait.
MR. CHEN: Madam Examiner --
MS. ROBESON: Which exhibit?
MR. KLINE: Okay. On the corporate center drawing titled Green Space Exhibit.
MS. ROBESON: Oh, I'm sorry. I think I'm too cold to think.
MR. CHEN: No, that's all right.
MR. HARRIS: Why don't we mark these as exhibits so --
MR. KLINE: Yes.
MS. ROBESON: I think that's what I was getting ready --
MR. KLINE: Sure.
MS. ROBESON: -- to do. So the --
(Discussion off the record.)
MS. ROBESON: Yes. 61 will be Green Space Exhibit Seneca Meadows Corporate Center.
(Exhibit No. 61 was marked for identification.)

MS. ROBESON: And then 62 will be blow-up, or detail of Exhibit 61.
(Exhibit No. 62 was marked for identification.)
MS. ROBESON: Okay. Go ahead.
BY MR. KLINE:
Q If everybody understands what's, the reason I've got these two exhibits is, one, because the Seneca Meadows project is mentioned in the applicant's justification statement as an example of how the introduction of, I'm sorry, retail contributes to an office park.
MR. HARRIS: Objection. It was not offered for that purpose. It was offered to show that a Master Plan recommendation is a flexible recommendation. It had nothing to do with amenities or anything of that sort.
MR. KLINE: Mr. Harris is probably more familiar and I will take his clarification. That's fine.
MS. ROBESON: Okay. Are they still relevant to your --
MR. KLINE: Yes, ma'am.
MS. ROBESON: -- cross-examination?
MR. KLINE: Yes, ma'am, they are.
MS. ROBESON: Okay.
MR. KLINE: Sure.

BY MR. KLINE:
Q Just for an orientation, if you take Exhibit 61 and turn it so that the legend or the colors is on the bottom, the left-hand side of the green area you'll see fairly distinguishable you'll see something called Interstate 270. And up in the, I would say about 11 o'clock is the interchange of I-270 and Father Hurley Boulevard. And the improvements that are shown in the brown boxes and the taupe box in the upper right-hand corner are blow up in Exhibit 62.
If you look at Exhibit 62, there is something marked Lot 11 and that is the Wegmans food store that Mr. Bogorad alluded to. In the front of that is a multi-story parking structure and to the east of the Wegmans store and in southeast are a, I'll use the term strip center, plus some pad buildings for various retail uses?
MR. HARRIS: I hate to interrupt at this point in time, but Mr. Kline is doing a lot of testifying here and --
MR. KLINE: That was orientation. That was not testifying.
MS. ROBESON: Well --
MR. HARRIS: So --
MS. ROBESON: Well, it is. It is. And --
MR. HARRIS: You can ask a question.
MR. KLINE: Well, I can't ask him a question if he

said he doesn't know what it is.
MS. ROBESON: Well, but that --
MR. KLINE: Well, then I think you have to introduce it --
MS. ROBESON: Yes, that --
MR. KLINE: -- with one of your witnesses and --
MS. ROBESON: Just a second.
MR. KLINE: Okay.
MS. ROBESON: Okay. You can't -- it is testimony. You could ask a hypothetical because he is an expert witness, but Mr. Harris has the right to cross-examine based on your, the reality of that hypothetical. Although, do you have a witness that's going to testify as to what this is?
MR. KLINE: Well, I don't know the answer to that, but I'll know by the end of the day.
MS. ROBESON: Well, that's good because I figured it out. You have until August, well, I have the date down when you need your expert witness. So you can hypothetically ask --
MR. KLINE: I can do this, for Mr. Bogorad's purposes I can work with what I've got here. Okay.
MS. ROBESON: But I would, I don't want to hear a huge amount of detail as to --
(Discussion off the record.)
MS. ROBESON: Go ahead.

MR. KLINE: No, no, I'll take the guidance.
MS. ROBESON: Okay.
MR. KLINE: Finish your sentence.
MS. ROBESON: No, go ahead. You can go ahead.
BY MR. KLINE:
Q Mr. Bogorad, let me start by saying this. Are you familiar with the Seneca Meadows Corporate Center?
A Very, just very generally, not very much.
Q Okay. Then let me phrase it this way. You mentioned the Wegmans food store as being a competition for what could occur in the Clarksburg area.
A Competition for supermarkets, yes.
Q Right. And Wegmans is a grocery store on steroids?
A I suppose one could say that.
MS. ROBESON: If you understand the question --
THE WITNESS: Yes, that's fair.
MS. ROBESON: Well, can you rephrase it some way besides steroids --
THE WITNESS: Okay. It's --
MS. ROBESON: -- for the record? How would you -- Mr. Bogorad, how do you characterize Wegmans as relative to other grocery stores?
THE WITNESS: It is much larger than most other, not all, but most other supermarkets, more than twice the,

you know, maybe on the order of twice as large typically. It has a very extensive selection of food items and so on, both the types that you would find in a normal, sort of historically in a supermarket and also a lot of prepared food items, much more so than you find in most other supermarkets.
MS. ROBESON: Okay.
BY MR. KLINE:
Q Wegmans, because of the way you described it, Wegmans would draw from a larger market area than would a normal grocery store, would it not?
A Yes.
Q So it has a draw, maybe regional would be too much to say, the larger than a local community draw?
A Yes.
Q Assuming that the pad sites in the strip center that are included as part of the retail component in the Seneca Meadows Corporate Center, have the uses that you listed on your list for town center uses, you can remember what that was?
A Yes.
Q All right. Would those uses not provide a greater service to the tenants in the office buildings you see in the taupe shown on Exhibit 61 to the south the way we saw it and have greater utility to the tenants than does the

Wegmans food store?
A That would be -- I would have to speculate about that. I don't --
MS. ROBESON: If you know. If you can assume.
THE WITNESS: Would those other stores have more impact on the Wegmans? I, more benefit than --
MS. ROBESON: Mr. Kline, I'm -- just a second, Mr. Bogorad. I'm not sure where you're going with this testimony. Are you saying there's no room even for a supermarket in the town center and, therefore -- okay.
MR. KLINE: I wasn't going there, no.
MS. ROBESON: What?
MR. KLINE: I wasn't going there, no.
MS. ROBESON: Oh, okay. Are you going to clarify where you're going pretty soon?
MR. KLINE: I guess I better.
MS. ROBESON: Thank you.
THE WITNESS: I mean I --
MR. HARRIS: Objection. I'm not sure --
MS. ROBESON: Well, just --
MR. KLINE: Well, no, you can't object, I haven't asked a question.
MR. HARRIS: Well, no, you did. He's trying to answer the question.
THE WITNESS: There's still a question.

MR. KLINE: He's trying to figure out the answer.
MS. ROBESON: Mr. Bogorad, don't say anything until I say to say something. Okay. Now do we have an objection on the table?
MR. HARRIS: No, no, no. I think he's rephrasing the question which is why I was --
MS. ROBESON: Oh, okay.
MR. HARRIS: -- speaking. Thank you.
MR. KLINE: With the tightrope you folks have me on, I'm just trying to make sure I get this right.
MS. ROBESON: We're tough.
BY MR. KLINE:
Q What are the uses that an office, yes, one of the things you've talked about is let's get all the basic, the service uses out of office buildings -- let me rephrase that. What uses would you typically find in an office building that would serve the tenants?
A In an office building?
Q Yes, they would be of a retail service quality?
A Often you don't have any. If you're lucky, you have some sort of a coffee or you might have a coffee, probably more a deli type of thing, a place to get sandwiches. That's probably the most commonly found. It's tough to support retail with an office building usually, so there's not usually very much.

Q Pick up laundry operation, not a full, but a pick-up laundry?
A Possible.
Q Delicatessen?
A I mean, you know, quite honestly you rarely see very much. I mean you might see, you know, if you're in -- the office building itself is rarely going to support anything other than a very minimal operation. So if they are in an area where they can attract other demand, they, Tyson's Corner, you have office buildings with wonderful restaurants in them, for example, but if it's a freestanding office building in Germantown or Clarksburg, it's going to be tough to have any retail and if you have one thing, it's probably going to be a deli, convenience type thing.
Q All right. A florist?
A It would be very difficult to get that in there.
Q Why?
A Not enough demand from the office users. It's, the retailer would die.
Q Assuming that the amount of office development that exists today is 900,000 square feet, we're not talking about people only in that building buying flowers, we're talking about a larger population buying flowers. Isn't that enough to support a florist?
A I'll do the calculation. The florist is a tough

business these days in general. I suspect not, but I would have to do some analysis.
Q Let's not stretch this out too far.
MS. ROBESON: Go.
BY MR. KLINE:
Q What we don't find grocery stores or retail, we don't find grocery stores, we don't find fashion retail in office buildings, correct?
A In suburban areas, especially. Downtown you get a lot of it. Generally not. I don't think it's for the reasons I suspect you're going to, but that's not something that office users might not want or use --
Q Right.
A -- but it just generally doesn't fit within a --
Q I think you're anticipating my next question. That is some of the things that are on your town center list are the kinds of retail services that are actually more attractive to office users than would be a fashion outlet center, correct?
A I think a range of things are attractive to office users and, quite honestly, the most important thing is the place making and having a place to go and do things during lunch break and having at least some restaurants and things of that sort that you can do during lunch or do after work. And, you know, they, I also -- sure some things, having a

cleaners nearby is convenient. I think there will be as part of the neighborhood serving aspects of Cabin Branch, they will most likely be, as I said, some of the types of stores that we talked about, particularly if you do get a lot of office you will see, you will see a cleaners, you will see a, you know, a pizza place, probably things of that sort and you won't get it without either one.
Q The Master Plan prescribed for the Cabin Branch neighborhood, 120,000 square feet of retail, neighborhood serving. We are talking about, no, I'm sorry, the applicant is talking about changing that. That will necessarily reduce the amount of neighborhood-serving retail, will it not?
A I don't know the details or the numbers.
Q All right.
MR. KLINE: No further questions.
MS. ROBESON: All right. Mr. Chen, let's -- how long do you think you're going to be?
MR. CHEN: Half hour at least, if not more. I sat here and took notes.
MS. ROBESON: Okay. Let me do this. Let's break for lunch and we'll see how Mr. Bogorad goes and whether we can fit Mr. Chen's client in. How many more witnesses do you have, Mr. Harris?
MR. HARRIS: Mr. Unterberg has to return and

finish his cross and --
MS. ROBESON: That's right.
MR. HARRIS: -- and his direct, and then cross.
MS. ROBESON: And is he your last witness?
MR. HARRIS: He is.
MS. ROBESON: Okay. Let's take an hour and thaw out and we will be back at 1:30. And I will try to get the heat.
(Discussion off the record.)
(Recess.)
MS. ROBESON: We are back on the record in a warmer room. Just for the record, I did see Mr. Robbins and Mr. Chen in the hall and I told them we were going to be in this room, so I'm glad I found, everyone found their way.
Now we were in the midst, I think Mr. Kline had finished his cross-examination of the witness and now it is Mr. Chen's turn to cross-examine Mr. Bogorad.
MR. CHEN: Thank you, Madam Examiner.
BY MR. CHEN:
Q Good afternoon, sir.
A Hi.
Q I'm going to ask you a series of questions. Hopefully they'll be clear to you, but if I'm not clear, just tell me, okay?
A Yes.

Q As I understood your testimony at the first hearing, you used the word challenge to state that the office market between Clarksburg and Gaithersburg is extremely challenged and you did not see a short-term change, is that correct?
A I said it was a challenge. I'm not sure I went so far to say I, or I guess what I meant to say is that I think there's a good chance that it will not get a lot better soon.
Q And what would be your horizon for soon?
A To be a honest, it's a very difficult time to predict what's going to happen since everybody in the industry is very concerned about what's going on with, so it could, you know, it's possible it will never improve. Hopefully that won't be the case and it will be a few years.
Q Will there be a change within two to three years?
A I'm not, I can't say whether, what's going to happen in the future. I can, I could comment at length about reasons why it's challenged and why those might or might not change, but I suspect you don't want me to take all that time.
Q Well, wait a minute, I would very much like to know why it's challenging.
A Okay, sir. To be, try to be brief about it, it's, it's a challenge for various reasons. First of all, job

growth is not as good as we've seen in some past periods in the D.C. region, although it's actually not bad, but it could be better. And typically office demand has been correlated quite closely with employment. Specifically, the Federal Government has been cutting back for budget reasons and so on and so a major source of office use has dropped dramatically.
And, third, both public clients, public tenants and users like the Federal Government and private sector office users are using a lot less space, leasing a lot less space per employee. So even if you have 40,000 job growth annually in the D.C. region and a good portion of that is in offices, it will use a lot less office than we've grown accustomed or than we've typically assumed. And, you know, hopefully the budget situation will be resolved, at least in a clearer fashion, before too long at which point at least agencies will know what their future looks like, but most likely that's going to be, continue to be a budget challenge given all the issues that we know well. And the consensus in the industry is that the decreased amount of office space per employee is probably a permanent condition, although I always have trouble saying anything is permanent.
Q I have in my notes, and I've got it in quotes, that you testified that,
"Absorption has been declining because lease

space demand is dropping.''
Is that accurate, sir?
A Yes.
Q And you then went on to say that this situation will exist for many years until office space will be, before office space will be utilized fully in Germantown and Gaithersburg?
A Yes.
Q Do you have the Master Plan there, Mr. Harris? Would you go to the general one? Do you have it there, sir?
A I do.
Q Thank you. Would you please go to page 67?
A This is the Master Plan from June 1994, yes.
Q Yes. Page 67, do you see the --
A Yes.
Q Thank you. Do you see the middle bullet there, sir, in the middle of the page?
A The middle bullet? Yes.
Q Could you please read the emphasized bold language?
A "Encourage an employee pattern which is supportive of I-270 as a high technology corridor."
Q Now as I understand it, that is one of the plan objectives, the Master Plan objectives, is that correct?
MR. HARRIS: Objective, objection. I don't

believe Mr. Bogorad talked at all about the Master Plan or its purposes or objectives, so this is going beyond the scope of his direct testimony.

MR. CHEN: I heard him testify even today about the Master Plan and he's a planner. He's got a master's degree in land planning.

THE WITNESS: Not land planning.

MS. ROBESON: No, I don't think he does.

MR. CHEN: Well, planning, excuse me.

MS. ROBESON: He doesn't. Although, I think the question here is, well, where are you going with this?

MR. CHEN: It goes to his testimony on retail attracting office use and --

MS. ROBESON: Okay. And that was the subject. So I'm going to give him a little leeway, but nobody is going to interpret the Master Plan. So go ahead.

MR. CHEN: Thank you.

BY MR. CHEN:

Q Do you see that plan objective, sir?

A That's encouraging an employment pattern which is supportive of I-270 as a high-technology corridor, yes. Yes.

Q Could you please explain how your testimony about future attraction of office use will satisfy that plan objective?

A Yes, I think it's a very important point in my testimony. I do think that having the retail that's been proposed with the various aspects of it that I have elaborated on, including the retail itself, the restaurants that would be there, the place making that would be very appealing to office users will be a significant advantage as this site competes with many others in this County and elsewhere for high technology as they call it there.

Q Okay. So it's your opinion that outlet use will attract high technology employment?

A That this, the modern form of outlet centers as proposed here will help to attract high tech and other office users. It doesn't mean that it's sufficient. Obviously, a lot else has to be going on, including a decision to want to be in this general area, but I do think this is a viable office corridor and that given all the competition for other, with other sites along the corridor and Loudoun County and with Leesburg, I mean with Fairfax and Frederick County, that there will be more high tech employment with the outlet center than without it.

Q Okay. And, in fact, you prefaced your statement just now by saying, and I wrote it down, with the modern form of outlet center as proposed here?

A That's correct.

Q Okay. What is the modern form of outlet center, sir?

A There's a lot more attention being paid to place making. It's not considered sufficient to just have stores in a strip setting. If you think of like, you know, Rehoboth where I happened to be last weekend, there's three different outlet centers. They're not places you go to have, you know, shopping is fun for a lot of people, but just you wouldn't go there to relax, hang out. There is some food there, but it's not something that, you know, if you weren't going to shop, you would never go there to have food. Even if you were working nearby, you might well go to some other, get in the car and drive someplace else.

Q Okay. But --

A The modern form of outlet center is quite different in that regard, even though the mix of stores on the fashion side is quite similar, but they pay a lot more attention to making it a really appealing place. Like so it's a place where there's typically a square or a fountain, restaurants that you can eat inside and outside, depending on the weather. And so it has a real appealing aspect to it that is the kind of thing that office tenants and office employees are looking for.

Q Okay. Yes, this morning in your testimony, in fact, you said that the proposal by this application, there would be fountains, outdoor seating and restaurants, is that correct?

A Those are examples of the types of things that I know are included in there as another modern outlet center. I'm not testifying about an exact plan. I'll leave that to others.

Q Well, your testimony is being offered, sir, in support of the application, isn't that right?

A Yes. And what I said was that the types of things that are included in centers these days by Simon and others are what, as I described, things that are appealing to office tenants and office employees. You know, if they ended up not putting in a fountain, but they had a square or they had a circle or they had this or that, the details of it would not change my opinion one bit.

Q What do you juxtapose the modern form of outlet center against?

A I think I just explained that, but I can answer again.

Q If you could do it again?

A The types of centers like Hagerstown or Queenstown or Rehoboth where really a strip center with, you know, convenient parking, places for the stores, but not a place to actually enjoy yourself, not any emphasis at all on quality restaurants.

Q You mentioned Hagerstown, I believe, and

Queenstown and Leesburg in your earlier testimony?
A I think I mentioned Leesburg as well, yes.
Q Yes. And you also testified earlier that, as I understood your testimony, that there was not a great deal of data yet available for quantifying at least, or that was not your word, but determining how the modern form of outlet centers attract office use, although you said you think it does, isn't that right?
A Yes, because there have been so few examples of outlet centers in places that have a possible office market.
Q What type of analysis, sir, did you do -- by the way, the Simon organization owns those three outlet centers, isn't that right?
A They do.
Q And they're relatively close? I mean they're closer than the examples you gave us of Traverse Mountain in Austin, Texas, and Citadel, Los Angeles, isn't that right?
A They are, but the two centers, the Hagerstown and Queenstown, as I said before, are in areas that clearly have no potential for office and so one would not expect even if you set aside the fact that they are old and of the old style, you would not expect them to have any impact on office. The one in Leesburg is interesting. It is in an area that potentially could have some office and there is office not too far away. And I did take the advantage of a

2-day break here to, between here and my direct testimony to look into a site. There is a vacant site just east of the Leesburg Center. The Leesburg Center itself was built by Chelsea when formerly, which was later bought by Simon. Their only business was outlet center business development, so they bought a site that was big enough for the outlet center.
Q When was that?
A The outlet center.
Q When was it built?
A I don't know that I have that. It's possible I have it in my notes. I'm not sure. But the point I was making is that there is a site owned by somebody else adjacent to it and I looked into that with some of my contacts in Loudoun County and it's owned by somebody from Belgium who inherited it from their father and they somewhat, you know, everyone is sort of surprised that they haven't done more to try to actually move ahead with the development of it but, because they do consider it to be, you know, a good location for office, although it's far at the end of the office corridor in Loudoun County.
But as is often the case, there seems to be a particular ownership issue. So that's not, you know, not any indication one way or the other of the effect on that on office.

Q Leesburg was, assume if you will for the moment, developed in the late 1990's. Does that sound reasonable to you?
A It sounds probably right. Let me see if I happen to have it with me. I'll accept that as a premise for the moment.
Q Do you want to check your notes?
A I don't know whether I have it or not. Probably not. No, I don't have it, sir.
Q And it's next to town of Leesburg, isn't that right, sir?
A It's in the town of Leesburg, I believe.
Q Yes, it's within the corporate limits?
A Yes.
Q And it's right up against a major highway, isn't that right?
A Yeah, it's not right on Route 7. It's on the bypass.
Q Yes. It's right on the bypass, isn't that right?
A Yes.
Q And it's been there about 20 years?
MR. HARRIS: Objection.
THE WITNESS: I'll accept your premise. I don't know.
BY MR. KLINE:

Q Okay. It has fountains?
MS. ROBESON: We have -- what's your basis?
MR. HARRIS: He answered that he did not know when it was built.
MS. ROBESON: Oh.
MR. HARRIS: And Mr. Chen is --
MR. CHEN: He also said he accepted my premise.
MR. HARRIS: -- purporting to say it's been there 20 years.
MS. ROBESON: Yes. Assuming it was, it's been there, correct?
MR. KLINE: Yes.
MS. ROBESON: Okay.
MR. KLINE: I thought I said that.
MR. HARRIS: He said he accepted your premise as an assumption.
MS. ROBESON: That's, that's true.
THE WITNESS: Not that I'm assuming it's correct, but assuming it is premise to the question, yeah.
MS. ROBESON: Let's move forward.
BY MR. CHEN:
Q Okay. It has fountains, doesn't it, sir?
A I haven't been there awhile. I believe it probably does, yes.
Q And it has restaurants?

A It has some. They're not, it wasn't the focus of it and they're not particularly attractive restaurants. It's in terms of drawing anybody from outside the center.
Q Well, it's got an Arby's, doesn't it? Do you know?
A That sounds about right.
Q Okay. And it has a food court?
A It has somewhat of a food court, yes. I have not been there in a while. I'm not -- I really can't answer the details about my --
Q Well --
A I do know that the modern outlet centers are much more appealing, they are much more oriented towards outdoor setting, pedestrian orientation, the kinds of places one actually would have formally like to go. I actually think the Leesburg center is quite nice as the older generation went.
Q It has outdoor seating, do you know that?
A I'm sure it does, yes.
Q It also has provision to eat outside if you wanted, are you aware of that?
A I'm not, I don't remember that, but I wouldn't be surprised.
Q And it's a self-contained outlet center in the sense that it's a pedestrian-used outlet center. You walk,

in other words, from store to store rather than getting into a motor vehicle?
A Pretty much all outlet centers are that way, as are most other strip centers.
Q And it also has outdoor play areas for children, isn't that right, sir?
A I don't remember.
Q Okay. And assuming it's been there for 20 years, and it is owned by one of your clients, you didn't bother to get information about the features of the Leesburg center contacting Simon center, Simon Group?
A I didn't think it was relevant.
Q Now you, I believe you characterize Hagerstown, so just on, back up on that for a minute, I know -- strike that. What quantifiable study did you undertake, sir, as to these three existing outlet centers, as to the correlation, if any, between office use and the outlet center?
A I didn't believe one was appropriate. I did not take, did not undertake it quantitative, no.
Q Okay. Have you been to the Hagerstown center?
A I don't remember actually.
Q Are you aware that you can eat at the Hagerstown center?
A As I said, you can eat at any town center, any outlet center, I believe, pretty much. There's always an

effort to keep the shoppers there and to provide food so they stay longer, but that's quite different from an attractive destination almost that people would actually affirmatively go to to eat at.
Q It's off of a major highway, isn't it?
A Yes, it's not in an office, it's not in an office location. There's no way that it would ever attract office in that location.
Q Okay. Queenstown is also off of a major highway, isn't that right, sir?
A Yes.
Q And it has eating facilities also, isn't that right?
A I'm sure it does.
Q In your, developing your opinion that you expressed to the Hearing Examiner, you did not undertaken any evaluation of these three outlet centers?
MR. HARRIS: Objection. Asked and answered.
MS. ROBESON: Yes. Yes, that is true.
MR. CHEN: Okay. Okay. I'll accept that. My thing is that he didn't, but I maybe my recollection is mistaken, but if that's the Examiner's recollection of his testimony, fine. He doesn't have to answer a second question.
MS. ROBESON: I thought he said that he didn't

because they weren't comparable.
MR. HARRIS: And not appropriate.
MS. ROBESON: Or, yes.
MR. CHEN: Is Mr. Harris testifying now?
MS. ROBESON: No, he's not. But --
MR. HARRIS: Well, but I'm clarifying your misconstruing --
MS. ROBESON: Okay.
MR. HARRIS: -- the testimony.
MS. ROBESON: That's enough. That's enough.
BY MR. CHEN:
Q Why is Leesburg not worthy of being considered in comparison to Clarksburg, sir?
A There's, and whether it's worthy or not, there's no office site adjacent to it. As I said, the only site that one could possibly build office adjacent to it is not available. The developer, the owner of it has not pursued any plans for it. It's quite possible that if they build there, it would have been a possible amenity. I actually think it probably would be, but it's not, no way to test it because the owner of it chose not to build there. Everything else is built up.
Q But you are testifying to the examiner that office will come if the outlet is there?
A That it will make it more likely it will come but,

again, it didn't make any sense to do a quantitative analysis of Leesburg when I knew that there was no office land around it. This is a totally different situation where you have predominantly office development that's planned and the question is will that office land be used at a faster pace if you have retail added of this outlet center sort or not and clearly there's plenty of land here to do the office development. There's a developer that is very eager to build the office and so it's, you need to have -- to be analogous, you need to meet several criteria and if you don't meet those criteria, it doesn't make any sense to analyze it.

One, it has to be in an area that is a reasonable office market. That eliminates Hagerstown and Queenstown. Arguably, it does not eliminate Leesburg. And you have to actually have land available for office to see whether that land was, in fact, developed as a result of, potentially as a result of the outlet center and you don't have that here.

Q What study did you undertake to determine that Queenstown and Hagerstown were not, I don't want to mis-state what your words were, appropriate for office development?

A I do a lot of office market analyses as part of my main business and I feel very comfortable saying that those are not office locations. The, I don't think it was, I mean

it's -- I hate to say it's obvious, but I think it is obvious. If somebody came to me and called me up and said I'd like to pay $20,000 for you to study the office market near the center of Hagerstown, I would say, you know, well, we'll take your money, but it's a waste of your money. It's not --

Q Well --

A -- going to be --

Q -- have you done any study of office demand in Hagerstown?

A No, I haven't.

Q Have you done any analysis of the zoning of the property surrounding the outlet center in Hagerstown?

A I would consider that irrelevant if there's not a market and I'm confident that there's not a market.

Q Okay. You're confident there's not a market in Hagerstown, but you haven't undertaken any study?

A Yes, based on what I said a minute ago.

Q Okay. Are you also confident that Queenstown does not have a market also?

A In that, that area there is some demand for office further west on Route 50 and some, you know, some modest amount has been built, very modest, but --

Q Did you undertake any study of the demand for office space in Queenstown?

A No, I didn't.

Q Have you undertaken any study of the demand for office space in Leesburg?

MR. HARRIS: I think that's been asked and answered.

THE WITNESS: I have. I have actually.

MS. ROBESON: Yes.

THE WITNESS: Not for this --

MS. ROBESON: I don't think, just a second. Before you continue, let me rule on the objection. I don't think that that was covered by his earlier testimony, so go ahead. Mr. Chen, do you want to ask a question?

MR. CHEN: I want an answer to the question I just asked that he objected to because I haven't asked before. I have not asked that question.

MS. ROBESON: No, I understand. I'm saying can you repeat it for me --

MR. CHEN: Oh, I'm -- yes.

MS. ROBESON: -- because I forget all of it. Go ahead.

BY MR. CHEN:

Q Sir, have you undertaken any study of office demand in Leesburg?

A Coincidentally I have in earlier projects and actually, I think it actually confirms my general conclusion

which is that it's also a challenge, the office market out there. Most of the demand for office is closer in to the airport and to Reston and so on. But there is a project out there that does have retail, the Village at Leesburg, and they have been more successful at attracting office over the last few years than other developments. It's not, it's not been a credible amount because it is a challenged location in general, but it's, but they would certainly say that that's been key to their attracting office, is one of them, a client of ours, Kettler, and they have been doing comparatively well on that and they do have sort of, some retail nearby, so that's in the development.

Q And you did identify one vacant parcel of land that's owned by a gentleman who is Belgian, is that right, sir?

A That's correct.

Q And you have no knowledge as to why that land has not been developed with office over the last 20 years?

A Well, I talked to one of the main zoning attorneys in the County and engineer, a person who was a planner at the engineering, the key engineering firm and that's where I got the information I mentioned a minute ago that --

Q Did anybody contact the owner?

A No, I didn't try to contact the owner.

Q Anybody else that you know try to contact the

owner?
A I think, I don't know whether the attorney has ever talked with him personally or not.
Q Okay.
A As I said, they're Belgian.
Q I also understand this is, again in quotes from my notes, that you testified that the, in describing the Cabin Branch community, sir, you, again, I hope I have this right in my quotes, you said that it was, a source of activity that will put Clarksburg on the map as a retail center, end quote. Do you recall that testimony?
A In general terms, yes.
Q Okay. Is there anything in the Master Plan that describes the Cabin Branch community as a retail center?
A I haven't read most of the Master Plan.
Q Okay. Are you aware of any?
A Not aware or not aware, (indiscernible). The reason I made the comment is that I do think my recollection of the Master Plan, at least hearing about it relative to the town center is that that was one of the key elements of the town center. The plan is to make that town center happen and what I was talking about was that this, in my view, would help to make this an area that retailers would think about and would see that actual development was happening and had some life to it.

Q I also recollect, and again I apologize because sometimes my scribblings are maybe not accurate and sometimes I even forget what I write down, but I believe this morning you testified that the, a supermarket in the Cabin Branch community would threaten the town center having a supermarket?
A Yes.
Q Are you aware that the Master Plan specifically calls for a grocery store in the Cabin Branch community?
A I'm aware generally. My recollection in the plans is going back a number of years is that the plan called for at least three supermarkets in Clarksburg and that it was holding off any of them until the one in the town center was built. I think that may have been modified later. But the, so I think there was an anticipation that that would be one of the three supermarkets as I think I talked about at length. I'd be happy to elaborate.
It's, you know, things have changed. Wegmans is competing now and in my view that, having that supermarket there would be very detrimental to one of, what I saw as one of the key objectives of the overall plan which was to make that town center happen and be successful.
Q Similarly, with regard to a grocery store, I've got in quotes your testimony that, quote, a grocery store, and here's the quote, is absolutely, that's your word,

absolutely critical to a neighborhood center, end quote. Is that your testimony, sir?
A Well, I was talking about the town center and --
Q No.
A -- to have a true neighborhood center I think it is important, very important. As I think I said during that cross-examination as well, I do think there is going to be demand for some neighborhood serving retail as Cabin John, Cabin Branch moves along. And I think it's also important to recognize that some of the retail within the outlet center is going to certainly serve the neighborhood restaurants and so on in particular.
Q I may be mistaken, and I apologize, but I believe your testimony pertained to a neighborhood center?
A A true neighborhood center as we define it in the industry includes a supermarket.
Q Yes, I believe another quote that I have that, as far as viability of a neighborhood center, you stated, quote, does not happen without the supermarket, end quote. Is that an accurate statement, sir?
A The town center, yes.
Q How about for a neighborhood center?
A Well, I think it's important to distinguish between a neighborhood center and a neighborhood serving retail. I don't know that any, you know, in my view what is

now planned or proposed at Cabin Branch is not a neighborhood center. It, that was what was sort of contemplated originally with anchoring, anchored by a supermarket. Without a supermarket there, it would not be a neighborhood center, it would still be neighborhood serving retail.
Q It just would not be a neighborhood center?
A And a neighborhood center is what I was talking about specifically, dealing with the town center that would in my view not happen without the supermarket.
Q Okay.
MR. CHEN: Can I have your indulgence one second?
BY MR. CHEN:
Q Could you please go to page 64 of the Master Plan?
A Yes.
Q Do you have it, sir?
A I do.
Q Do you see the second paragraph?
A The second -- this area lies to the west of I-270.?
Q Yes. It's a two-sentence paragraph.
A Yes.
Q Could you please read that paragraph?
A This areas lies, we're talking about Cabin Branch, "This area lies to the west of I-270 and is the

only portion of the western side which is proposed for significant residential development. The following characteristics of the site have led to its designation as a mixed use neighborhood center."

Q And could you bear with me for just --

A And I just wanted to see what chapter we're in here. Okay.

Q It is the section on the Cabin Branch neighborhood or community?

A Yes.

Q Okay. And could you please then jump to page 68?

A Yes, I have it.

Q Okay. And do you see the bullets in the middle of the page?

A Yes.

Q Do you see the sentence leading up to the bullets?

A Sentence? The design of the neighborhood --

Q Yes. Could you please read that?

A We're talking about the, the Cabin Branch neighborhood.

"Should adhere to the following guidelines for transit and pedestrian service ability.''

Q Could you jump down to the third bullet?

A Locate a grocery store within the core.

Q By the way, just that paragraph I had, do you see the middle sentence that begins with, the core.?

A "The core should consist of a cluster of higher density residential uses, retail services, office uses and civic uses.

Q Thank you.

MR. HARRIS: Madame Examiner, we're getting into great detail about the Master Plan here and I can sense where this question is going. It is well beyond the scope of Mr. Bogorad's direct testimony.

MR. CHEN: I'm sorry. His direct testimony was heavily on supermarkets and grocery stores and I'm just addressing that area of his testimony.

MS. ROBESON: Well, I guess what I've been wondering, however, is that he's using one nomenclature for neighborhood center that may not necessarily be what the Master Plan intended to be.

MR. CHEN: That may be for Mr. Harris to take care of.

MS. ROBESON: Well, how much more do you have on this?

MR. CHEN: I'm not done yet with my cross-examination.

MS. ROBESON: I know that.

MR. CHEN: Oh, you mean quoting the Master Plan?

I --

MS. ROBESON: Yes.

MR. CHEN: -- think I'm pretty much done with quoting the Master Plan.

MS. ROBESON: Okay. You also characterized the proposal before the District Council in this DPA as providing for, quote, very different types of stores, end quote. Do you recall that testimony, sir?

A I don't know the context, I'm sorry, I do not know specifically.

Q Okay. It was in describing the types of uses that --

A Oh, different types of stores than at that the town center, that I would expect to have at the Clarksburg Town Center?

Q Yes.

A Yes. Yes.

Q Are those types of stores any different than the types of stores that would be found at any other outlet center?

A Well, I talked about two sets of stores. The sets of stores that I would expect in an outlet center were, in fact, taken exactly from the Simon website and are the types of the stores that are at other, other outlet centers, yes.

Q Does the proposal before the District Council

identify any specific store to be located in the outlet center?

A Not that I've seen.

Q Does the DPA before the Board specify any specific type of eating facility?

A I haven't seen anything. I haven't seen it one way or the other.

Q Assuming the District Council were to approve the development plan amendment, sir, do you know how much retail square footage would be available for development in the Cabin Branch community outside of the retail specialty store area?

A I'm not sure, would be available, in Cabin Branch you're saying --

Q Yes. Yes, sir.

A -- is that your question then?

Q Yes, sir.

A Leave, well, I'm not sure it's outside of. I think the number I've heard and I, this is really Mr. Unterberg's specialty, but --

Q Well, I don't want to put you on the spot if --

A -- I think 120,000 square feet of neighborhood serving retail, but I don't know that that's necessarily outside of the outlet portion of this. I don't know.

Q Does -- is the Gosnell commercial area located

within the Cabin Branch community?
A I, let's, I don't, I have not studied the specific ownership.
Q Okay. One more second. Do you have any information, sir, that a specific retail store would locate, a specific retail store would locate in the town center rather than the outlet center?
A As far as I know, nobody has any specific stores in either one identified at this point. It would be unusual to have it at this stage.
Q And certainly this DPA doesn't identify any such stores, does it?
A I, I haven't read the DPA, I don't believe, but I would not expect it to identify stores.
Q And I believe your testimony, the words you used that the biggest benefit, and I've got those words in quotes, in the change in the retail that's being proposed by the DPA is that there would not be a grocery store in the Cabin Branch community?
A Yes, I had various reasons why I did not think it would have any detrimental effect, but among the factors that would be positive in my view that's probably the most important.
MR. CHEN: That's all I've got. Thank you. Thank you, sir.

MS. ROBESON: Mr. Harris.
MR. HARRIS: No further questions.
MS. ROBESON: No recross. So how -- it's 10 after 2:00. I have a feeling Mr. Unterberg is going to take a little bit of time. Mr. Chen, how long do you expect your client to take?
MR. CHEN: 15 minutes, half hour maybe. I will advise the Examiner, I, during the break, the luncheon break, I spoke with Mr. Cobb and he definitely cannot make the scheduled hearing on the 4th of September, so that I think we better do it today because I can't, we're either going to finish today, I think Mr. Harris is planning on finishing today. Even if we don't finish today and we slip into the 4th of September, I can't see us going past the 4th of September myself.
MR. HARRIS: I have no problem with him testifying now.
MS. ROBESON: Okay. Then we'll do that. Why don't you have him come forward?
MR. CHEN: Thank you, Mr. Harris.
MR. HARRIS: Yes, no problem.
MR. CHEN: Thank you, Madam Examiner.
MS. ROBESON: Mr. Bogorad, you are excused.
THE WITNESS: Thank you. Thank you.
MS. ROBESON: Thank you. Although, I don't think

this is the last we've seen of you, but okay. Please raise your right hand.
(Witness sworn.)
MS. ROBESON: Thank you. Mr. Chen.
BY MR. CHEN:
Q Mr. Cobb, I believe you have a statement that you prepared that you would like to read to the Examiner?
A I do.
Q Okay. Please go and do so.
A Thank you. Good afternoon, Madam Hearing Examiner. As the owner of a small, historically protected commercial property in the Clarksburg historic district, and as someone whose family has made a major commitment to the historic district, I would like to request that this development plan amendment be denied. The Clarksburg Premium Outlets concept is -- it's very attractive. I don't have a problem with it standing alone, but the development plan amendment would effectively move the heart of Clarksburg across Interstate 270. It, therefore, violates the express terms of the Clarksburg Master Plan and would fundamentally alter the vision set forth in the Master Plan.
By way of background, the Clarksburg historic district is located along Maryland Route 355 and according to the Master Plan it's one of the County's oldest and most significant early communities. A number of 19th Century and

early 20th Century buildings remain there, including the property that my wife and I own, the Gardner House. This is the only commercial property that we own. Despite its location on Maryland Route 355, there's only, there are only a few businesses in the historic district and those that are there have struggled due to the lack of nearby businesses and civic uses that would bring more activity.
For two principle reasons, this development plan amendment is directly contrary to the letter and the spirit of the Clarksburg Master Plan. First, it turns the Master Plan on its head by shifting the focal point of Clarksburg from the town center, which includes the historic district, to Cabin Branch. Second, it quadruples the amount of retail permitted by the black and white text of the Master Plan. I would like to discuss these issues and conclude with a discussion of what Clarksburg could look like if the vision of the Master Plan is upheld.
To show how this development plan amendment turns the Master Plan on its head by moving the focal point of Clarksburg across the highway, it's helpful to explain the overall concept of the Master Plan. The town center is called the town center for a reason. The Clarksburg Master Plan emphasizes that it creates a town center which will be a strong, central focus for the entire study area.
It further states, I'm quoting,

"This plan continues the historic function of Clarksburg as a center of community life. The historic district will be part of an expanded town center, 635 acres, which will include a variety of uses, a school, civic uses, car, retail centers and a mix of housing types. This plan provides a concentration of civic uses, library, post office, elementary school, et cetera, to help define the town center as the focal point of public activities."

The town center is an area of 635 acres that includes the historic district, the proposed Elm Street neighborhood and retail area east of the historic district and commercial and housing areas west of the historic district and adjacent to Interstate 270. And this is the area where Peterson is proposing development, going to develop his stream side. The town center is this much larger than the relatively small neighborhood retail center that Elm Street owns. And contrary to Ms. Hulley's statement I believe on July 29th, I don't think it's at all consistent with the Master Plan to consider the Cabin Branch area that's across Interstate 270 to be within the town center.

The Master Plan, thus, intended that a mix of retail, civic and transportation uses be located within the

town center. This DPA would establish competing uses across the highway in Cabin Branch, thus, making the establishment of a town center area, including the historic district, as a focal point of Clarksburg unlikely, if not impossible. The development now proposed for Cabin Branch is permitted across the interstate from the town center. The town center is unlikely to ever achieve the vision of the Master Plan. Explicitly reflecting the priority given to the town center, the Master Plan seeks to spur retail development in the town center. It states,

"What this plan recognizes, that retail uses are critical to the validity of a community and can play a significant role in reinforcing the town center as a central focus for the entire Clarksburg area.''

There's no indication that the intent of the Master Plan was to omit a regional retail center across the interstate to supplant the town center as a central focus for the entire Clarksburg area.

Moreover, the outlet now proposed for Cabin Branch does almost nothing for the town center and the historic district. The Cabin Branch amenities will not be in walking distance of the town center. It's not credible or intuitive that a regional outlet mall across the interstate highway from, as well as about a mile away from the town center,

will draw people into the town center. If anything, it will draw people out of the town center district across the highway into Cabin Branch and it would leave development scattered on the fringes of Clarksburg. For all the good it does for the town center, the Clarksburg Premium Outlets could be located anywhere up and down Interstate 270.

In fact, Ms. Kinney Hoffmann's testimony earlier today, I think, supports my point where she testified that there would be no impact on 355 of the Clarksburg Premium Outlets. The customers will get off the interstate and go to the outlet center and they'll get right back on the interstate. Unless someone happens to make a wrong turn, it's unlikely that they will wind up coming to the town center or the historic district. You know, unfortunately, if the development plan amendment is permitted to go forward, it's highly unlikely that many amenities promised for the town center will ever arrive as most development in the town center won't be economically viable.

Now exacerbating the damage done to the town center by shifting the focal point of Clarksburg across the highway, the development plan amendment quadruples the retail uses permitted by the Master Plan within the Cabin Branch area and will, thus, severely limit the amenities available in the Clarksburg town center within the historic district. The Master Plan very clearly proposes 120,000

square feet of retail in Cabin Branch. It does not state that this retail should be augmented by the two to 2.3 million square feet of proposed employment uses.

Nothing in the Master Plan indicates that the MXPD zoning is meant to increase the retail uses. In fact, the Master Plan discusses the MXPD zoning for Cabin Branch in terms of, including residential uses in the employment area. Also in discussing the employment uses in Cabin Branch, the Master Plan emphasizes that it, quote, encourages an employment plan which is supportive of I-270 as a high technology corridor. I don't believe that retail employment can be considered high technology.

Also, I note that the type of retail contemplated by the development plan amendment is not the type of neighborhood retail expressly required by the Master Plan. Page 68 of the Master Plan specifically calls for a grocery store in the Cabin Branch neighborhood, but this development plan amendment would prohibit a grocery store in Cabin Branch. By quadrupling and changing the retail uses permitted by the Master Plan, the development plan amendment by its express terms of the plan, it will keep the town center and historic district in their current, largely deserted and underused state for the foreseeable future.

Now if the vision of the Master Plan is simply upheld, I believe that the historic district and the town

center can be lively, successful places. For example, in June the historic district came alive during the annual Clarksburg Day celebration. The event brought many people to the historic district to learn about the town's history, enjoy children's activities, have a good meal, buy a book. There were pedestrians walking on the street and the atmosphere was vibrant and festive. The Gardner House was the site of historical displays, as well as a train ride and moon bounce for the kids.

The Master Plan envisions the types of amenities for the historic district and the town center that would make the Clarksburg Day experience an everyday experience. There's been a lot of talk about place making during this proceeding. I believe that the Master Plan already designates a place for Clarksburg and that's in the historic district and the town center.

In closing, I think that the development plan amendment should be denied outright. This would preserve the possibility that development in the town center would proceed according to the Master Plan's vision. That concludes my statement.

MS. ROBESON: Thank you. Do you have follow-up questions?

MR. KLINE: No, ma'am. No.

MS. ROBESON: I, I, I have, I guess I've been

sorting through what I've been hearing here and I'm trying to get to -- it seems to me that there's an assumption and you have to understand that I may not -- you probably know far more of the ins and outs of the different players in Clarksburg and what's going on than I do. There seems to be an assumption -- what's the basis of your assumption? You just heard --

MR. HARRIS: Bogorad.

MS. ROBESON: -- Mr. Bogorad's testimony that this will not impact the town center retail. What's your basis for the assumption that the town center would be dead if this goes forward?

THE WITNESS: Well, the basis for the assumption is, or my basis for the assumption is just that if you've got this major, massive retail center across the interstate highway, then, you know, folks aren't going to want to open competing stores in Clarksburg town center in the historic district.

MS. ROBESON: Okay. All right. All right. Thank you for your -- you now get, Mr. Kline, do you have follow-up questions?

BY MR. KLINE:

Q Well, I heard you use the phrase, and actually I think you were quoting off the Master Plan, but specific uses and things that would go on in the town center. Those

are not stores, so why wouldn't some of the public quasi-public facilities get built in the town center to sort of jump start it and then encourage the businesses to -- why do you have this skepticism about what's going to happen if the retail outlet center occurs?

A Well, because I think the civic uses follow the, follow the people. And if the people are all across the highway, then there won't be the demand that would drive the creation of the libraries and the fire department and all that stuff that you need.

Q You were here for Mr. Kaplan's testimony, part of Mr. Kaplan's testimony?

A For part of his testimony, that's correct.

Q And you heard his description or actually let me rephrase that. Have you read the applicant's justification statement of the, what I'll call the activity program, what's going to occur along with the actual retail in the stores?

A I have not.

Q Mr. Kaplan talked about some of the activation factor that would occur with implementation of the retail outlet center, you heard that?

A Yes, I did.

Q Okay. Do you see some of those activation factors as taking away from the vitality of the town center, which

is a separate question on the retail at issue?

A I do. I do. I think that, you know, the locust of activity, people, transportation is going to be across interstate highway.

Q Well, let me use it as a template. Mr. Kaplan talked about the potential of having a thousand-seat amphitheater on the west side, it's on the development plan. There was an amphitheater contemplated for the town center, was there not?

A I believe so.

Q Okay. Likely we're going to have two amphitheaters, one on each side of the highway?

A I think that's, I think that's unlikely.

Q Yes. If you had a up to a thousand seat amphitheater, isn't that likely to create an activation factor that would draw away from what could occur at the town center?

A I believe it would. I believe it would.

Q To the detriment of the town center?

MR. CHEN: You have to say yes or no. You can't nod your head.

THE WITNESS: Thank you. Yes. Yes. Yes, I do.

BY MR. KLINE:

Q So I'd like you to articulate that. You used the phrase a couple times the focal point. The plan clearly

says it's supposed to be in the town center. Does the way this is set up with what it could accomplish change the focal point to the west side of I-270 and away from the town center to the detriment of the latter?

A I believe that's exactly what my testimony is, is that, is that you're going to have a different focal point for Clarksburg and that's not consistent with what the Master Plan, you know, vision spelled out. If, you know, if -- you know, obviously it's possible to change the Master Plan and you could go through the process to amend it to say that, well, no, the focal point of Clarksburg was going to be in Cabin Branch and that would be okay, but that's not what I think the Master Plan currently says.

Q Thank you.

MR. KLINE: I have no further questions.

MS. ROBESON: Okay. So is it your testimony then say the town center's retail does develop to the full amount with a grocery store, it's your testimony that the civic uses wouldn't be developed or -- assume for the moment that town center was redeveloped to the maximum square footage of the retail, what, in what way would that, would this project detract from that, detract from Clarksburg be the focal point?

THE WITNESS: Well, if the town center district, you know, including the historic district, the east side,

the west side, all of it together, you know, was developed to the maximum potential, then I, you know, then I don't think that this would detract from that, but the problem is that it hasn't been developed yet and it's unlikely to happen, certainly not in our lifetimes.

MS. ROBESON: Now that's the one I'm trying to figure out. Why is it that if this goes forward, you, this will prevent both? That's what I'm missing.

THE WITNESS: Well, I mean I, you know, I'm --

MS. ROBESON: What's going on that says -- why can't they both be developed?

THE WITNESS: The, you know, I think the question is partly a question of timing. I think that if, you know, Cabin Branch goes forward first, then until that is fully built out and have capacity, which will be 20, 30 years, I mean I think that's the time frame we're talking about. There's not going to be much demand across the highway. Everything will be --

MS. ROBESON: Well, I --

THE WITNESS: -- drawn over there.

MS. ROBESON: -- guess, okay, what I'm missing is, though, if the grocery store comes, and there may be something that is going on that I don't know about, but if the grocery store comes to town center, but why would this prevent the grocery store from jump-starting retail in the

town center?

THE WITNESS: Well, I think that -- maybe this is the, this is the area I should clarify. It's not just the grocery store in the neighborhood retail --

MS. ROBESON: Okay.

THE WITNESS: -- center that Elm Street is proposing. That's just one small part of the town center district.

MS. ROBESON: Okay.

THE WITNESS: You know, there's, there's a whole, you know, Miles Coppola property, the streamside development that Peterson is proposing that's adjacent to 270 that's separate from --

MS. ROBESON: And, see, I don't know what that development is. So you're saying that this Peterson development, which is in part retail, that is in the town center, is that in the town center --

THE WITNESS: It is in the town --

MS. ROBESON: -- in the Master Plan?

THE WITNESS: It is in the town center as defined by the Master Plan.

MS. ROBESON: Okay. And so you're saying that won't go forward?

THE WITNESS: That's correct.

MS. ROBESON: What's in that -- are there

competing uses in that proposal?

THE WITNESS: I believe so.

MS. ROBESON: Are there uses in that proposal, because I hear about another regional outlet center? Is --

THE WITNESS: Yes.

MS. ROBESON: Is that what's going in there? But that's not recommended by the Master Plan either, is it?

THE WITNESS: It's the same, it's the same zoning, I believe it's the same zoning on both sides of the highway.

MS. ROBESON: Well, but the Master Plan only recommended 153,000 square feet of retail for the town center. So I'm having trouble figuring out -- what you're saying is, and correct me if I'm wrong because I'm really, I do not have all the background that you do. What you're saying is you need, that that retail center, if it's another outlet, wouldn't that be -- that won't go into 153,000 square feet, will it?

THE WITNESS: Yes, I'm not, I'm not familiar enough with the details to tell you what, you know, how many square feet is proposed. I know that they're proposing not just retail, but housing and hotel uses and so there's a mix of uses that they are proposing and they're proposing at the same time to basically, you know, build out the town center concept that was laid out in the Master Plan, including, you know, the transportation roadways, the transit center

providing sewer.
MS. ROBESON: So what you're saying is they're -- okay. So there is an elephant in the room which is this, and maybe Mr. Kline will introduce it, but what you're saying is that there is a competing center and that competing center is going to provide the infrastructure necessary to town center, is that what you're saying?
THE WITNESS: That's my understanding. That's correct.
MS. ROBESON: And, therefore, all right. I'm just sorting this through in my head. So -- and this assumes that you can't do both?
THE WITNESS: That's correct, at least not --
MS. ROBESON: You're assuming you can't do both? And what's the basis of that assumption?
THE WITNESS: Well, I mean I think that, well, first of all just for, you know, common sense, if you're got the same thing across the highway, you're not going to, you're not going to, you know, build the same thing and I think that was Mr. Bogorad's testimony that if you had, well, it would be detrimental to, you know, if you had the same kind of thing across the highway. And I think there's also just, you know, again it's timing, a timing issue. If the priority for development, you know, contrary to Master Plan is given to Cabin Branch, then the town center is going

to languish.
Q Okay. I understand your testimony. I just wanted to fully understand what you were saying in light of what we just heard. So with that, I'm going to let Mr. Harris cross-examine.
BY MR. HARRIS:
Q Good afternoon, Mr. Cobb. Do you live in Clarksburg?
A I live in Sandy Spring, Maryland.
Q Sandy Spring? Okay. And what is the address of the property you own?
A It's 23330 Frederick Road in Clarksburg, Maryland.
Q Okay. And would you agree with me that that's at least a half a mile away from where the Cabin Branch outlet is planned?
A Approximately, yes, I guess.
Q And so from your property there, you can't see the Cabin Branch property, can you?
A I haven't tried to look from the top of the roof, but not from the ground floor.
Q Okay. You've got no evidence of any particular adverse traffic impact from the Cabin Branch development on your property on Frederick Road, do you?
A No, I don't.
Q Okay. The -- I'm going to assume that you've had

no experience building an outlet center?
A No, I'm a real estate amateur. I'm probably opposite of Simon, which is the largest real estate company in the world.
Q Fair enough. Fair enough. And I think you answered the Hearing Examiner's questions that you've done no fiscal impact studies or market studies with respect to the impact of outlet retail or other development on other neighboring development?
A That's correct.
Q The, let's see here, let's, we separate for a moment the historic district and the rest of the town center, okay? I believe you would agree with me that the historic district is part of the town center district in the Master Plan?
MR. CHEN: Is this a question or, I mean Mr. Harris has been --
MS. ROBESON: He said I assume you would agree with me. You can ask --
MR. HARRIS: Would you agree with me --
MS. ROBESON: Yes.
MR. HARRIS: -- that the historic district is a portion of the town center district in the Master Plan?
MR. COBB: I do.
BY MR. HARRIS:

Q And so when we talk about, quote, "The town center," and if we're talking about retail development or commercial development, there's multiple parts of that, there is the town center retail that Dave Flanagan of Elm Street development, that's one component, is that correct?
A That's correct.
Q There's another retail component on Stringtown Road that's been built for a number of years there, I believe, right?
A I'm not sure that's technically part of the town center.
Q I think you're right. I think it's technically just south of that. There is the historic district, if you will, along 355. And then you have mentioned the Peterson property, the Miles Coppola property. That is within the town center district in the Master Plan, correct?
A That's my understanding.
Q So let's first deal with the impacts that you're talking about with respect to the historic district because that's where your property is and that's where your concern is. So today in the historic district, and I walked it the other day, correct me if I'm wrong, I saw an antique shop, no customers. I saw a beer and wine deli store.
MR. CHEN: Excuse me.
MR. HARRIS: I saw --

MR. CHEN: Pardon me.
MR. HARRIS: Well, okay, would you agree, would --
MS. ROBESON: Well, he said correct me if I'm wrong. Is that your --
MR. CHEN: Well, he's testifying.
MR. HARRIS: Okay.
MR. CHEN: I mean he's, it's not a hypothetical.
MR. HARRIS: Would you -- all right. I can do it differently.
BY MR. HARRIS:
Q Would you agree with me that there is an antique store in the historic district?
A I would.
Q Have you been in it?
A I have, there was a previous one that I was in, but not in the current one.
Q Okay. There is a deli of some sort, correct?
A That's correct.
Q There is a book store?
A That is correct.
Q I believe the book store is owned by someone who leases the space from you, I believe that's your property?
A That's correct. That's correct.
Q There is a brand new, relatively brand new restaurant that the Buffington's built, the Bennigans, is

that correct?
A That's correct.
Q Are there any other retail establishments in the historic district?
A Not that I'm aware of and you could, might consider the gas station or the bank a little bit north, but --
Q Oh, because you're north of 121?
A Yeah.
Q Would you agree with me that there are a number of run-down buildings in the historic district?
A Yes, I would.
Q So basically I think I heard you saying that retail development at Cabin Branch was somehow going to hurt the historic district, was that what you were saying?
A That's my concern.
Q It isn't going to hurt the antique store I don't think, is it?
A I really can't comment on, on its impact on --
Q Okay.
A -- the antique store or other businesses.
Q Or other businesses? So you have no knowledge of how it would affect any of those businesses, whether for good or bad?
A Well, let me clarify that. You know, I can't

comment on how it would affect a particular store. I believe that --
Q Okay.
A -- I believe that, you know, with the businesses I am most familiar with, including the book store and the Bennigans that having the traffic drawn across the highway will not benefit the historic district.
Q Will not benefit the historic district?
A That's correct.
Q But it wouldn't harm it?
A Well, actually it might very well harm it because, you know, some of the customers who would be coming to Bennigans because right, for instance, Bennigans is currently the only sit-down restaurant in Clarksburg. Well, now the, instead drawn across the highway to the Cabin Branch area.
Q Do you believe there's only room for one sit-down restaurant in Clarksburg?
A No, I'm sure that there's, there's room for more.
Q So it probably could survive even with another one or two or three?
MR. CHEN: Objection. He's already answered that question that he doesn't know what the impact would be on any separate --
MS. ROBESON: That's fair.

MR. HARRIS: Okay.
BY MR. HARRIS:
Q The tenant of your book store, Mr. Darby, he has not entered any opposition to this application, has he?
A Not that I'm aware of.
Q Is it -- what likelihood do you think there is that Hugo Boss, Armani, J. Crew, or name any other retailers that Mr. Bogorad talked about this morning as being a premium outlet, what is the likelihood of any of them going into the historic district?
A I don't think I've, I have any basis to answer that question.
Q So you have no reason to believe they would go in for the town, into the historic district?
A Would have not. Would have not.
Q Okay. And isn't it true that the historic district, the development there is severely limited by the Master Plan?
A Actually, well, actually the Master Plan encourages development in the historic district, but it's only, it's only a very small area, only a very few number of lots. I mean there's really not that much they have right in the historic district. It's really what happens out, in the, sort of sandwiched in between these other areas and so what happens in these other areas is going to drive, you

know, what, the success of the historic district.
Q I'm showing you the 1994 Clarksburg Master Plan, page 47. Would you read for me the two bullets here that I've marked?
A Sure. Out loud?
Q Yes, please.
A "Encourage the renovation of existing buildings in the Clarksburg historic district for both residential and compatible like commercial uses, e.g. professional offices, antique stores, tea rooms, small restaurants, bed and breakfasts and small grocery stores."
Q Now are any of those uses that are encouraged for the historic district the uses you heard Mr. Bogorad talk about as likely at Cabin Branch and the outlet center?
MR. CHEN: Excuse me. I'm not objecting because I'm going to get redirect on this and I'm just reminding the Examiner that I'm going to go down the same road.
MS. ROBESON: Well, I don't know what that means, but if you're, I guess I'll find out if I want to go down that road.
MR. CHEN: I could object that this gentleman does not have the credentials that Mr. Bogorad had to testify as to what is going to go where. But I'm allowing Mr. Harris to ask the question because in fairness I'm going to be able

to ask the same question myself as to whether or not Armani and these other stores are going to go into the rest of the town center area that is outside of the historic district. And that's the point where I'm coming from, that it well may be that in the historic district an outlet center cannot go --
MS. ROBESON: Well, is, well, before you go down that road --
MR. CHEN: Yes, ma'am.
MS. ROBESON: -- is the rest of the historic, I mean the rest of the town center zoned for that?
MR. CHEN: I believe that you will hear evidence that, yes, that there are two outlets that you've already heard and that the stores that you've heard Mr. Bogorad identify in his testimony this morning that would go into the Simon outlet center on the west side, that there's going to be an outlet center on the east side and the same type of comparable retail stores will be on the east side.
MR. ROBBINS: But you didn't answer the Hearing Examiner's question. Is it zoned now for that?
MR. CHEN: I don't know what it's zoned for right now. I mean and that's already came up, come up.
MS. ROBESON: I guess what I'm getting to, I guess what I'm getting to is the issue here but, again, I was just trying to figure out the background of what's going on,

quite frankly. And I mean the issue here is whether this meets the Master Plan. Now part of the Master Plan, there are many, many things in this Master Plan, maybe it was a good idea to do and maybe it wasn't in hindsight, it relies on private financing of infrastructure to a heavy degree and it tries to designate specific industries and shops at specific locations. Whether that was a good idea, not a good idea, I don't know, but what I'm going to do here is the issue here for me is whether it will prevent the development of the town center as envisioned, currently envisioned by the Master Plan.
MR. CHEN: My, in responding to the Examiner, I represent Mr. Cobb.
MS. ROBESON: I know that.
MR. CHEN: Mr. Cobb has property in the historic district.
MS. ROBESON: Yes.
MR. CHEN: The concern that you have raised as I understand, and it's not my client, that there, is answerable, but that's not my client's interest and --
MS. ROBESON: Well, I'll give you some leeway. I will give you some leeway because these two, at least the individuals that come in have all raised the issue which was the basis of my trying to figure out what was going on. So I will give you some leeway to go into that. At the end of

the day, at this moment, and maybe you'll change my mind, at this moment what I have here is one developer and the vision for the town center and will this impact what's in the Master Plan for the town center. But I will give you leeway because it's been raised numerous times.
MR. CHEN: All that I was alerting the Examiner to is Mr. Cobb has understandings about what will happen with this development and what can happen and is supposed to happen in the town center. And that's where I would be asking questions about. Candidly, there are other interested parties to what can happen in the rest of the town center that have much better information on that than I have.
MS. ROBESON: Okay. All right.
MR. CHEN: And that's the caveat I'm giving you right now --
MS. ROBESON: Okay.
MR. CHEN: -- on where I'm coming from with my client.
MS. ROBESON: Okay. Well, I am going to give you leeway as far as doing that. I think he did raise the competitive aspect. So I will give you leeway, some leeway to do that. Okay.
MR. HARRIS: Okay. So --.
MS. ROBESON: Okay. So finish your question. Or

re-ask it please.
BY MR. HARRIS:
Q Yes. Back to page 47 of the 1994 Clarksburg Master Plan, the one, two, three, four, fifth bullet there. And what we're talking about is the historic district portion of the town center. And would you read for me what that bullet recommends for the historic district. I'm sorry, you already did read it.
A I read that first.
Q Yes. Thank you. Yes. And I think you agreed with me that those are not likely uses for the Cabin Branch outlet?
A Well, I think your question was what did Mr. Bogorad say and, you know, did he say that any of these uses that I just reads would be in Cabin Branch outlet and at least two of the categories, small restaurants and small grocery stores, I think he did say could be in the Cabin Branch outlet. In fact, he was specifically talking about small grocery stores being in Cabin Branch.
Q Okay. As far as the grocery store, the Master Plan, you've heard exhaustively, already recommended a grocery store for Cabin Branch, so that would not be a new use at Cabin Branch competing with the historic district, would it?
A No, no, no, otherwise, I understand it this, this

development plan amendment does not permit a grocery store within Cabin Branch.
Q And small restaurants, are you aware that restaurants have always been contemplated at Cabin Branch?
A Oh, yes, yes, I was --
Q So that's not a new use to compete with the historic district?
A Part of the buildings, retail center, yes.
Q I'm sorry, so that's not, this development plan amendment does not introduce a new use there to compete with the historic district, it's a use that already was provided there?
A Right, in the context of 120,000 square feet.
Q Okay. And then would you read the second bullet there for me please?
A "Encourage a limited amount of new construction, as long as the new buildings are compatible with the historic ones in terms of size, scale, rhythm, percentage of lot coverage, relationship to the street and relationship to open space.''
Q Thank you. Now I'm interpreting that as allowing limited new development in the town center and basically requiring uses there to reuse the historic structures that are there, is that your understanding as well?
A I think that's correct.

Q Now let's go to the rest of the town center. The other two, quote, retail, key components there, the Dave Flanagan retail let's call it --
MS. ROBESON: No, I don't know what that means.
MR. HARRIS: Okay. Most people call it the town center retail and it is within the Clarksburg --
MS. ROBESON: Well, you can't testify.
MR. HARRIS: Okay. All right. Well, let me -- all right, then I -- are you familiar with the retail that --
MS. ROBESON: Why don't you assume something?
MR. HARRIS: Okay.
BY MR. HARRIS:
Q Clarksburg Square Road and if you go, I forget what the other road is there, is there another shopping center planned in the Clarksburg Town Center?
A That's right. It would be, it would be, I guess, north or west of the historic district.
Q Inside the partially developed residential community that's there?
A Yes. Yes.
Q And some several hundred feet, maybe a thousand feet, west of 355?
A Well, actually, no. I think it's east, I'm assuming it's east.

Q East, yes, thank you for correcting me, yes, east. Yes. Okay. So let's call that the town center retail because I think that's what most people refer to it as. So are you aware that Mr. Flanagan has indicated that the Clarksburg outlet retail would not have a negative impact on the town center retail?
MR. CHEN: Objection.
MS. ROBESON: His, yes, just a second. Yes?
MR. CHEN: I understand this is in the nature of, generically a hypothetical. If counsel is going to do that, counsel has to proffer that the facts, the hypothetical facts underlying the hypothetical will be introduced in evidence through the appropriate witness and that is the proper basis for a hypothetical.
MR. HARRIS: It wasn't a hypothetical. It was a question of whether he was aware that Mr. Flanagan, a developer of the town center retail, had said Cabin Branch will not adversely affect it so long as Cabin Branch doesn't have a grocery store.
MS. ROBESON: Let me do this. Mr. Cobb, are you aware of a retail development approximately in the location, a proposed retail development approximately in the location that Mr. Harris described?
MR. COBB: I am.
MS. ROBESON: And is it owned by Elm Street

Development?
MR. COBB: I don't know. I think the legal ownership is by a company called Third Try, LLC, and I believe they are associated with Elm Street in some way.
MS. ROBESON: Okay. And would David Flanagan be a representative for that property?
MR. COBB: I believe he would be.
MS. ROBESON: Okay.
MR. HARRIS: So --
MS. ROBESON: Mr. Harris, what is your question?
BY MR. HARRIS:
Q Are you aware that he, that Mr. Flanagan has submitted a letter to this Hearing Examiner indicating that he supports the Cabin Branch outlet retail and that he does not see it having an adverse impact on the Third Try/town center retail?
A I've heard people mention that during this proceeding, but I have no direct knowledge of that.
MS. ROBESON: Well, before -- does it say he doesn't, he supported it? Let me limit that question to until I look at the letter because I don't want you putting words in his mouth.
MR. HARRIS: Objection.
MS. ROBESON: 37. 37. 37.
MR. HARRIS: Okay. Exhibit 37?

BY MR. HARRIS:
Q Please read Exhibit 37 and then if you can answer my question after you've read that?
(Discussion off the record.)
BY MR. HARRIS:
Q Have you read it then?
A I've read it.
Q Okay. And would you agree with me that Mr. Flanagan has indicated that he is not opposed to the Cabin Branch -- in fact, he may even say that he supports it. Well, I don't see that word in there, but would you agree with me that he does support the Cabin Branch outlet?
MR. CHEN: Objection. The document is in evidence. It speaks for itself.
MS. ROBESON: I agree --
MR. HARRIS: Okay.
MS. ROBESON: -- with Mr. Chen.
MR. HARRIS: That's fine. So, and are you aware that the Planning Board at the hearing a few weeks ago at which, where you were in attendance, that the Planning Board agreed by a 5-0 vote that this would not adversely impact the town center retail?
MR. CHEN: Objection. The Planning Board has issued its report and recommendations.
MS. ROBESON: And the document speaks --

MR. HARRIS: Okay.
MS. ROBESON: But I --
MR. HARRIS: So --
MS. ROBESON: -- sustain.
BY MR. HARRIS:
Q So you have no evidence other than what you've testified to that it would adversely impact the town center retail?
A Yeah, I presented the evidence that I have --
Q Correct.
A -- during my testimony.
Q All right. And you've never developed town center retail of that sort or out-graded, have you?
A I have not, no.
Q Okay. The --
A I have, however, you know, had to, you know, try to lease the space and understand the economics of the historic district probably better than a lot of people and I know that it needs more activity surrounding it in order to be successful.
Q Fine. Let's then, the third component of the potential retail in the town center, the first being the historic district, we talked about that; the second being the town center retail; the third being the Miles Coppola property. We talked about that. That's the third potential

component.
A Yes.
Q Are you aware that that property is zoned R-200, which is a single-family residential zone?
A I'm really not familiar with the zoning of the property.
Q Okay. And are you, well, would you read for me, yes, can you tell us where that Peterson, Miles Coppola property is located?
A Well, it's, you know, approximately it's between I-270 and the historic district, I guess. So it's to the east of I-270 to the west of the historic district --
Q And --
A -- relatively speaking.
Q -- north of 121?
A Largely. I think it may cross some of 121.
Q So in layman's terms, it's in the northeast quadrant of the 121 I-270 interchange?
A I think that's roughly accurate.
Q Okay. And would you read for me what the Master Plan recommends --
A Where are you?
Q Page 44 and the first bullet there and the, and the rest of that paragraph under the bullet.
A I'm sorry.

Q I'm sorry, starting --
MS. ROBESON: Wait. What page are you on?
MR. HARRIS: Page, excuse me, 44. Near the top of the page there's a bullet that starts, reinforce.
MS. ROBESON: Okay.
MR. HARRIS: Okay.
MR. COBB: Do you want me to read --
MR. HARRIS: I don't think you need to --
MS. ROBESON: He'll let -- do you want to read?
MR. HARRIS: -- read it --
MS. ROBESON: Yes, I don't think --
MR. HARRIS: -- because it stands for itself, but --
MS. ROBESON: And keep in --
MR. HARRIS: -- but I would like you to read it to yourself --
MS. ROBESON: Okay.
MR. HARRIS: -- because I have a question about it.
MS. ROBESON: Well, keep in mind that he's not an -- Mr. Chen, you didn't --
MR. HARRIS: No, he's --
MS. ROBESON: -- offer him as an expert?
MR. CHEN: He's a layman.
MS. ROBESON: Okay.

MR. CHEN: He's a property owner before the Hearing Examiner.
MS. ROBESON: This may be appropriate for another witness, but go -- I'm assuming what you're going to say. Why don't you take a minute and read it and then you can ask your question.
BY MR. HARRIS:
Q Okay. Would you agree with me, and I saw you look at another page there which is perfectly appropriate, would you agree with me that the Master Plan notes that this is zoned R-200, but it recommends that property for MXPD zoning --
A Okay.
Q -- but that it limits the development --
MS. ROBESON: Let me hear the --
MR. HARRIS: -- to 470,000 square feet?
MR. CHEN: Same objection.
MS. ROBESON: Wait. Okay. I have an objection. What's your objection?
MR. CHEN: The -- this is even more so than the other documents. This is the Master Plan. It's in the record. To ask a layman to read text out and then to characterize it, there's no fact. On a lay person, it's not appropriate. Number two, if the point is to reinforce what the Master Plan provides, it's already in evidence and

presumably if the, if counsel does not think the Examiner is going to look at the Master Plan, counsel can point it out to the Examiner.
MS. ROBESON: I do, I am going to -- I don't know if that's a basis for an objection, but I don't think it's an efficient use of time right now, especially with the lay question, lay witness. Are you -- what are you trying to get to?
MR. HARRIS: Madam Examiner, the witness testified effectively that development of the Peterson property was going to somehow or other --
MS. ROBESON: Save the town center?
MR. HARRIS: -- save the town center, save the historic district.
MS. ROBESON: I got that. And I'm --
MR. HARRIS: And my point simply is that it's not zoned for that, that it's got a maximum of --
MS. ROBESON: Yes.
MR. HARRIS: -- 470,000.
MS. ROBESON: Just a second. Let me stop you. You can get to that with a witness of your own, I think.
MR. HARRIS: Okay.
MS. ROBESON: I don't think you need to belay a lay witness with this, all right?
BY MR. HARRIS:

Q Let me ask one final question on that. Are you aware that the Miles Coppola Peterson property is in Stage 4 of the Master Plan whereas the Cabin Branch property is in Stage 3?
MR. CHEN: If he knows.
MR. COBB: I'm aware that Miles Coppola is in Stage 4.
BY MR. HARRIS:
Q Okay. Which is the last stage of development?
MS. ROBESON: Yes, I read it. I read it.
BY MR. HARRIS:
Q To what extent have you had discussions with the Peterson Company or any of their representatives about their project, their proposed project?
A I've had some discussions with them about what they're planning to do there. They made a presentation to a number of people interested in Clarksburg about what they were proposing to do, including providing sewer service to the historic district, finishing the transportation arterial.
MS. ROBESON: Is that Observation Drive, Bay 16, the transportation arterial?
MR. COBB: Yes.
MS. ROBESON: If you know?
MR. COBB: Essentially it's, they modified it a

little bit from that, but that's what --
BY MR. HARRIS:
Q And have you met with them, I'll say one on one, but outside of a larger community meeting?
MR. CHEN: Objection. What -- I don't know where this is going.
MS. ROBESON: I think it goes to credibility. I'll let him answer, but we don't need too much of this line.
MR. COBB: Yeah. I've met with and talked with many, many people, including people from Peterson and other developers one-on-one, in groups, you know, there's a lot of discussion in Clarksburg about these issues.
BY MR. HARRIS:
Q Another witness testified that Peterson had told them that they, the Peterson Companies, if and when they develop their property, would provide sewer service to the historic district. Have they made that representation to you as well?
A They have.
Q And is it your understanding that they are committing to pay for it?
A Maybe if you could clarify what you mean by pay for it?
Q Will they pay for the main trunk line sewer that

will serve the historic district?
A Yes, I believe that's their, that was their intent.
Q And would you agree with me that they would need sewer for that property whether they developed it as multi-family residential, as office or as even single-family residential?
A I assume so. I'm not a sewer expert, but I assume so.
Q So the sewer could come to them and if they pay for it, to the historic district under any number of developments as scenarios?
A I'm sorry, I'm not sure I understand your question.
Q I think you answered it already. One second please.
MR. HARRIS: Okay. That's all the questions I have.
MS. ROBESON: Okay. Redirect --
MR. CHEN: Yes. Thank you.
MS. ROBESON: -- Mr. Chen?
REDIRECT EXAMINATION
BY MR. CHEN:
Q Mr. Cobb, you were asked a series of questions by Mr. Harris about the uses that were being proposed in the

DPA that's before the Hearing Examiner, including restaurants, is that correct?
A That's correct.
Q And you noted that those were uses that were being recognized in the current Master Plan, isn't that right?
A That's correct.
Q Is a grocery store a use proposed in the current Master Plan for the Cabin Branch community?
A Yes, it is.
Q Does the DPA propose a grocery --
MS. ROBESON: Okay. Do you have an objection?
MR. HARRIS: I do. Five minutes ago we were talking about what the Master Plan recommended was off limits and now it's back on.
MR. CHEN: Can I question -- I'm just following up on the same questions he asked.
MS. ROBESON: Okay. Just a minute. You can answer if you know.
MR. COBB: Yes, in fact, I believe I already testified to that. Yes.
BY MR. CHEN:
Q It's not being proposed?
A Oh, I'm sorry. In the DPA is it being proposed?
Q Yes.
A Oh, no, my understanding is that there is no

grocery store and that was a condition of the Planning Board's approval.
Q Okay. And he noted that restaurants are being proposed, is that right?
A That's correct.
Q And, they're recognized in the Master Plan?
A That's correct.
Q Does the Master Plan recognize an outlet center in the Cabin Branch community?
A I do not believe so.
Q Does the Master Plan recognize 484,000 square feet of retail in the Cabin Branch community?
A It does not.
Q I believe Mr. Harris asked you to read a short bullet from the Master Plan, do you recall that testimony, sir?
A I do.
Q Directing your attention to page 46 of the Master Plan, I think Mr. Harris used the word bullets. I'd like you to take a look at the third bullet from the bottom of the page on 46 and please read that bullet.
A "A retail center designation is proposed east of the historic district as part of a large-scale, mixed use development. See Figure 19, page 43. By incorporating the retail center proposal into a

larger plan development, there will be a greater opportunity to assure a strong integration of the retail center to adjoining residential and public uses and to ensure a compatible relationship to the Clarksburg historic district.''

Q Now the historic district is just part of the retail center, is that right, sir?

A That's correct.

Q Turning your attention to the reference on that page to Figure 19 on page 45, is the historic district shown on that figure?

A Yes.

Q Okay. Is it possible for the benefit of the Hearing Examiner for you to locate your property, sir, on that figure?

A Yes.

MS. ROBESON: Are you on Figure 20?

MR. CHEN: Yes.

MS. ROBESON: Okay.

MR. CHEN: Yes, Your Honor.

BY MR. CHEN:

Q Can you orally describe where your property is for the Examiner, looking at the same figure, would be able to follow your directions to where your property is located on the figure?

A I will try. It's along Frederick Road, Maryland 355, you see the label for that road, and then starting from the south, if you go up north along 355, it's two blocks north where there's a building there at the corner.

MS. ROBESON: Of what?

MR. COBB: And, right, the corner, the corner street is not marked, but it goes directly into a, the center of --

MS. ROBESON: The square kind of or rectangular?

MR. COBB: Right. It, the street dead-ends at a, at a kind of a V-shaped intersection.

MS. ROBESON: Yes.

MR. COBB: And that's actually Redgrave Place, which turns into Clarksburg Square Road north of 355.

BY MR. CHEN:

Q And which --

MS. ROBESON: And where is your home? Oh, where is your property?

MR. COBB: It is on the, I guess that's the south, what is that, southeast corner of 355 and Redgrave Place.

MS. ROBESON: Okay.

BY MR. CHEN:

Q By the way, do you see an amphitheater illustrated on that figure?

A There does appear to be an amphitheater, you know,

I'm not totally sure what it -- it does look somewhat like an amphitheater.

Q Sir, do you know the size of the historic district?

A The size of the historic district?

Q Yes.

A No, I do not.

Q I take it -- well, clearly looking at Figure, I'm sorry, 20, by the way what is this figure captioned?

A Town Center illustrative sketch.

Q Is this area, as you know it, the town center of Clarksburg?

A Right, roughly speaking there's, you know, different areas, but this is the main part of the town center, yeah.

Q And your property is located within the historic district, which is within the town center?

A That's correct.

Q Thank you.

MR. CHEN: That's all I have.

MS. ROBESON: All right. Mr. Kline.

MR. KLINE: One question.

MS. ROBESON: Yes.

BY MR. KLINE:

Q Peterson Companies has Miles Coppola property in

the contract, correct?

A I --

MS. ROBESON: If you know.

MR. COBB: That's my understanding, yes.

BY MR. KLINE:

Q Okay. Maybe I can phrase it this way. Is it your understanding, do you know if the Miles Coppola property is within the area of the Ten Mile Creek in the Master Plan amendment and that there are alternative design scenarios that are being reviewed at that time that would allow the limitation of a retail outlet center when the plan is adopted?

A I believe that is correct.

Q Okay.

MS. ROBESON: Okay. Any --

BY MR. HARRIS:

Q Isn't it correct that one of the options being considered in that Master Plan would allow it and one would not?

A I believe there's a number of options.

MS. ROBESON: Well, does one, to your knowledge, does one not allow it?

MR. COBB: I actually couldn't, couldn't say.

MS. ROBESON: You couldn't? Okay.

BY MR. HARRIS:

Q Do you have a copy of the Planning Board's letter that says a grocery, the absence of a grocery is a condition of the Planning Board approval because that's news to me. I don't see that in the --

A I was at the, well, you know, I don't know what's in there, the actual recommendation. I was at the hearing, the Planning Board hearing where they voted on this and that's what they said. That was a condition they said they were going to put on it, so I just assumed it was included, but maybe they didn't.

Q If someone testifies differently that that was not what they said, you don't have anything to disprove that they did say that -- you don't have anything to prove that they said that was a condition, do you?

A I think we could review the transcript and determine that.

MS. ROBESON: Well, they're bound by what they wrote, well, I guess.

MR. HARRIS: That's fine. I think it will speak for itself.

MS. ROBESON: Yes.

BY MR. HARRIS:

Q Are you aware that the MXPD zone allows up to 20 percent retail?

MR. CHEN: Objection. Calls for a legal

conclusion.

MR. HARRIS: It was, you asked him whether you could build 484,000 square feet of retail at Cabin Branch.

MR. CHEN: I was talking about the Master Plan and I was following up the same line of, type of questions that you asked.

MR. HARRIS: Okay. Well, then let me ask him about the zoning ordinance.

MR. CHEN: The zoning --

MS. ROBESON: Okay.

MR. HARRIS: Do you know what the zoning ordinance --

MR. CHEN: The zoning --

BY MR. HARRIS:

Q Do you know what the zoning ordinance is?

MS. ROBESON: Stop. Stop. Stop. I can read the Master Plan and I don't think asking him -- maybe what the point is is that do you know whether this Miles Coppola property has all the -- are you aware or not aware whether the Miles Coppola property has all the zoning approvals that you need?

A I do not. I do not know about the zoning of the --

Q Okay.

MR. COBB: -- Miles Coppola property.

MS. ROBESON: All right.

BY MR. HARRIS:

Q Okay. Final question. I've looked at my notes and I don't see that Mr. Bogorad said that you could not do two outlet centers here, one at Cabin Branch, in other words, and one at Peterson. Do you have any evidence that he said that where they could not do two?

A Well, my notes that I wrote down at the time say that if you had the same types of stores, potentially a negative impact. And then you want to say, well, you know, a supermarket wouldn't be the same type of store. So that was, that was, that was my notes and my recollection of what he was saying.

Q Okay. Thank you.

MS. ROBESON: You may be excused. Thank you for testifying, Mr. Cobb.

MR. COBB: Thank you, Madam Examiner.

MS. ROBESON: Yes, time out? Yes.

MR. HARRIS: May I present --

MS. ROBESON: And then we'll come back with Mr. Unterberg.

MR. ROBBIN: We have, there's a citizen representative here that came in during the cross-examination. If it would be possible to just --

MS. ROBESON: Do you, before we take a break, Mr.

Kline or Mr. Chen, do you have any objection?

MR. KLINE: No, that's fine.

MS. ROBESON: Okay.

MR. CHEN: Of course not. Anything for Mr. Robbins or Mr. Harris.

MR. ROBBINS: Thank you.

MS. ROBESON: We'll take a 10-minute break.

MR. ROBBINS: Okay. 10 minutes and then you can go.

(Recess)

(Discussion off the record.)

MS. ROBESON: Please raise your right hand.

(Witness sworn.)

MS. ROBESON: Thank you. Is he, are you represented by --

(Discussion off the record.)

MS. ROBESON: Are you represented by any of the attorneys here?

MR. WEI: No.

MS. ROBESON: No? Okay. Did you sign the sign-up sheet with your e-mail address?

MR. WEI: Yes.

MS. ROBESON: Thank you. Okay. Please state your name and address for the record.

MR. WEI: My name is Boa Zhu Wei. I live in

Clarksburg. Address is 12642 Granite Road, Clarksburg.
MS. ROBESON: Okay. Thank you. And what would you like to say?
MR. WEI: What I say is this project need to, people need, I think, I think the mall serve to the not only Clarksburg, also the whole County, this County, also Frederick County because this mall is basically sells brand name products, right? It's premium mall.
What I see is, I don't think it's conflict with, with town center retails because this is premiere mall. It sells brand name. Right now we need to drive 40 miles to Hagerstown or Leesburg. So if we have such a mall, we would just close, save both time and save gas.
MS. ROBESON: Okay.
MR. WEI: And that's all, that's one, and what I say, it's not conflict with town center retail because you don't buy groceries from this mall, you know? So it's not conflict.
MS. ROBESON: Okay.
MR. WEI: And for some people say maybe it cause traffic jam or something like that. What I see is you don't go to the mall at the same clock. A traffic jam now, it's basically people's work time and say from 6:30 to 9:00. But the mall opens after 9:00, so I don't see any, any conflict.
MS. ROBESON: Okay.

MR. WEI: So I don't read, I'm not clear with the Master Plan or zoning, but I think whatever people like you, it's, well, probably it serve people's need, right?
MS. ROBESON: Yes.
MR. WEI: Make people's life better. So what I see is if we have such a mall here developed, we will make people's lives better.
MS. ROBESON: Okay.
MR. WEI: So that's what I say.
MS. ROBESON: All right. Thank you.
MR. WEI: Uh-huh.
MS. ROBESON: Mr. Harris, any questions?
MR. HARRIS: No questions. Thank you for your comments.
MS. ROBESON: Mr. Kline?
CROSS-EXAMINATION
BY MR. KLINE:
Q Sir, I didn't write your name down, so I'll just call you sir. What was the source of knowledge from which you formulated this position or where did you get the information to come to those conclusions?
A (Indiscernible.) Some call it common sense. Like I will say, I say not conflict with town center retail. It is common sense, you don't buy groceries from the premium mall, right? The town center retail especially is a service

type. You buy grocery, cut your hair, whatever, something other than this. You go to premium mall by planning (indiscernible), right? It's not conflict.
Q Well, I probably didn't focus my question tight enough. Did you go to any of the community meetings where --
A Yes.
Q -- either Mr. Harris's clients --
A Yes.
Q -- or my clients --
A Yes.
Q -- were making presentations to learn about the --
A Yes, I did go to community meeting.
Q That's all I wanted to know. And on the basis of that information, did you get mailings or letters from either one of our clients describing what's going on in Clarksburg?
A Yes.
Q You did?
A Yeah.
Q Okay. That's all I need to know. Thank you.
A Okay.
BY MR. CHEN:
Q Sir, good afternoon. How do you spell your first and last name please?

A My first name spelled B, like boy, A, American, O, Z is the last letter, H like high and U like umbrella. That's first name. Last name W-E-I.
Q I had it.
A Okay.
Q Thank you very much, sir. Thank you.
MS. ROBESON: Any other questions? Mr. Chen, no?
MR. CHEN: No.
MR. HARRIS: No.
MS. ROBESON: Okay.
MR. ROBINS: Okay. Thank you very much for taking the time to come down. Appreciate it.
MR. WEI: Okay. Thank you.
MR. ROBINS: Okay.
MR. CHEN: Okay. Thank you.
MS. ROBESON: Okay. Are we, there's no other individuals?
MR. HARRIS: No. I believe we're back --
MS. ROBESON: Okay.
MR. HARRIS: -- with Mr. --
MS. ROBESON: Mr. Unterberg.
MR. HARRIS: -- Unterberg.
MS. ROBESON: You're still under oath, Mr. Unterberg. I believe you left us, you were pointing out compliance with the Master Plan. That's my recollection.

THE WITNESS: That is mine also.
MS. ROBESON: And you were at a specific page, but I didn't have the transcript, so can you direct us to where you are going to pick up?
THE WITNESS: Actually page 30. We finished page 28 last I --
MR. HARRIS: Yes, I think so.
THE WITNESS: And I don't know, do you want me to just jump in, Bob, or --
MR. HARRIS: Yes, please.
THE WITNESS: -- do you have any of the -- okay. I'll pick up where we left off. We were talking about the general recommendations of the Master Plan and I believe this is the last one before we get into the specifics of the neighborhood. So page 30, which is a policy aide employment and this is the, to highlight it, it talks about the employment along 270 and particularly it also talks about the I-270 corridor and the employment on both the east side and the west side of 270 and what is encouraged by the Master Plan.
The last, second to last bullet from the bottom states that it incorporates office and retail uses as part of a neighborhood development. And a couple thoughts with that with the proposed development plan. This DPA continues to establish that the, at 270 is place for employment use

and it also broadens the employment base by identifying opportunities for office, research and development, light industrial, hotel, urgent care, medical office and professional services, as well as retail, entertainment and public uses.
With this proposal, there is a cap of $2,420,000 and with the 20 percent retail of 484,000 spoken of, there is still just under 2 million square feet of employment to be realized in a variety of ways. Also, as noted in the Park and Planning staff report from the July 18th hearing, this variety of uses is consistent with other employment centers in Montgomery County located outside central business districts and transit stations, areas such as Washingtonian, Park Potomac and Rock Spring. And this was instead of an antiquated office park.
The DPA is trying to include this mix in a wider mix of uses that will attract other types of employment and particularly to enhance the 270 technology corridor. And that, and with that we believe, or I believe that policy 8 in the employment, and the importance of employment for this corridor is realized by this development plan.
And I think with that, Bob, we go to specific --
BY MR. HARRIS:
Q How about the specific recommendations in the Master Plan, can you walk us through those as well?

A Yes. And to begin, what I'd like to do, the, again, the staff report from Park and Planning outlined all these particulars and from the July 18th hearing, pages 14 through 17, and I would also like to adopt that as my testimony, but would like --
MS. ROBESON: But the technical staff?
THE WITNESS: Of the technical staff report, yes. But I would also like to go, go through them as we, particularly as we talk about pages 64 through 67 for the Cabin Branch neighborhood.
MS. ROBESON: Of the Master Plan.
THE WITNESS: Of the Master Plan, yes. In particular, for the overall, the Master Plan provides for a mix of uses, including employment per the Master Plan. And one of the visions of the Master Plan and the development plan is for a comprehensively designed employment center. And there's a variety of mix of uses that are recommended and ranges of numbers and so forth.
Particularly one of the mixes or one of the uses that's recommended is residential and we have not changed the amount of residential on this development plan amendment. Specifically, there's a cap of 11,039 units and it includes a mix of single-family, detached townhouses or single-family attached and multi-family units. Overall, the Cabin Branch is a project and has preliminary plan approval

for 1,886 units and, again, it reflects that mix. In addition to that, there's 500 senior units and that also has not changed with this amendment.
Employment uses recommends 2,420,000 square feet of employment retail and that is, that has not changed and that cap has not changed.
MS. ROBESON: Wait. Where does -- what did you say?
THE WITNESS: It recommends 2,420,000 square feet of employment and retail.
MS. ROBESON: Oh, you added --
THE WITNESS: I've added, yes.
MS. ROBESON: -- the two together. I'm sorry.
THE WITNESS: Yes. Yes. Because it gives a range of employment and the retail --
MS. ROBESON: Yes.
THE WITNESS: -- square footage. Okay. So with that, I would like to talk about the retail a little bit and there's been a lot of discussion already today. This proposal with the, which is also reflected in the technical staff report proposes to have 50 to 120,000 square feet of neighborhood retail, okay? This would not include a grocery store and, or a supermarket that's typically of a size of 60,000 square feet or above. There's been a lot of discussion about that.

The Master Plan recommends a mix use, a mix of uses and also recommends the MXPD zone. Particularly if we talk about the neighborhood retail, one, there's no definition for neighborhood retail either in the Master Plan or in the zoning ordinance. And then when we look at the specialty retail because we're requesting and particularly to clarify that the Master Plan allows and the MXPD zone allows up to 20 percent retail, which is the increase from 120,000 to 484,000 square feet.

The balance from a range of 50 to 120,000 neighborhood retail services, the balance of that would be specialty retail and/or fashion retail as it's been also mentioned. But more to the point, there's probably --

MS. ROBESON: What specialty retail?

THE WITNESS: The, particularly in the staff report, it's the fashion retail of the outlet mall has been termed specialty retail.

MS. ROBESON: Okay.

THE WITNESS: And not neighborhood. Okay. Let's see if this works sitting and with the microphone. What I'd like to do is walk you through where our neighborhood retail is located and envisioned, and with the balance being the specialty or the outlet or the fashion retail. In particular, there's three areas that we have neighborhood retail. I'm going to start to the north which is north of

the relocated 121 and is shown as retail on development plan, and that has not changed from the prior plan. That's where the north of 121, there's an approved site plan for SMTM, also known as the Gosnell property, and they're approved for 8,600 square feet of retail and that includes a gas station, a car wash and a convenience store.

MR. HARRIS: Okay.

THE WITNESS: The balance of that site plan includes employment uses which is 87,500 square feet of primarily a hotel, but also of two banks, with banks being in the office where employment category per the approvals from Park and Planning.

MS. ROBESON: What about the hotel, the same?

THE WITNESS: The hotel is also employment. Our second location for retail is located between area B and area A, and one of our main streets -- we're trying to create a place and we'll, I'll be speaking more to how we do create that place as we go through the different pages. But along Well Spring, which from 121 is, and this is Cabin Branch Avenue that comes through the B on the plan --

MS. ROBESON: Are those labeled on the plan? It bisects the B?

THE WITNESS: It bisects the B and Cabin Branch Avenue is labeled on the plan --

MS. ROBESON: Okay.

THE WITNESS: -- and actually I'll go through the ones that are labeled on the plan because there's, I'm going to be mentioning a number of roads that are not labeled on the plan --

MS. ROBESON: Okay.

THE WITNESS: -- but they are on subsequent or approved site plans.

MS. ROBESON: Okay.

THE WITNESS: Maryland Route 121, or Clarksburg Road, and there's the label and that's to the west. West Old Baltimore Road is to the south. I-270 is to the east. As we come from the 121 interchange, there's a first roundabout that's right between area A and area B. There's a second roundabout that intersects Cabin Branch Avenue which goes from north to south and that terminates at another roundabout at New Cut Road, which is now known as Little Seneca Parkway.

Coming west to the second roundabout on Little Seneca Parkway is Broadway, which is also labeled. And Broadway with the orange dashed line is the zoning boundary where everything east of Broadway is MXPD. Everything west of Broadway is RMXTDR.

The second neighborhood retail is, as we come down from the circle on 121 down Cabin Branch Avenue, right where the B is, this intersection is a street known was

Wellspring. And Wellspring is one of our east-west connections. On the western side, it terminates at what is known as Burn Park and this is also the elementary school site and the local park. And it, yes, with the, primarily at the park is where it terminates.

Along Wellspring there is a Greenway about 30 feet that connects the Green Park and School, it fronts units through the neighborhood, the residential units, and that Greenway will be continued through the site past the Stream Valley through Little Seneca, again, and just to the right of the B and up through the site into one of our places and our core or main activity areas which is on A.

MS. ROBESON: What do you mean when you say Greenway?

THE WITNESS: This is literally, we've called it the Wellspring Greenway, but it's literally an area that's about 30-feet wide, plus or minus, that is landscaped lawn area. It has, the street has --

MS. ROBESON: Is there paving, it's a paved street?

THE WITNESS: The street is paved, but the Greenway is to the side. So you have the --

MS. ROBESON: Got you.

THE WITNESS: -- you have the street, you have two sidewalks. The Greenway is literally 30 plus or minus feet

of park area. It also has a meandering path and it's landscaped. The units that face the Greenway, and they do literally face the Greenway, they have that extra front yard or village green in the fronts of their units. And that green space is also one of our civic amenities that links our park and elementary school east to west. It also connects and provides a visual opening and tie to the Stream Valley buffer at the intersection of Wellspring and Cabin Branch, and then that will continue through our mixed use area on, in the area B on the development plan and then will also carry through and into one of our focal points in area A where, as testified or mentioned before, this generally of the northern area is the outlet mall or specialty retail.

We also see, which between the mixed use area there is some freestanding restaurants which we're putting in the neighborhood retail category. There's also food court and restaurants within the outlet or specialty retail. And then there are a number of uses that could, and we don't have the specific tenant, et cetera, but there are a number of uses that overlap with the outlet and serve both as neighborhood retail and as specialty retail. So the outlet uses do double-duty such as the restaurants, such as and, I know there was a list mentioned earlier today, but the, some of the apparel shops, coffee shop and then also there could be neighborhood furniture, Home Goods and so forth, and

that's probably a very incomplete list of what could overlap as far as uses that are allowed. And they will not only serve the neighborhood and provide those services for the neighborhood, but they will also be part of the outlet center and provide those services to people that come to that destination.

The third area which is in, to the southern along Cabin Branch Avenue in area C, we show two mixed use blocks. And these are at the roundabout. There's another roundabout in Cabin Branch Avenue right at the label here. And this is a skimmer, which is the cross street. And this is our southern, one of our major southern east-west connections. And the connection to the west is our community center and pool, which is the No. 8 on the plan. That's in the RMX zone. It's an approved site plan. And that is the terminating view along a skimmer with the pool in the foreground and then a 2-story community building as the terminus of that view that climbs the hill.

The skimmer itself is a boulevard and we also have what we call the north lawn and south lawn, which is mid-block between Broadway and Cabin Branch. And those are green spaces, open space lawn areas provided for the neighbors all these units face on those green lawn areas.

And as we come to the roundabout and the gateway or entrance to our employment area, we have mixed use which

also will include neighborhood retail. And, again, there will not be a supermarket or larger grocery store. There could be some type of food store. Whether it's a general store, whether it's a pharmacy and the pharmacy is right now, if you look at a CVS or a Walgreens, they carry milk and staples for food.

The other thing with these mixed use areas is we would have neighborhood retail, but also with the emphasis on employment, we're going to have neighborhood employment where, as we mentioned before with the Gosnell approval, banks are in the employment or office category similar to medical office, doctor's office, dentist office, realtor, so there's a number of neighborhood services that are in the employment category. And this is our southern hub and this is really a secondary mixed use area with the primary mixed use along Wellspring.

In addition to the residential, the seniors, the employment and retail uses, public uses are also required by the Master Plan. And we've shown up 275,000 square feet of public uses. Most of these, well, it's a combination -- these could include a place of worship, a daycare center, and those are also in addition to, which are outside the MXPD, the elementary school.

And I think from there, Bob, do you want to go to page 68 or do you want me to just keep going?

BY MR. HARRIS:

Q No, no, go ahead. And what other specific recommendations in the Master Plan with which you believe this complies?

A Okay. If you go to page 68, one of the requirements is to maximize access to open space and to the open space system. As a whole, we've already discussed how the Little Seneca Stream Valley is preserved. And as I mentioned, we have a series of east to west Greenways or green links, either a physical park system, road or combination thereof and those are east-west connections through the development and the to the western tributary which is in the RMX, which is the Cabin Branch tributary.

We have a Greenway along Maryland Route 121 that will continue and that is, buildings are set back and there's a three to 4-foot high stone fence and then at the entrances, particularly Burn, Broadway and Cabin Branch, there are entrance monuments that are on the approved site plan and that Greenway will continue through in front of the remainder of the employment and retail area for area B and A along 121. The Gosnell's plans, with their site plan approval, they also have a low stone wall and a green edge along 121.

We've spoken about Wellspring Greenway, which is, again, goes from west to east and connects the residential

and integrates the residential via the road and the green park system to our mixed use core and to our employment area. As we go further south, we have Tribute Parkway, which is also a, we've called it our Central Park, which is a divided road and the median in the middle is larger. It has a series of outdoor rooms and actual sculptures of different native animals.

As we come further down, we have a skimmer, which is a community center on the left. The skimmer is a Greenway. We have the north and south lawn on either side. Continue through to the roundabout and that road comes through. And we also have a perimeter road along most of area C that takes advantage of the view to the Greenway itself.

MS. ROBESON: On the eastern side of areas --

THE WITNESS: Correct.

MS. ROBESON: -- northeast --

THE WITNESS: Northeast.

MS. ROBESON: -- north and east sides of area C.

THE WITNESS: Okay. And then as we come further down Little Seneca Parkway itself is a boulevard with roundabouts with landscaping and then as that, we've continued a front lawn or a Greenway, there's no road, but units face this Greenway and path system that connect with a sidewalk system and then that connects with the trail system

within the Cabin Branch tributary.

BY MR. HARRIS:

Q What about recommendation in the Master Plan with respect to creating neighborhood focal points?

A As I just discussed, we consider all these focal points, .but I will again point out the Wellspring Greenway. In particular, we have Burn Park Road, the west side at no units and then it has the elementary school and the local park all green. The Greenway connects that through from Broadway going east to Cabin Branch and that Greenway will continue through our mixed use area.

And then it also is, has development on one side which is the north and east side. The southern side then opens up to the views along the Stream Valley. And this is one of our focal points which was shown on some earlier drawings, one of our plazas, roundabout.

MS. ROBESON: When you say this --

MR. HARRIS: Yes.

MS. ROBESON: -- can you describe it?

THE WITNESS: Yes. The northern, for the Seneca, Little Seneca tributary, the northern tip of that which connects to the Wellspring Greenway, about two-thirds the way between the large A and the large B, this is our main focal point which transitions to the specialty retailer of the outlet mall and also connects our mixed use areas

together, and by doing so with the Greenway and the views onto the Stream Valley.

BY MR. HARRIS:

Q And does the MXPD zoning for the property conform with a recommendation in the Master Plan?

A Yes, it does, and which is on page 98 of the Master Plan where it's recommended be rezoned MXPD. And it is zoned MXPD since it was rezoned in 2003. And we're amending the development plan for the clarification for this hearing.

Q To what extent was the MXPD recommendation a desired objective in the Master Plan?

A It is a desired objective and particularly the MXPD. There's potentially two ways the property could be developed under the existing zoning, which was RMX, and I-3 or MXPD. And the MXPD was an option that was highly encouraged to have the flexibility and also the overall mix to better accomplish the goals of the Master Plan through the MXPD zone.

Q What about the variety of housing types, is that recommended in the Master Plan?

A Yes. And we are accomplishing that. And as I mentioned, approved for 1,886 units which includes both the MXPD portion and the RMX as a whole. There is a percentage mixture where multi-family cannot exceed 20 percent and it's

on page 67 of the Master Plan. There's a range. Detached, single-family cannot go below 45 percent. And then the attached are townhouses are in the middle. And with all the approvals, we have obtained the date. We are within those ranges and have not exceeded the minimum or the maximum for the appropriate unit type.

In addition to that, you have the three main unit types, but with the couple builders out here, particularly Winchester and Toll Brothers, they have a variety of unit types, for instance, townhouses. They have, each builder has a number of townhouses, different locations in the project, different looks. Some have flat roof architecture for the townhouses and in particular the Winchester towns that are along Cabin Branch have a flat roof so they can better relate to the urban fabric of the mixed use and employment zone and that transition, whereas some of the townhouses in the orange on the western edge are more traditional with a pitch roof and that variety is provided.

Q I want you to cover roadway recommendations in a moment, but before that are there recommendations at page 105 of the Master Plan with which this proposal conforms?

A Yes, and I'll read those four on the top of page 105 as Cabin Branch neighborhood key land use recommendation to encourage a variety of housing types which was just --

MS. ROBESON: Right. I --

THE WITNESS: -- discussed.
MS. ROBESON: You don't have to read them.
THE WITNESS: Okay.
MS. ROBESON: I can read them.
BY MR. HARRIS:
Q Does this conform with those recommendations?
A Yes, it does.
Q Thank you. Roadway recommendations, does it conform with roadway recommendations in the Master Plan?
A Yeah, and pages 69 and then also pages 112 through 126 with the roadway and transportation recommendation, particularly page 69 speaks of an inter-connected roadway system. We've walked through the roadways, particularly with the north/south Cabin Branch Avenue, the north/south Broadway Avenue and then the inter-connecting grid east to west links accomplish that. Also, the road dedications, pages 112 through 126, speak to the fact that these should be public roads and dedicated to the County, and the majority of these roads are public roads and will be dedicated to the County.
Q Can you address the ways in which it conforms with any transit plan recommendations in the Master Planning?
A Yes. And pages 110 through 111 outline the transit plan. Particularly for Cabin Branch, there are to be a series of bus loops and convenient bus locations or bus

stops. And those can easily accomplish along Cabin Branch and along Broadway with anticipated stops within our mixed use areas to the south in area C on Broadway and the cross street skimmer.
As we go north again along Wellspring, a series of bus stops will be available or made available and then also along 121. The bigger picture with the Master Plan, the bus stops are envisioned for the Cabin Branch neighborhood, so the bus loops can circle back to the eastern side of the, of Clarksburg and to the corridor of the east transit way.
MS. ROBESON: I'm sorry, I didn't hear that last phrase.
THE WITNESS: To the future corridor city's transit way where bus service will be able to take people to the eastern side and there's a planned transit station on the Comsat property to the east of the Cabin Branch. And those --
MS. ROBESON: And that's all bus?
THE WITNESS: That's all bus and --
MS. ROBESON: What happened to Observation Drive? Is that out of the picture or is that the transit way you're talking about?
THE WITNESS: Observation Drive is, the transit way goes up the center of Observation Drive which is off the sheet --

MS. ROBESON: I know.
THE WITNESS: The Comsat property is to the east of Cabin Branch across 270 and Observation Drive goes through that property and to the south. The transit is in the median of Observation Drive.
MS. ROBESON: And what is that transit, if you know?
THE WITNESS: Currently what they're moving forward for the southern lag is bus rapid transit and it was proposed either be light rail or bus rapid transit. The current announcement from the Governor in the state is bus rapid transit that will go from Shady Grove up to Metropolitan Grove Road as the first phase and then the future for Metropolitan Grove Road, it will come up through Germantown to Clarksburg and the current plan show the station stopping at the COMSAT property --
MS. ROBESON: Okay.
THE WITNESS: -- or the end station at the COMSAT property.
MS. ROBESON: Which is south of the town center?
THE WITNESS: Correct. Correct.
BY MR. HARRIS:
Q Can you identify ways in which it conforms with the bike way plan in the Master Plan?
A Yes. And we have a, with our number of, the

infrastructure site plan in particular and then the subsequent site plan have been approved. There's a number of bike trails that have been added, particularly an 8-foot hiker/biker trail that has been added instead of a 5-foot sidewalk. And that bike way will be on Maryland Route 121 from all the way at the top down to West Old Baltimore Road. There's a leg along Old Baltimore Road and then it comes up part of Broadway. And then part of that continues, actually continues right here, continues over which is known as Fulmer, which is the western road. That leg continues all the way up and then is adjacent to the park and the school and it inter-connects.
There's also a bike route along Cabin Branch Avenue north to south and a bike route along, dedicated bike lane along Little Seneca Parkway. That will continue in the future when the interchange is built. That bike route will continue across 270. Likewise, the bike route on 121 with the interchange improvements plan will also continue across 270. And that is consistent and conforms with the Master Plan.
Q What page of the Master Plan are those bike way recommendations?
A That's page 134.
Q Okay. Moving on to environmental issues. Can you identify the ways in which this conforms with the

environmental recommendations in the Master Plan?
A Yes. The environment has been looked at and held in high regard as far as this program project and Clarksburg in general. I believe I mentioned before that this property is partially in the special protection area for Clarksburg and we committed, or Cabin Branch committed early on to treat the whole property as a special protection area.
To date, an overall infrastructure site plan has been approved and an overall forest conservation plan has been approved with the overall water quality plan. With the seven or so site plans then approved, each time that water quality plan and the forest conservation plans have been updated to coordinate with that approval. And most of the features, environmental guidelines, are outlined in pages 144 through 148.
Q Okay. Is the project in the Ten Mile Creek area and do any of the Ten Mile Creek environmental constraints apply here?
A It is not in the Ten Mile Creek area and, therefore, none of the Ten Mile Creek issues apply to Cabin Branch.
Q How about is there a staging recommendation in the Master Plan and, if so, how does this development plan conform with those recommendations?
A Staging recommendations are page 185 to 215.

Cabin Branch is in stage 3, which was authorized by the County Council in 2001. That, the big thing it did was to change the water and sewer category to allow water and sewer to come to the site and since then the water and sewer has been partially constructed and is currently ongoing with construction with water and sewer on the site.
Also, the purpose of the staging was for the community as a whole to plan and implement and to plan as a whole. And, one, for fiscal impact; two, for orderly build-out; three, to work with the requirements of the special protection area and the water quality impacts; and four is where, when and where our water and sewer is available and should be made available per the staging of the Master Plan.
Q There's been a lot of talk during the hearing about an alternative outlet proposal either in addition to this one or as an alternative. Can you compare the two sites from your perspective?
A Yes. I believe you're talking about the Miles Coppola site which is in the town center district and it's the, I'll go off the, off the exhibit again. It's the other side of 270 and it's the northeast quadrant of the 121 interchange. I believe it's about 100 acres and a couple thoughts with the Miles site and, which is in the town center district.
Currently it's zoned R-200, which is a residential

zone. It is recommended in the Master Plan to be rezoned to an MXPD as part of the employment corridor, not dissimilar to Cabin Branch. Currently I'm not aware of any plans that have been submitted, so it's hard to discuss a particular plan. But I do know the parameters of the Master Plan and also the -- if it is rezoned, well, currently it's zoned residential. So to do another outlet mall or employment, there would have to be a rezoning under per the existing or the approved '94 Master Plan.
It has been mentioned, and I believe at page 42 or 43, page 43 it talks about the I-270 high tech corridor and that site or that eastern part of 270. And it talks about up to 470,000 square feet and it also in the zoning recommendation is to be zoned MXPD. If that is rezoned MXPD, 20 percent of that site, the 470 per the zone, could be retail which would be 470, 20 percent is 94,000 square feet could be retail.
And in addition, that site, it's a different neighborhood. Cabin Branch is a neighborhood, has its own Master Plan requirements. They're both within Clarksburg. They need to meet the general requirements of the Clarksburg Master Plan. Cabin Branch is its own neighborhood and has its own requirements. The town center district, which includes the Miles Coppola property, also includes the neighborhood center, the town center, which is the Elm

Street or the Dave Flanagan property that's been mentioned. That has its own set of requirements and needs to meet those to provide the Master Plan if it proceeds with the MXPD zoning.
Q Are you aware of a pending Master Plan amendment?
A I am and right now that portion of the town center district is in stage 4. Route 355 is roughly the watershed divide. I think there's a little bit east with part of the historic district that's also in stage 4. But stage 4 all drains to the Ten Mile Creek watershed and part of that line is Maryland 121. Everything west of Cabin Branch is in Ten Mile Creek as you go further north up to 355. The Miles Coppola property is also in Ten Mile Creek, which is currently in stage 4 and not authorized to proceed.
Q And are you aware of the draft recommendations in that Master Plan?
A The staff, Park and Planning technical staff has presented which I believe was in July, presented a couple of recommendations. One would be for retail on that site with a mixed use development. I believe the other would be for high-density housing as an alternative. Each of those has a laundry list of environmental requirements that go along with it and as of now the staff has made recommendation. There's a hearing scheduled for September for the Planning Board to take that under consideration. Once the Planning

Board makes a recommendation, that needs to go to the County Council and so that still has a few steps to go later this year, if not into next year before that's approved.

Q And based on your planning and development approval experience in Montgomery County, do you have an estimate for how long that project would take to proceed were the zoning changed and were the Master Plan changed to accommodate it?

A Yeah. And based on our experience with Cabin Branch, we've been working on that for 12 years. There was a period in there called a great recession or great depression where a couple, two, two, three years where there, it slowed down a little bit. But based on zoning approvals, preliminary plan approval, site plan approvals, and then finally engineering to get to construction, my estimate is that property is somewhere in the window of five to seven years to proceed to construction.

Q Any final conclusions with respect to the Master Plan conformity?

A Yes. In summary, the development plan and the development plan amendment in my opinion is in complete conformance with the 1994 Master Plan which has also been reconfirmed by the staff report, technical staff report from July 18th and the Planning Board approval as noted in their July 25th memo to the hearing office. And what I'd like to

do is read two of those paragraphs from that recommendation.

Q In keeping with the Zoning Hearing Examiner's direction for it, would you just identify what paragraph you're talking about there?

A These are both on the first page and it's the paragraph at the bottom and then the one above that. And it's the Planning Board's findings and reiterates the unanimous approval and also how the project, the amendment conforms with the Master Plan and the zoning.

MS. ROBESON: Okay. Thank you. Are you going to address, my recollection there was a limited amendment to the Master Plan addressing the staging on page 196 about retail commercial development in New Cut Road and Cabin Branch neighborhoods will be deferred until 90,000 square feet of retail uses have been established. It's my recollection that that was amended.

THE WITNESS: Yes.

MS. ROBESON: Can you explain that or just --

THE WITNESS: Yeah, and a little bit of background.

MS. ROBESON: Because I want to know how your plan fits into the amendment.

THE WITNESS: Okay.

MS. ROBESON: And I am going to take official notice of that resolution that adopted that limited

amendment of --

THE WITNESS: Which was adopted in 2011?

MS. ROBESON: Right.

BY MR. HARRIS:

Q Would you provide the resolution number so --

MS. ROBESON: Or we could have the, if you have a copy --

MR. HARRIS: I have one copy.

MS. ROBESON: Okay.

THE WITNESS: It's Resolution No. 17-188, introduced and adopted June 28, 2011. Subject approval Planning Board draft amendment to the Clarksburg Master Plan Hyattstown special study area.

BY MR. HARRIS:

Q And what was the essence of that Master Plan amendment?

A The, they changed the, basically they did away with the staging component. A little bit of background, Clarksburg has three neighborhood centers that are set up. One is Cabin Branch, one is in the town center district and the other is in the New Cut neighborhood. And the condition in the Master Plan was that other retail could not go forward until the town center went forward. That has not gone according to plan before the Master Plan in particular. There is an amendment introduced, limited amendment by Park

and Planning and what that did do is it got rid of that timing element.

And the result of that is the New Cut neighborhood center has gone forward and that's currently under construction. So they --

MS. ROBESON: Is there -- I guess what I want you to do is say is there a, isn't there a criteria in that amendment that allows it if there's an approved preliminary plan? And so my question is, for the record, that is my recollection.

THE WITNESS: Yes. And from this resolution, page 196, revise the first paragraph as follows. Stage 3 includes all portions of Clarksburg that do not drain to Ten Mile Creek watershed, i.e., most development east of I-270 and the Cabin Branch neighborhood. See Figure 54, page 215. Retail, commercial development in the New Cut Road and Cabin Branch neighborhoods will be deferred, however, until 90,000 square feet of retail uses have been established, approved with a preliminary plan in the Clarksburg Town Center. And there is an approved preliminary plan in the Clarksburg Town Center and, therefore, particularly the New Cut has preceded two approvals and is currently under construction which is a Harris Teeter grocery store in the New Cut neighborhood.

MS. ROBESON: Okay.

BY MR. HARRIS:

Q Thank you. Can you, you mentioned earlier about the site being split-zoned to RMX and MXPD. Can you explain that a little bit for us?
A Yes. And as mentioned, there's two zones and also there are two options envisioned with the Master Plan. But particularly I'd like to talk about the RMX zone and --
MS. ROBESON: I'm motioning, asking Mr. Robins now to turn some of the cool air on.
THE WITNESS: I thought it was just me getting warm in here.
MS. ROBESON: No.
MR. ROBINS: No, it's actually very warm.
MS. ROBESON: Just for the record, if there's some kind of whispering, that's what it is.
MR. KLINE: Why don't we just move to the 7th floor?
MS. ROBESON: No, I'm not ready to go there. Okay. I'm sorry, Mr. Unterberg.
THE WITNESS: Okay. The, what I'd like to do is talk about the RMX zone in particular and the requirements and also the difference in the MXPD zone and the requirements.
MS. ROBESON: Wait. Why are we doing that? Why are we talking about the RMX zone?
MR. HARRIS: Because it relates to the Master Plan

recommendations as far as retail.
MS. ROBESON: All right.
THE WITNESS: The RMX, which is Chapter 59-C-10.2.2 speaks to specific density and numerical limitations and briefly, which is the optional method --
MS. ROBESON: Right.
THE WITNESS: -- which allows commercial or retail.
MS. ROBESON: Right.
THE WITNESS: Under this method, general commercial uses and higher density residential uses are allowed in the RMX zones provided they are, provided they are in accordance with the provisions of Section 59-C-10.3, as well as the density, numerical limitations and other guidelines contained in the applicable Master Plan approved by the District Council. And that's the optional method which you can do commercial.
BY MR. HARRIS:
Q So do you have an interpretation as to whether the RMX requires a Master Plan recommendation for retail in the RMX zone?
A Sorry, say that again, I lost it a sheet here.
Q Do you have an interpretation of the zoning ordinance as to whether the RMX zone requires an affirmative Master Plan recommendation for retail to be included in the

RMX zone?
MR. CHEN: Objection.
MR. KLINE: The same here.
MR. CHEN: It calls for a legal conclusion. The zoning ordinance is for the Examiner, if anybody, to interpret, not a land planner.
MS. ROBESON: Yes, Mr. Kline?
MR. KLINE: And my objection is a little bit more to the content and it probably goes back to where you started, I think, a second ago. If you took half of the property and rezoned it in the MXPD zone because it was more flexible for what they wanted to accomplish, there's no reason to go back and study the zone that was there before which was thought to be deficient and inadequate for what they wanted to accomplish. We should only be dealing with the MXPD zone and not what might have been recommended in RMX because we trash canned that because it wasn't going to accomplish the vision for Cabin Branch.
MS. ROBESON: Where are you going with this?
MR. HARRIS: The property is split-zoned today. The RMX zone has not been trashed and this is highly relevant than was crucial to the Planning Board's interpretation of the Master Plan.
MS. ROBESON: Explain why and where this line of questioning is going.

MR. HARRIS: Okay. The, at the time the Master Plan was written --
MS. ROBESON: Yes.
MR. HARRIS: -- the property was designated for two zones. And I'll have Mr. Unterberg testify to this so that Mr. Chen is not concerned about --
MS. ROBESON: Yes, I'm asking you to proffer why it's going --
MR. KLINE: You projected?
MR. HARRIS: Yes.
MR. CHEN: Yes.
MR. HARRIS: Because it will explain how the Planning Board recommendation for 120,000 square feet in the Master Plan relates to the ability to now do more retail than that given the change in zoning to MXPD for, I'll call it half the property. Mr. Unterberg, this was explained to the Planning Board at their hearing?
MS. ROBESON: So you're proffering, just let me summarize, you're proffering that -- you're, okay, I'm sorry. You're proffering that something, say why it's relevant again.
MR. HARRIS: It is relevant because the Master Plan can only be interpreted in connection with its zoning and the Master Plan provided two options for zoning this property. And if you interpret recommendations in the

Master Plan applicable to one, you need to understand how the change in zoning makes those recommendations inapplicable in the case of a rezoning.

MS. ROBESON: Are you going back, well, can you be more specific as what you're trying to get him to say?

MR. HARRIS: He will state that Broadway is the boundary line today between the MXPD zone and the RMX zone, RMX --

MS. ROBESON: Yes.

MR. HARRIS: -- being to the west. That the Master Plan recommended 120,000 square feet --

MS. ROBESON: Oh, because that's --

MR. HARRIS: -- in the RMX zone.

MS. ROBESON: -- all you could get in the RMX?

MR. HARRIS: Correct.

MS. ROBESON: Okay. Now I don't think that's an interpretation of -- I'm not sure that's an interpretation of the Master Plan, but I would ask do you have any, well, let me ask you this because this would be important to me. Do you have any knowledge that that 120 was based on an assumption that -- I guess my problem is the Master Plan to me was pretty encouraging of the MXPD. Do you have any reason to believe that the 120,000 square feet was based on development in the existing RMX zone?

THE WITNESS: I do and my opinion is this

property, if the owners chose not --

MS. ROBESON: Just a minute. Just a second.

MR. CHEN: Respectfully, this seems to be indirectly getting at the initial objection. You asked for a proffer from counsel and I did not object to that. That is proper. But it sounds right now that the Examiner is asking the witness to express the opinion as to which there is an objection on the table.

MS. ROBESON: I guess -- okay. Well, what I was asking him, and your objection is what, he's not a legal, it calls for a legal conclusion, correct?

MR. CHEN: Well, number one, that's what it was when I first heard --

MS. ROBESON: Right.

MR. CHEN: -- counsel.

MS. ROBESON: And now what is it?

MR. CHEN: But now I think we're going beyond that, that this is now going to be an attempt to explain away an explicit standard in the Master Plan. And, let me just finish, as to which there is virtually, virtually no that I know of, virtually no explanation or discussion in the Master Plan for what I now think I'm about to hear.

MS. ROBESON: Well, we have allowed witnesses to, as far as interpreting the Master Plan to give -- what I was trying to elicit from them is a factual basis, not his basis

as a legal expert, but we have considered contemporaneous considerations or, you know, legislative history in that sense. So that is what I was asking him for.

MR. CHEN: That's what I thought you were asking, is there, where I thought you were going, frankly, when you started out was is there any legislative history for the standards contained in the adopted and approved Master Plan. I appreciate that type of inquiry and I don't think I'd have a hard time objecting if counsel were to sit here and say, yes, we have checked the record on the adoption and the approval and exhibit such and such provided such and such, here's a copy of it out of the record, can you give that to the Examiner? I think that's germane. I, you know, that's admissible evidence. What I've heard this gentleman say is, yes, I have an opinion and I don't think that is proper.

MS. ROBESON: Well, part of the problem is we can't get to the basis, I can't get to the basis of -- I don't know what his opinion is yet. I mean, no, I don't know what the basis for his opinion yet, all right? We've had a proffer and I don't know what Mr. Unterberg is going to say as far as the basis for his opinion. If it --

MR. CHEN: He didn't say, he didn't say I have looked at --

MS. ROBESON: Well, I don't know what he's going to say.

MR. CHEN: But he, please, my only problem is he skipped the stage that you have just identified. He, his words were it is my opinion.

MS. ROBESON: Well, that could have been anything.

MR. HARRIS: He will explain it amply. Madam Examiner, we've had the farmer's market lady, Mr. Whit Cobb who says he doesn't know anything about that. Both offer their non-expert opinions of what the Master Plan says. I would find it highly irregular not to allow an expert on the topic to offer his opinion. That's what experts are here to do.

MS. ROBESON: I guess what I'm going to ask Mr. Unterberg is what is the basis for your opinion? I mean what type of evidence do you have that, that the 120,000 figure in the Master Plan was the result of the RMX zone being the base zoning on the property, if you can call RMX a base zone?

THE WITNESS: The property could under the Master Plan, could move forward two different ways based on the zoning of RMX optional within --

MS. ROBESON: Yes. But the Master Plan doesn't envision one way -- I didn't read it to envision one way or the other.

THE WITNESS: But specific and with the RMX zone that I read, it talked about location and numeric which is

very specific and the Master Plan has a sketch that shows where that would be.

MS. ROBESON: Okay. Let me stop you there because I haven't ruled on Mr. Chen's objection yet. Mr. Chen, he can testify to it as a basis for an opinion, an expert opinion. I'm going to let it in for the weight it deserves. I don't know how much weight it deserves, but I will let it in and he can testify as the basis and you can cross-examine on that, all right?

So, Mr. Unterberg --

MR. HARRIS: Let's take one step back and see if we can break this into smaller pieces so that everyone can follow.

MS. ROBESON: Well, one, I am going to warn the parties I have to break at 5 o'clock tonight.

MR. HARRIS: Okay.

MS. ROBESON: So keep that in mind.

MR. HARRIS: Okay.

BY MR. HARRIS:

Q Mr. Unterberg, would you turn to the RMX zone, Section 59-C-10.3.4, specifically paragraph C. And it's a short paragraph, so if the Hearing Examiner will indulge us, I'd like you to read it because I think it will help understand where we're going.

(Discussion off the record.)

THE WITNESS: 10.2, I just need to go a few more pages, 10.3.4, maximum commercial density?

BY MR. HARRIS:

Q Yes, paragraph C.

A Paragraph C.

"The density of development approved by the Planning Board must not exceed the density shown on the approved and adopted master or sector plan."

Q Now I don't think it takes a lawyer to interpret that to say that that --

MS. ROBESON: Well, are you --

MR. HARRIS: Well, yes. Never mind. Never mind. Okay.

MS. ROBESON: You can make that argument --

MR. HARRIS: Yes, and I --

MS. ROBESON: -- later.

MR. HARRIS: -- shall, but --

MS. ROBESON: You're free to.

MR. HARRIS: -- yes, you're correct.

BY MR. HARRIS:

Q So let's go to the MXPD zone and would you let me know if you find anything in the MXPD zone that requires, that says the Planning Board approval must not exceed the density shown in the approved and adopted master or sector plan --

A I --

Q -- density of commercial development?

A I cannot find that language in the MXPD zone.

Q So would you -- let's turn to the MXPD zone and walk through two of the provisions on there, specifically 59-C-7.5 and paragraph D, David.

A D. D,

"To ensure internal capability of residential and non-residential uses by providing a suitable residential environment that is enhanced by the commercial recreational employment and institutional amenities within commercial and industrial components of the multi-use center is D.''

Q Let's skip reading that. Let's jump to --

MS. ROBESON: Wait. We just did read it.

MR. HARRIS: No, I'm sorry, there's more. There's more.

MS. ROBESON: Oh.

MR. HARRIS: Yes, I don't want to belabor that.

BY MR. HARRIS:

Q The -- would you walk us through how the zoning on this property evolved from the time of the Master Plan to its current status with MXPD zoning and how that relates to

the recommendation in the Master Plan for 120,000 square feet?

A Okay.

MR. KLINE: Could I have a point of origin? The way I understood the phrase of the question was the sequence was reverse of that and we had the Master Plan first and then the rezoning. I thought I heard you ask him to explain how the plan came first or, I'm sorry, the rezoning came first. Did I misunderstand?

MR. HARRIS: Yes. Okay. Let me clarify that.

MS. ROBESON: No, I got it.

MR. HARRIS: There actually were two rezonings. There would have been a sectional map amendment after the Master Plan, but then a local map amendment --

MS. ROBESON: I see.

MR. HARRIS: -- for the MXPD.

MS. ROBESON: Right.

MR. HARRIS: So I'm asking him to --

MS. ROBESON: Okay.

MR. HARRIS: -- explain the relationship between the sectional map amendment zoning following the Master Plan and the local map amendment zoning to the MXPD.

MS. ROBESON: Okay.

THE WITNESS: State that one more time.

MR. HARRIS: Okay.

BY MR. HARRIS:
Q Was the, after the, following the Master Plan, was the site split zoned?
A Yes, and actually we have an exhibit that helps illustrate that.
MS. ROBESON: I don't think -- what was the split zoning?
MR. HARRIS: Why don't you use the exhibit? I think that will help.
MS. ROBESON: Is it a new exhibit?
THE WITNESS: New exhibit.
MR. HARRIS: It is.
MS. ROBESON: And this will be Exhibit 63. What do I call that exhibit? Diagram of split zoning?
THE WITNESS: Yes, and this is --
MS. ROBESON: Sectional map split zoning, how is that?
(Exhibit No. 63 was marked for identification.)
THE WITNESS: And this is page 66 of the Master Plan with the diagram.
MR. CHEN: What is the exhibit number?
MS. ROBESON: No. 63.
MR. CHEN: Thank you.
BY MR. HARRIS:

Q Using Exhibit 63 then, Mr. Unterberg, would you explain the zoning and the land use recommendations in the Master Plan and how they relate with one another here?
A Yes. The zoning with the Master Plan, which is the base zoning in '94, shows the western half in the RMX and then part of the eastern half along 270 is zoned I-3. Then parts of the north is also IMX. This chart talks about how the employment corridor should be along 270 from the legend.
With this map also is specifically located retail core which was to be, which was in the RMX zone. In order to implement that, you would need to go forward with the optional method of the RMX which you could do. And then the RMX talks with the portion sited at the location and numeric has to be per. exactly per the Master Plan and then also the other proportion, you cannot exceed that. And you could go forward or the property could have gone forward without the rezoning to MXPD. Go down and the town center in this location which is kind of north, but it's west because it's in the RMX half. And that could have gone forward with that location, a specific number, 120,000 square feet under the optional method without rezoning to MXPD. And if that went forward, then part of the employment would need to go forward under the I-3 zone per the zoning, the '94 Master Plan.

Q Does the I-3, did he I-3 zoning at that time allow 120,000 square feet of retail?
A It --
MR. CHEN: Objection. It calls for a legal conclusion.
MS. ROBESON: No, he's a land planner and he can say what the zone allowed or didn't allow. So overruled. Go ahead.
THE WITNESS: It did not include the retail at that time. Primarily it was an office zone.
BY MR. HARRIS:
Q What kind of retail could have been provided --
MR. CHEN: Objection.
MR. HARRIS: -- under the I-3 zone?
MS. ROBESON: Basis?
MR. CHEN: It's not in the zoning ordinance and he is now asking a planner what could have. He's --
MS. ROBESON: No.
MR. CHEN: -- still going to be bound by --
MS. ROBESON: He can, he can, Mr. Unterberg can testify what uses were permitted in the I-3, or the RMX and the I-3 zone if he has --
MR. CHEN: I agree with you.
MS. ROBESON: -- knowledge.
MR. CHEN: I agree with what you just said.

MS. ROBESON: Well, that's what he asked.
MR. CHEN: No, he said could. I mean permitted if he, but the question is --
MS. ROBESON: Okay.
MR. HARRIS: Permitted. That's fine.
BY MR. HARRIS:
Q What retail uses were permitted in the I-3 zone at the time of that Master Plan?
A I believe limited retail, which would be support for an office such as a deli or something like that, coffee shop, et cetera.
Q Okay. So did the Master Plan also recommend the MXPD zone?
A It did and that's on page 95.
Q And does the MXPD zone require a specific Master Plan recommendation in order to do retail?
A The, in order to do MXPD you need that specific recommendation and then per the commercial standard which is 59-C-7.52 under uses permitted, B, commercial, all permitted and special exception uses are allowed in C-2, C-2 and HN zones, including chancelleries and international organizations are permitted in the mixed use plan development zone. If we continue to sub-item 2, in order to establish, well, actually I'll go with one first and then with 2. One is,

"The location of general type of commercial uses proposed on the site must be shown on the development plan submitted in accordance with the provision in 59-D-1 and must be approved by District Council as part of the approved development plan.''

Sub-item 2, in order to establish a dominant employment character within the commercial industrial component of the mixed use plan development zone, retail commercial uses should not exceed 20 percent of the gross commercial industrial floor area proposed on the site and shown in either the concept plan or development plan.

Q So at the time of the Master Plan, did the planners know that a portion of the property would ultimately be rezoned to MXPD?

A They did not and in my opinion there is an option to proceed with the RMX and the I-3 or the option to proceed with the MXPD.

MR. CHEN: Objection. Move to strike. I mean this is pure speculation, Madam Examiner. You know, what would the planners think? Well, I think they would have thought -- please.

MR. KLINE: If I might add to that? I mean it is on page 97, the property is recommended for MXPD zoning. So that suggests to me using the RMX as a base zone in the MXD

is the ultimate preferable zone. So I would say the argument is that they probably did know it was going to be put on property.

MS. ROBESON: Well, you can make that argument --

MR. KLINE: Yes. All right.

MS. ROBESON: -- in your case. I'm going to let it in and give it the weight it deserves.

MR. KLINE: Okay.

BY MR. HARRIS:

Q Was part of this property zoned I-3?

A Yes, it was.

Q Not RMX?

A Correct.

Q So RMX was not the base zone for part of the MXPD?

A Correct.

Q Are there properties in Montgomery County that are recommended for MXPD or that have been recommended for MXPD that did not get rezoned to MXPD?

A Not --

MS. ROBESON: Is there an objection?

MR. CHEN: I, I know --

MS. ROBESON: Relevance?

MR. CHEN: Yes.

MS. ROBESON: Okay. I have the same question.

MR. HARRIS: It's a bit frustrating because he

maintains that they knew it was going to -- they're objecting to Mr. Unterberg saying that people did not know at the time of the Master Plan whether the MXPD zoning would have it or not. To me that's intuitive. That's not a legal conclusion. That's not trying to pick somebody's brain. It's the fact that you need to apply for the MXPD zone by a local map amendment and no one knows whether somebody is going to submit a local map amendment. Since he hasn't been able to testify to that, I'm trying to get there through the back door because it's, well, it's just intuitive to me.

MS. ROBESON: Well, Mr. Unterberg, what was your -- repeat your question. Do you remember it?

MR. HARRIS: I do not.

MR. CHEN: You've said on other rulings, you have said let it in and give it the weight to which you think ultimately it should be afforded. Those are maybe my words. Let's get it done.

MS. ROBESON: Thank you, because it is 4:45. So just ask him.

BY MR. HARRIS:

Q Is the Miles Coppola property recommended for MXPD zoning?

A It is recommended in the Master Plan currently.

Q How long ago was it recommended for that?

A It was recommended in 1994 when the Master Plan

was adopted.

Q Has it ever been rezoned to MXPD?

A To my knowledge, no.

Q Who is in control of applying for that zone?

A The property owners.

Q Does the property owner have the right to apply or not apply for that zone?

A They do.

Q Would the same be true for Cabin Branch?

A Yes.

Q If the property owner had not sought the MXPD zoning, what could they have done with respect to retail development?

A Under the RMX optional method, they could have proceeded with the neighborhood center under 20,000 square feet. The --

Q And would that be as shown on Exhibit 60 --

A Three.

MS. ROBESON: Three.

BY MR. HARRIS:

Q 63?

A 63 and it would need this hatched out, black, dark area retail core that would need per the zone would need to be the location for that 120,000 square feet.

Q Now if the property owner subsequently sought the

MXPD zone, could the owner have sought more retail development than they could have in the RMX zone?
A Yes.
Q And what is your interpretation of the, or your opinion with respect to how much retail they could seek under the MXPD zone?
A Under the MXPD zone, you can seek 20 percent of the overall gross commercial area.
Q Does the Master Plan, the 1994 Clarksburg Master Plan recommend a hotel within the MXPD area?
A It does not. It's silent.
Q Did the Planning Board approve a hotel within the MXPD area?
A They have, which is on the SMGM site plan, a hotel and two banks of 87,500 square feet.
Q Do you have a belief as to whether the MXPD zone requires a specific use recommendation in it for that use to proceed?
A It does not in the Master Plan. The MXPD, again, is meant to be a flexible zone and has references, the C-2 and the HM zones for the permitted uses.
MR. HARRIS: One moment please.
BY MR. HARRIS:
Q Did you, in the heat of battle here I've lost track. Did you identify the provision under 59-C-7, MXPD

zone 59-C-7.52(b) as in boy, (2), did you discuss that at all?
A Yes, I did and that's, talks to the 20 percent. In order to establish the dominant employment character within the commercial industrial component in the mixed use planned development zone, retail commercial uses should not exceed 20 percent of the gross commercial/industrial floor area proposed onsite as shown on either the concept plan or development plan.
Q In terms of your interpretation of the Master Plan and the MXPD zoning, did the Park and Planning Commission staff agree with you?
MS. ROBESON: Wait. I know they did.
MR. HARRIS: Okay.
MS. ROBESON: So we don't have to go there.
MR. HARRIS: Okay.
MS. ROBESON: I have a question. I see what you're trying to say. I'm not sure I totally agree, so I'll just let you know and then we're going to have to wrap up. But if the objective and purpose of the MXPD zone, it is intended that this zoning category be utilized to implement existing plans and policies in a matter and to a degree more closely compatible than may be possible of other zoning categories. So would they have in the Master Plan really based this on the possibility that their recommended

floating zone wouldn't develop? I guess my problem with this argument that I think you're making is as I read the Master Plan that they would have, both the MXPD and the RMX would have been bound by that 120,000 square foot recommendation. Am I right or wrong?
MR. HARRIS: You're saying that's my argument? No, mine is just the opposite. My argument is that the RMX zone, because it requires a specific recommendation for the use and density being proposed, you can only get a use and density if it's specifically recommended in the Master Plan. That's under --
MS. ROBESON: Right.
MR. HARRIS: Okay. The MXPD zone --
MS. ROBESON: Oh, and that --
MR. HARRIS: -- is totally different. It does not require that.
MS. ROBESON: I know, but okay. All right. Well, I understand that argument. I'm not sure I agree that they -- I understand the argument, but I'm not sure I necessarily agree because of that purpose clause that when they put in the 120,000 square feet, that was a result of the RMX being on the, on the property be a sectional map amendment. You're saying, but the Master Plan came first, correct?
MR. HARRIS: Then the sectional map amendment,

then the local map amendment.
MS. ROBESON: Right. And I think your argument would be stronger had they not also very favorably recommended the MXPD.
MR. HARRIS: But they did not know whether anyone would apply for the MXPD. They knew they wanted retail here, at least 120,000 square feet. So they recommended 120,000 square feet in the RMX zone because otherwise they couldn't have done any. If the property owner did not seek the MXPD zone and it would have left half zoned I-3 and half, or partly zoned --
MS. ROBESON: Well, they could have recommended a two something.
MR. HARRIS: They could have.
MS. ROBESON: They could have said up to 484.
MR. HARRIS: They could have.
MS. ROBESON: So that's my issue with your argument. And I'm not saying how I feel overall about your case or whether you comply. I'm just saying I'm not sure that this is strong enough to pursue as we have, but I'd leave that up to you.
MR. HARRIS: Okay. I --
MS. ROBESON: And with that, I'm going to stop there --
MR. HARRIS: Okay.

MS. ROBESON: -- because it's five minutes until 5:00. Mr. Unterberg, you will have to return another day. Now if you can wait, I'm going to go off the record for two minutes. I want to see, I think that the 4th is scheduled for the 7th floor. I want to see if this room is available.
MR. CHEN: While we're still on the record --
MS. ROBESON: Yes?
MR. CHEN: -- Madam Examiner, I about 10 minutes ago, I made some comments to the Examiner about how you have thus far said you would accept information and give it the appropriate weight as to which you've included. For that reason, I have not been a jack rabbit sitting over there, but I just remind you that because we're coming back, in a ways --
MS. ROBESON: Well, if you want to note a continuing objection, that's fine, and I don't mean to cut you off, Mr. Harris, you're free to put in everything you want to put in. I, but I am letting you know as far as that argument goes, if you have something to respond to my question, you know, I would like to hear it. All right. I'm going to go off the record just for a couple of minutes. I want to see if this room is open because it still Council recess.
(Recess)
MS. ROBESON: Okay. We're back on the record. I

did, unfortunately, the Board of Appeals is in this room on the 4th, so we'll have the hearing on the 7th -- we're going to continue this hearing to Wednesday, September 4th at 9:30 in the morning in the 7th floor. We will do everything possible to make sure that the HVAC is working, all right? And anything else before we go off the record?
MR. HARRIS: One question I have for, I guess, Mr. Kline really. I think I heard you say upstairs this morning that you expected to know whether you would have an expert witness for the 4th. Have you, by the end of today --
MR. KLINE: Having, well, I think the answer is having been here, I don't know what's come into my office. You said you have actually a date and you said you wanted --
MS. ROBESON: Well, I did.
MR. KLINE: -- me to be sure I gave you --
MS. ROBESON: -- but they just, they didn't give me the calendar. I believe it was August 23rd, being 10 days before September 4th.
MR. KLINE: And the reason I said what I said was because I'm leaving, happily, for Canada --
MS. ROBESON: I know.
MR. KLINE: -- tomorrow because I like the cold weather so much. But I will make sure that Mr. Harris has his answer by the 23rd and I'll just --
MR. HARRIS: Okay.

MR. KLINE: -- have somebody else take care of it since you have the able assistance of Mr. Robins. I'll get Mr. Robins involved.
MR. HARRIS: There you go.
MR. ROBINS: That's fine. Can we make sure that that is the cut-off date period?
MS. ROBESON: Yes, I said I'm not going to postpone it.
MR. KLINE: No, I'm not asking to postpone here.
MS. ROBESON: If your answer isn't in by close of business August 23rd, then --
MR. KLINE: Never had any intention to prejudice in this case.
MS. ROBESON: Okay.
MR. CHEN: And --
MS. ROBESON: Yes, Mr. Chen, don't go off the record yet, Kathy. Yes?
MR. CHEN: You've asked counsel, Mr. Harris, to provide you with his basis for this last legal argument. I would ask --
MS. ROBESON: No, I didn't. Well, what's your, what do you want to say?
MR. CHEN: Excuse me, I thought you were putting comments on that and you were giving your observation as to the legal argument and that I, I don't remember the words, I

didn't write it down, but I thought you told counsel that you wanted to receive from counsel information on that interpretation. Now if that's not what you said, okay, but if you did, and especially if it's a legal argument, I think we should have it before the 4th of September.
MS. ROBESON: Oh, I wasn't asking for that.
MR. CHEN: Oh.
MS. ROBESON: I was, what I was saying is I'm not persuaded by that legal argument, if he has any additional evidence to offer then I would be, I will listen to it, but right now I'm not persuaded by that single argument. It doesn't mean overall that I've decided the case one way or the other, all right? Yes, Mr. Kline?
MR. KLINE: If I, since I'm under the gun, could I ask that the applicant provide by the hearing on the 4th confirmation that all the parties along the land with the MXPD are parties to this application?
MS. ROBESON: Is that acceptable to you?
MR. HARRIS: I retain my objection to that being required. I've found nothing in the zoning ordinance that does require it.
MS. ROBESON: Yes. But can you provide it by that -- no.
MR. ROBINS: Yes.
MR. HARRIS: Yes. I know what she wants. Yes.

MS. ROBESON: He wants to know if you can provide it, I've noted your objection.
MR. HARRIS: Yes.
MS. ROBESON: Mr. Kline -- I'm still asking you to provide it --
MR. HARRIS: I understand.
MS. ROBESON: -- perhaps out of an abundance of caution. Can you provide it by August 23rd or no later than September 4th?
MR. HARRIS: Subject to my objection, yes.
MS. ROBESON: Okay. So which one is it, August 23rd or September 4th? August 23rd?
MR. KLINE: Well, from my point-of view, I just want to know are we walking on the 4th --
MR. HARRIS: September 4th.
MR. KLINE: -- have we got all the parties? So I'm okay with that.
MS. ROBESON: So September 4th?
MR. CHEN: Yes, right.
MS. ROBESON: All right. So we've agreed on that with Mr. Harris's objection noted.
MR. KLINE: May I ask a question and that is I probably have at least two legal arguments I want to make and I have --
MS. ROBESON: Two what?

MR. KLINE: Two legal arguments sort of independent of all this and I haven't had a chance to get to them. If I may, you know, and if you're telling me, well, I was going to try and have it done as soon as I returned from Canada.
MS. ROBESON: And when is that?
MR. KLINE: I'm back in town on the 26th.
MS. ROBESON: Well, see, technically I have to get our rules. I think it would be helpful. Well, if you return to town on the 26th, when could you have it available? Or do you have cell phone capability in Canada?
MR. KLINE: That's why I go where I go.
MS. ROBESON: Yes.
MR. KLINE: To avoid all that. I could have it in everybody's hands on the 28th.
MS. ROBESON: Mr. Harris? August 28th?
MR. KLINE: Yes, ma'am.
MS. ROBESON: Mr. Harris, do you have an objection?
MR. HARRIS: No.
MS. ROBESON: All right.
MR. HARRIS: Thank you.
MS. ROBESON: August 28th then.
MR. HARRIS: Okay.
MS. ROBESON: And with that, anything else? Mr.

Kline, those are -- you're talking about in, you're going to put these legal arguments in --
MR. KLINE: Yes, I'll be submitting them.
MS. ROBESON: -- writing?
MR. KLINE: Yes, ma'am.
MS. ROBESON: Okay. August 28th for your legal argument; August 23rd for your pre-hearing statement, correct?
MR. KLINE: Yes, ma'am.
MS. ROBESON: And September 4th for Mr. Harris's submission of the owners' consent, correct?
MR. HARRIS: Yes.
MS. ROBESON: Okay. With that we will adjourn until September 24th at 9:30 in the --
MR. ROBINS: September 4th.
MR. CHEN: 4th.
MS. ROBESON: I mean September 4th at 9:30 in the morning in the 7th floor hearing room. Yes, one more?
MR. KLINE: No, no, no. Go off --
MS. ROBESON: Oh.
MR. KLINE: -- the record because I was going to tell you the whole --
MS. ROBESON: Just a second. Kathy, we're off the record.
MR. KLINE: The whole process may be actually

invalid because if you're opening --
(Whereupon, at 5:03 p.m., the hearing was concluded.)

C E R T I F I C A T E

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

Petition of Adventist Healthcare and Cabin Branch Commons
DPA 13-02

By:

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Tracy Hahn, Transcriber

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OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

FOR MONTGOMERY COUNTY

APPLICATION OF ADVENTIST HEALTHCARE, INC., and CABIN BRANCH COMMONS, LLC.	:	**Case No. DPA 13-02**

A hearing in the above-entitled matter was held on August 12, 2013, commencing at 9:36 a.m., at the Office of Zoning and Administrative Hearings, 100 Maryland Avenue, Second Floor Hearing Room, Rockville, Maryland 20850 before:

Lynn A. Robeson

Hearing Examiner

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* * * * *

C O N T E N T S

Witnesses:	Direct	Cross	Redirect	Recross
Ron Kaplan				
By Mr. Kline:		11		38
By Mr. Harris:			37	
Leonard Bogorad				
By Mr. Harris:	39	(Reserved)		
Christopher Turnbull				
By Mr. Harris:	61		76	
By Mr. Kline:		68		
Gary Unterberg				
By Mr. Harris:	77			

E X H I B I T S

Exhibit No.		Marked/Received
1-54	Premarked Exhibits	
55	Highlighted Exhibit No. 21	14
56	Resume of L. Bogorad	56
57	Resume of C. Turnbull	61
58	Resume of G. Unterberg	78
59	Amended Development Plan 7/29/13	81

P R O C E E D I N G S

MS. ROBESON: This is a public hearing in the application of Adventist Healthcare, Inc. and Cabin Branch Commons, Inc., requesting an amendment to the development plan approved by the District Council in LMA G-806, requesting an amendment to -- I'll get there. I'm having a hard time here.

Request an amendment to increase the amount of retail space from 120,000 square feet to 484,000 square feet, and to decrease the amount of office space from 2.3 million square feet to 1.935 million square feet on property consisting of 283.5 acres east of Clarksburg Road, west of I-270, and north of West Old Baltimore Road in Clarksburg, Maryland.

Mr. Harris, I don't think I need to explain that we're all very sorry for your loss.

MR. HARRIS: Thank you.

MS. ROBESON: Now, are there any preliminary matters? Seeing none, I think, well, Mr. Kline, did you obtain an expert? Did you retain an expert, I mean?

MR. KLINE: I have not, as of this point in time. I was probably a little overly optimistic, forgetting I was going to be out of town. And when I wasn't out of town, other people were. I will have an answer by the 14th, which is the date you -- the 12th, I'm sorry, the date you asked

for it.

MS. ROBESON: Okay. All right.

MR. HARRIS: Ms. Robeson, obviously, I was not here when the discussion went on but I did read the transcript, and my understanding was that Mr. Kline was to have designated that person by 10 days before today, which would have been, well 10 days before today, when we resume.

Frankly, I think the rules required him to do it 10 days before we convened the hearing on July 29. So 10 days before today would be a substantial accommodation, and yet, we don't have it here today. I'm puzzled by that, and I think that's inappropriate.

MS. ROBESON: I think what we had said was that -- okay. I apologize. I got back, I have not read this yet.

MR. KLINE: Maybe I'm the one who should be apologizing, but I thought I had to have a name before the 12th per the understanding that we would be going into September and there would be an adequate amount of time --

MS. ROBESON: Well, you need to have your expert designated 10 days before a hearing. Now, I am assuming that we are going to have more hearings than the 14th. And we picked reserve dates. But you do need to provide notice. I don't want to extend an additional hearing date at all.

MR. KLINE: I'm saying, that's what I said. I will have an answer for you by Wednesday. I will tell you

on Wednesday.
MS. ROBESON: I think I do agree with Mr. Harris. I think the, what we had requested you to do is to designate by the 14th.
MR. HARRIS: Ma'am, the transcript at page 168 says, talking about the 10 days, Mr. Kline says, ''I will use my best efforts to have somebody lined up and submit whatever I can early enough so Mr. Harris could be adequately prepared for the 14th.'' That means 10 days before the 14th, not the 14th.
MS. ROBESON: Right. That's correct.
MR. HARRIS: And so that means the 4th.
MR. ROBINS: Can I chime in for one second. Steve Robbins, also with Lerch Early and Brewer. When we had this discussion, what the transcript specifically says is that we would have a designation so that Mr. Kline could use his expert on August 14th. And you said, we need to have your prehearing 10 days before that, which would have been August 4th, which was a Sunday, so it was really August 5th, that that expert had to be designated by.
I checked with your office on multiple occasions, and no expert was ever designated. So it was our understanding that there would not be an expert.
MS. ROBESON: Mr. Kline.
MR. KLINE: And my understanding, and maybe

mistakenly, now that you've read the transcript was, I wasn't going to be calling a witness on the 12th or on the 14th. That was for sure. So what I meant to say was, as long as I gave them more than enough time to put on testimony to address anything that would come up, they would not be prejudiced. So I thought I was supposed to give you a name on the 14th, knowing that that person wouldn't be called until September.
MS. ROBESON: Well, we don't know that. We can be optimistic. Mr. Chen, do you want to weigh in on this?
MR. CHEN: My only experience has been that as long as it's 10 days before a hearing, that satisfies the requirements of the rules.
MS. ROBESON: And that is how we've handled it. So what I'm going to do, I do not want to delay a hearing. So we will see after today, I think we'll have a better idea after today whether we're going to use the September date. I think it was September -- so I'm going to defer. I had one reserved date, I thought, on the 4th. And one on the 6th. And I apologize. I just got back from Cape Cod. Well, it was sort of a vacation. I was burying my parents.
MR. KLINE: You and the president. We understand.
MR. HARRIS: Ms. Robeson, not to belabor this, but I go to page 167, even before that, and talking about when he might have his witness. And it says, you say, right, how

about the 14th? The 14th. Yes. I'll make that work.
MS. ROBESON: Okay.
MR. HARRIS: Which is for his expert witness. I just, I'm --
MS. ROBESON: I understand. It's not, but it has been our policy as long as the person gets it in 10 days. I don't want to belabor the hearing on this. It has been our policy as long as he can get the witness or the designation in 10 days before the hearing that, you know, we will let him do that.
Now, I'm not, what I'm not going to do, if we have a September 4th or a September 6th hearing, I'm not, if you don't have one by then, I am not going to delay it again. Okay. So with that, and you're correct, Mr. Harris. That is what was attested to. But as I said, our policy has been, if you can get it in 10 days before a hearing. But I'm not going to delay the next hearing if you don't have the witness in with 10 days before the hearing.
MR. ROBINS: Unless we finish on the 14th.
MS. ROBESON: Unless we finish on the 14th.
MR. ROBINS: If we finish on the 14th, Mr. Kline's position always has been --
MS. ROBESON: I understand.
MR. ROBINS: -- if we finish and he doesn't have an expert, he doesn't have an expert.

MS. ROBESON: I understand. Right. That's fine.
MR. HARRIS: And the final word I'll have on this is that I would hope that no one at this table would engage in any dilatory tactics then to extend it beyond the 14th for the simple purpose of doing that.
MS. ROBESON: I was already with you.
MR. HARRIS: Yes. Okay.
MS. ROBESON: And I was already anticipating riding herd. So that I understand our point.
MR. HARRIS: Thank you.
MR. CHEN: Madam?
MS. ROBESON: Yes, Mr. Chen.
MR. CHEN: Just looking at my notes, you had, by my notes, that the transcript may not bear me out, but I have on my notes that you had September 6th, Friday, as a definite hearing date, and that September 4th was on the table. I think that was your expression, that it was on the table.
MS. ROBESON: That's my recollection also. And I know you're in a major litigation, so --
MR. CHEN: These dates are fine. We went through the dates --
MS. ROBESON: Okay. All right.
MR. CHEN: -- that you've got, we are fine.
MS. ROBESON: All right. You may want to double

check. I'd like to get, if we can, you're correct. We had the 6th firm. The 4th was tentative. If we can set the 4th, you know, if you want to check during the day today, if we can use the 4th, I think that would be helpful. Okay. All right. With that, Mr. Harris, you're up.

MR. HARRIS: I believe it's continued cross-examination of Mr. Kaplan.

MS. ROBESON: Yes.

MR. KLINE: Remember, I was going to faint.

MS. ROBESON: That's correct.

MR. HARRIS: I'll cross-examine him if Mr. Kline wants me to.

MS. ROBESON: Okay. Fine. Okay. Mr. Kline.

MR. KLINE: Sure. Could I ask if the applicant's technical experts could restore the Cabin Branch mixed use center exhibit. Mr. Harris, we changed the slides somewhere.

MR. HARRIS: Which slide would you like?

MR. KLINE: Well, actually, I wanted, I know that you marked it. Don't you have an overall site plan as well of Cabin Branch?

MS. ROBESON: Now, this is in the hard copy of the slides?

MR. KLINE: This is Exhibit No. 45. It was put in the record.

MS. ROBESON: Okay. Fine.

MR. KLINE: And then that was supplemented with a single addition page later on.

MS. ROBESON: Right. Okay. Could I please have the North District slide?

CROSS-EXAMINATION (Resumed)

BY MR. KLINE:

Q Mr. Kaplan, without trying to go back over some of the questions I know that you testified about and that Mr. Chen asked you, I just want to try and understand how this all works. The red fingers, for lack of a better description, that are arced around in the northern part of the property, that represents the retail outlet center?

A These fingers?

MS. ROBESON: Okay, when you say these --

THE WITNESS: I'm sorry.

MS. ROBESON: -- you're pointing to the reddish --

MR. ROBINS: You have to describe where you are pointing.

MS. ROBESON: -- the solid buildings, like fingers?

BY MR. KLINE:

Q I'm counting, and red is the right way to look at them. It kind of looks like six different builds or arcs around that you described as pedestrian walkways?

A Yeah, I believe. I believe there are eight including these. And yes, that's the primary --

MS. ROBESON: Okay. You're saying there's eight including the two pads across, or whatever they are, the red pads across whatever road that is?

THE WITNESS: Correct.

MS. ROBESON: What road is that? Well, if you don't remember --

THE WITNESS: Yeah.

MS. ROBESON: -- they are to the southwest of the larger arcs. How is that? Okay. Go ahead.

THE WITNESS: Yes.

BY MR. KLINE:

Q Well, then that, I guess, would lead me into this question then. So are the -- you have basically on a table in the upper right hand corner which says, retail 430,000 square feet. Above that you have, restaurant/food of 30,000 square feet. The two pad sites to the lower left of the core, if I may use that term --

MS. ROBESON: The southwest.

BY MR. KLINE:

Q -- southwest of that center are pad sites for restaurants? That's a question. I'm sorry.

A Our final site plan is not complete, so this is --

Q I understand.

A -- just not a site plan.

Q Is this a vision of how you would like it to work? Those are probably pad sites for restaurants?

A Restaurants and possibly other retail. It's not finalized yet.

Q Okay. Retail that would be classified as fashion retail?

A In all honesty, I can't say. We don't know yet.

Q What I'm going to do, Mr. Kaplan, is, this is a copy of the applicant's justification statement, which is an exhibit in the record.

MR. ROBINS: 20?

BY MR. KLINE:

Q Thank you. Yes, Exhibit No. 20 on which I've taken the liberty of highlighting some comments, just and you'll see there's multiple pages that are highlighted.

MS. ROBESON: Now is this your highlighting?

MR. KLINE: Yes, ma'am. Because those are the questions I want to ask him.

MS. ROBESON: I'm going to enter this as a separate exhibit, and that way if I have to refer to the highlighted areas for some reason, I will, I can refer to a new exhibit. So this will -- unless anyone has an objection? 55 will be highlighted version of Exhibit, what exhibit is it?

THE WITNESS: 21.
MS. ROBESON: Okay. Go ahead.
(Exhibit No. 55 was marked for identification.)
BY MR. KLINE:
Q Mr. Kaplan, in the second paragraph, about the middle of the second paragraph, probably about seven lines down, there's a sentence reading, ''The central square at the food court will serve as the neighborhood square and will be easily accessible by area residents.'' So looking at the north district slide that we're looking at on our right hand side, explain to me where the food court is?
A Again, with the caveat that this plan is early and not a final site plan, okay, red dots don't help. So at the southernmost part of the northern district with the red fingers that we were describing, there is a number of squares. One is at the very far south. And it's possible that the food court will kind of be organized around that. So that's what this --
Q You're reserving the location where the food court would go?
A Again, I want to be really clear --
MS. ROBESON: I understand.
THE WITNESS: -- not definitively, but yes.
MR. KLINE: Yes.

MS. ROBESON: You're being clear that it's not a final plan.
BY MR. KLINE:
Q I'm not trying to trick you here.
A Yes. Okay.
Q I'm just trying to get a sense of where --
A I'm just trying to be really, just trying to be really honest. Yeah, the goal is, I guess, as importantly what this is trying to say is --
MS. ROBESON: When you say square, you mean the green area, the green space?
THE WITNESS: Yes.
MS. ROBESON: Or this oval?
THE WITNESS: Well, I don't, I didn't write the justifications. So when they say the central square, I think what they're talking about is a gathering place.
MS. ROBESON: Okay.
THE WITNESS: I don't know if it's that specific oval or that specific rectangle.
MS. ROBESON: Okay.
THE WITNESS: But it's saying that there is going to be an effort to create an environment that acts as something easily accessible by area residents.
MS. ROBESON: Okay.
THE WITNESS: Whether that's round or rectangular,

but that recognizing in older developments, food courts tended to be buried, and drew people back. This is something that's going to try to be open and accessible to the residents in some sort of gathering spot type place. If that's helpful.
BY MR. KLINE:
Q And do you have any sense at this point in time what is the size of the food court?
A No. We don't know yet exactly.
Q Well, and let me tell me why I'm asking the questions. I'm trying to nail down some of these numbers because the line on the table in the upper right hand corner says, restaurants, food 30,000 square feet. If you go to the exhibit I gave you that's been marked as Exhibit No. 55, if you go up in the first paragraph, the middle of the highlighted text it says, including 14,000 square feet of restaurants and a substantial marketplace food court.
So I, well, let me ask the question this way. I mistakenly assumed that the two buildings in the southwest of the core area were pad site restaurants at 7,000 apiece, and that the other apparently 16,000 square feet would be devoted to a food court? Or am I wrong on that and the restaurants, food court are more disbursed than I have just suggested?
A Well, the food court won't necessarily be

disbursed. It will be around this kind of central area. There will be some pad sites that are restaurants. There will be some food up here. This is describing, I believe --
Q Okay, you know, can you sit up there and tell us what you are pointing at?
A The northernmost piece of the north district, if you will.
MS. ROBESON: Okay. Across is that --
THE WITNESS: 121.
MS. ROBESON: Yes.
BY MR. KLINE:
Q So we have, so what you were just pointing on, north side 121, we see some small red boxes, squares. Those are retail uses and may have some restaurants?
A They may. I can't speak to that, but they may.
Q I think you used the phrase, point of activation, something like that phrasing. The squares. Do you have a sense of kind of how that's going to be used or what program has been envisioned for it?
A Can you help me? I want to answer what you're asking, and I'm not sure when you say, which programming?
Q Going again down to the lower paragraph on this first page of the Exhibit No. 55. The central spur of the food court will serve as the neighborhood square and be easily accessible by area residents. So my question is,

what's going to happen in the neighborhood square? Or is it just hardscape and green land?

A I'm struggling because I want to try to answer you, and I want to make sure --

MS. ROBESON: I'm not sure I understand what you're trying to get. I don't know what you're asking.

MR. KLINE: Since the statement is made that that's serving as the neighborhood square, I'm just trying to see, is it a physical place or is it a place of animation? And he has suggested it is a place of animation. And my question was, what is going to occur there?

MS. ROBESON: Okay. Okay.

THE WITNESS: There would be seating, I guess, for people to be able to eat inside or outside. There'd be, I guess that's the thing I'd add that maybe I hadn't said before.

BY MR. KLINE:

Q So at this point in time that's the extent to which you can answer the question?

A Yes.

Q Going back to Exhibit No. 55, the last sentence that I've highlighted says, over the longer term as build out occurs, approximately 66,000 square feet of entertainment uses will be added. Can you tell me what those entertainment uses are and where they go?

A I hate to keep sounding like a lawyer because I'm not, but I'm feeling the pressure of being in a legal setting. So with the caveat that not definitively, this was really trying to -- the point I hope that I made in my beginning remarks was that you do try to think ahead. And you try to think ahead long term, understanding that you can't be definitive.

So as we look longer term and envision the area getting more and more built out, it was possible that you might put entertainment uses down here in this southern portion I'm pointing to along 270. What you see here in blue, that might be mixed use, possibly office above, some entertainment uses. Not sure yet, but that's a possibility of a place where that may make sense.

And you try to block those things out a little bit to look at the future and say, will these work if the demand is there to do that. And at a very preliminary level, it looks like it could. So we've delineated that.

Q Can you give me an example of what would be an entertainment use that would be installed in one of those locations?

A I would think of a bowling alley as an entertainment use to give one, you know, something that's not specifically retail and is more entertainment oriented.

Q So you would take the space for a bowling alley,

take it out of the office component, rather than the retail component?

A I don't actually know legally how a bowling alley would be classified. I just am not familiar. I'm sure my lawyers are. But I can't answer that, to be honest. I don't know how that gets classified.

Q Well, I guess -- okay. I mean, I don't want to go through the list of all the entertainment uses, but what I'm trying to do is figure out what pigeonhole you are putting it to. And the reason I'm saying that is, I'm trying to add up all of the red that's in there, plus what is potentially more retail that's not even red, and see, are you able to keep everything within 484,000 square feet?

MS. ROBESON: Okay. That was helpful, because I was just going to ask you where you were going with this.

MR. KLINE: If you don't mind me giving a little extemporaneous speech, that's what I was trying to lead us to.

MS. ROBESON: Yes, well, consider I asked you a question.

BY MR. KLINE:

Q Yes. I'm trying to kind of get a little bit of a bookkeeping.

A Yes. No, that's --

Q And it may well be that there is another more

appropriate witness for that. But I'm just asking you, because you are the first one out there.

A Yes. No, that is helpful, because I was not sure. One of the key things you just said that really helped me is, I think you used the work pigeonhole, and that's kind of exactly what I can't do right now. That's all of the caveats I keep giving are to say, you can't look at a plan.

I referenced when I first spoke, we did a 10 phase plan, literally, a 10 phase plan at Bethesda Row, and it took 16 years before the 10th phase was actually built. And it was definitely different than when we had envisioned it 16 years earlier. I think even the zoning had changed.

So it's as much trying to just look down the road and say, you can know what's next up. You can know what your first phase is. You can look and envision future development coming. You can imagine the different, continuing on that mixed use theme that was so encouraged in the Master Plan, trying to envision how that might come out.

Whether that all precisely today, and whether the zoning is the same in the future, a whole host of things will come into play. So it's hard, Mr. Kline, for me to give you, I think, what you're looking for which is a super precise accounting. But this does try to break out, as we see it today, where might you lay out these different uses and how might they interrelate.

There's a lot of transportation, pedestrian-orientation, where are the gathering places, that you can try to set those today, and what might this look like. And that's what this is trying to be, a vision of that.

MS. ROBESON: Okay. I guess my question is, is the hotel, bank, entertainment, restaurant and retail, are you considering all of that, that's all part of the employment that -- okay. Okay.

I'm trying to figure out, you've requested 484,000 or something like that, in retail. So I haven't added it up, but I see retail 430. So are you considering all of the ones above retail, all of the uses above retail, are you considering all of that retail?

THE WITNESS: No. Everything above this line that says retail, like the hotel would not be retail, for sure.

MS. ROBESON: Well then, I guess, maybe you have another witness that's going to go into this, because he's not a land use expert.

MR. HARRIS: May I offer this. If you look back at the current development plan --

MS. ROBESON: Yes.

MR. HARRIS: -- you'll see a number of categories in there. If you add them all up, they exceed the total development there. The development plan, rather, had pods with ranges of development in them, so that --

MS. ROBESON: Oh, and then an overall cap.

MR. HARRIS: -- and an overall cap.

MS. ROBESON: I see.

MR. HARRIS: And so you can't always add one plus one to equal two.

MS. ROBESON: Right. Okay. That's where I was confused.

MR. HARRIS: Yes.

BY MR. KLINE:

Q I understood that, and that's clearly set forth in the development plan. But the table seemed to be even more specific. And so are you suggesting there should be ranges for these numbers rather than specific numbers? I should have asked --

A Well, no, I mean, but --

MS. ROBESON: I think you are deviating from procedure and getting into a discussion, but go ahead. He did ask a question.

THE WITNESS: Yes. No, in the spirit, I guess, of trying to explain what we were hoping to accomplish in the area, why, hopefully, my enthusiasm for this came through last time, you know, I prepared some slides to try to help to illustrate what we were doing. I'm not an attorney. And I'm not a land use expert, as you just pointed out.

So yes, maybe perhaps legally if this, that would

need ranges if we were submitting it as some sort of site plan or something. But this was me trying to share a big picture of how a developer looks at --

MS. ROBESON: So this is simply, what you are saying is, this is simply conceptual, and that these numbers are not hard and firm, and whatever happens there is going to come in within the 484,000? Is that --

THE WITNESS: Absolutely, because there's a legal side of the development plan amendment that has caps of 484. And this is trying to show how this may play out. But obviously we're not deviating from what you're legally allowed to build.

BY MR. KLINE:

Q But we are agreed that the entertainment uses -- well, let me ask you this question. This chart, north district slide, says, entertainment, 75,000 square feet. The written statements said 66,000 square feet. Is that the range we are talking about, between 66,000 and 75,000 or is that just some discrepancy that we just need to reconcile, if you know?

A Again, from my standpoint, my experts may disagree with me, but I view this as a conceptual illustration of how this may lay out, and how it may layout over a long period of time, for a framework for us to be able to move forward. We have a legal restriction based on zoning, and then

ultimately site plan of maximum numbers of all sorts of development that we're going to have to adhere to.

But when you start, you know, you start somewhere with a plan, and you start laying it out. And we know the first thing that we'll be building. We don't know its exact configuration. We don't know exactly which tenants will be there or how they will be configured. But obviously they will have to fit within, you know, on the retail side, they'll have to fit within 484. Is that helpful? I'm trying to answer you.

Q Yes. No, I understand. We don't completely know the numbers. So let me try and wrap it all up, I guess. Looking at Exhibit No. 55, and the paragraph at the top of the page we talked about, 450,000 square feet of employment based retail, and that includes 14,000 square feet of restaurants, and a substantial marketplace food court.

So everything that's in red in there, including the food court, is all treated as being retail within 450. And then you go, pointed to needed additional retail north of 121 of some amount. I can't remember if we used a number. Those of us in the room know the number. I'm not sure you recalled what that was.

And then there is some more for neighborhood serving retail south of the exhibit we've got up there right now. Correct?

A That sounds accurate.
Q Okay. When I add all those up, which are clearly retail, we can't squeeze 66,000 square feet of entertainment in there and stay within 44. So your testimony is, entertainment would be treated as an office use. It would not come out of the retail 484,000 that you're asking for?
A I can affirmatively state that we wouldn't build more than 484,000 feet of retail because we wouldn't be allowed to.
Q And your point, if entertainment was treated as retail, you just wouldn't build as much entertainment as you thought?
A Correct. Correct.
Q Could you take me to what I'll call the overall plan, rather than I mentioned, I used the term, neighborhood serving retail. Maybe that's not the right term, but in the middle of the exhibit there's two more red boxes sort of in the center. That's to be the neighborhood serving retail. Is that -- what does that red represent? Let me put it that way.
A Retail.
Q Your statement talks about having some office use, probably upstairs. Do you have a sense of what the mix might be, or have you envisioned how you'd like to do that?
A I think ideally it'd be something like you see at

Bethesda Row, where you might have ground floor retail with some floors of office above.
Q Any sense of the amount of square footage that's available to be used in that area, or is depicted in that location? If you know.
A Yeah, I don't know, by the way, how much that was.
Q But you have said it will not include a grocery store?
A Right. We committed at the Planning Board, there was a limit on square footage of size of tenant which they felt was in order to ensure, frankly, we agreed that there wasn't a major grocery store that would compete with town center.
Q Well, I don't recall the square footage limitation being related to anything other than specialty retail. So it didn't relate to a grocery store in the location, did it?
A Which location?
Q The one we're talking about in the southern, the middle of the project.
MS. ROBESON: The red in the middle of the project.
THE WITNESS: I believe what came out of the Planning Board, and the commitment that we made, was to a square footage limitation.
MS. ROBESON: But I thought you testified

earlier --
THE WITNESS: We're not going to build a grocery store. That's correct.
BY MR. KLINE:
Q Of any size.
A Right. Right. We're committed to, we've made that commitment personally to the developers of town center.
Q We all have the benefit of being able to read your transcript, Mr. Kaplan, and I wanted to ask you some questions about how you, to use a loose colloquial phrase, how you get turned on by the idea of an amphitheater? You said that in your review, I guess, of the town center, you saw that there had been recommended for an amphitheater at town center, and then office and people, and where that idea can be integrated into your development.
Just tell us more about who you talked to and basically how you are going to make that work, or why you thought it would be appropriate here?
A Uh-huh. So let me wrap all that together. So the turned on part is because I just, and my partners get excited by creating developments that really activate and are positive for a community. And we really believe this one has the potential to do that. And we kind of in every meeting heard that from the community. So that's exciting.
And part of that is trying to step back and say,

you know, what creates that excitement and what's missing in a community. And the amphitheater, I do get excited by the fact that town center is planning an urban kind of outdoor entertainment space, and we're planning an outdoor entertainment space that we believe could be very complementary and serve a need that's not being served right now, because there is no space of this size there where a performer could actually perform right now. So I'm not an expert in this, but I've had the pleasure of partnering with Strathmore and the folks there.
Q You told us about it.
A So I spoke with them about it. I've spoken with the folks at Black Rock about it. I've tried to surround myself and speak to a bunch of --
MS. ROBESON: With who?
THE WITNESS: There's another music center called Black Rock, which is up 270 closer upcounty, music venue similar but smaller than Strathmore. And I've spoken to both of them, frankly, about both spaces, the town center space. I've had meetings with the town center developers and these experts talking about how you might program those. And the community has been pretty positive. And those folks thought that this might be an amenity that we could create for the County that could be exciting. So that was the nature of it.

BY MR. KLINE:
Q Well, you use the word complementary, and in fact, you used that term the first time. So I'm trying to understand, how does it function? How is it complementary in the sense that presumably you don't compete against these other venues. Is this Merriweather Post Pavilion, or is this just a grass hillside and a banjo player?
A Because of its scale is why it's complementary. It affords a different type of programming. It is a grassy amphitheater, so it's not a Merriweather Post Pavilion, but it is of a different scale than you could create at town center.
And that, you know, you program a small space with more of a banjo player kind of setting. And something like this you may actually bring in stages and loudspeakers, and actually be able to hold a much larger kind of performance. So that's the way that I meant complementary. You just, you couldn't host something of this size, a similar performance in a small square in a town center. You just, they're different.
Q You used the phrase that you've talked to the developer of the town center, and you've found that they could be complementary uses.
A Uh-huh.
Q This is a copy of Mr. Flanagan's letter in the

record. It's number 37.
MS. ROBESON: I have it.
BY MR. KLINE:
Q In the second paragraph down at the bottom, the second sentence says, specialty outlet retail will complement and augment the retail development of the town center, as long as a grocery store is not included in the specialty outlet retail. It will generate additional economic activity and bring new people and shoppers to Clarksburg and the town center.
You've said that the uses will complement each other. I read this to say the retail outlet center will create economic complementary. Isn't it a bit of an overstatement to say the town center developer has said your amphitheater will complement would they want to do in activation in the town center in light of the text of Mr. Flanagan's letter?
A I don't think his letter references the amphitheater at all.
Q Correct. All he talks about is how the specialty outlet retail will complement and augment the retail development of the town center. So it's an economic issue not a social or activation issue. This letter does not say the amphitheater will operate in a complementary fashion, correct?

A That's correct. This letter doesn't talk about the amphitheaters. I was relaying conversations. But this letter clearly doesn't talk about the amphitheaters.
Q If you're not the right person to ask, answer this question, just tell me so. I believe you talked about transit oriented. And can we get back to the north district? How is this layout transit oriented? Or what transit services are available, and where?
MR. HARRIS: Objection. I'm not sure the witness did testify to that, at least I don't recall it. I could stand corrected. But I think that's going beyond the scope of his direct testimony.
THE WITNESS: Regardless, I'm not sure I'm the best person to answer the question.
MS. ROBESON: Then we'll save it.
MR. KLINE: I'll defer the question to another witness.
MS. ROBESON: I see transit in the transcript at 78-7, 81-11 and 96. That was a reference to the corridor city's transit way. So I'm going to let another witness deal with that.
BY MR. KLINE:
Q Could I draw your attention to page nine of Exhibit No. 55 that I gave you, or highlighted text there? Going to the middle of that paragraph, the second sentence,

the fashion center employment retail proposes part of the final DPA will be a catalyst to the development of the remainder of the employment center. There is a proven track record to substantiate this statement.
Can you or will you have another witness give us a description of how a retail outlet fashion center stimulated an otherwise more of an office market? Do you have an example? You say there is a proven track record, so I assume there is some backup somewhere. Can you tell us what that is and when we're going to hear it?
A Again, I'd only want to speak from my own personal experience. We have found that time and again, actually, around the country.
Q Excuse me. We? Who is we?
A Let me say I, since I'm speaking, rather than we. I've found that time and again across the country where we've brought in retail tenants, often fashion oriented, and it has proven to be a catalyst for a pretty significant development around it, because absent that, you often don't have the activation that people are looking for, the excitement of that.
So one of the earliest examples of that would be in Santa Monica, California, on the Third Street Promenade where the office market and the rents changed dramatically as Third Street Promenade retail got developed. The same

thing happened in the Gaslamp Quarter of San Diego. Again, just referencing personal experiences. We saw it even in the development in San Jose, and certainly in Bethesda, closer to home.

Q Mr. Kaplan, your place making credentials are unchallenged. You are very good. But I haven't heard, the examples you all mentioned, Santana Row, et cetera, all sound to me like urban settings. And I don't think any of those qualify as a retail outlet fashion center operation that would have stimulated an office park. Am I correct?

A The ones that I just described, they're not outlet centers. That's correct. They're what this talks about, fashion center employment retail. They were primarily, they were largely fashion. They were retail. They didn't have a value orientation necessarily.

Q And my question is going to go to, and this will be my final question, and that is, there is sort of an element in the application that is, built it and they will come, meaning, build the retail outlet center and the office will come. And that's why I'm asking you to give us an example where that is true, because at least of the ones that we have talked about in this room, Leesburg, Queenstown, Hagerstown, that's certainly not a good example at all. So where is the example, because you say there is a proven track record?

A Well, first off, I don't say. You're reading --

Q I'm sorry, and maybe I misunderstood. Since this was written so well and you speak so well, I assumed you had a material hand in putting this together. Is that not true?

A So let me try to answer the question that I think you're getting to. My background is in retail, and I do believe from my personal experience, again, not as qualifying as an expert on this particular statement, but in my experience in development for over 20 years in retail, it has a truly catalytic experience.

We've worked with a lot of office developers and a lot of residential developers, and if retail can go somewhere, the others all wanted to partner and follow, because that created that excitement. That made that unique from any other piece of land where you might just put an office building, and there wasn't anything.

If you could find land where retail could go, so you had amenities for the people that would be working in the office, and it applies to residential, too, it became the gating issue. If you could have that retail, we would have our pick sometimes of the office developer or the residential developer versus the land as it sits today without that retail. There is a lot of land without retail where somebody can choose to put an office building.

And I think I referenced, you know, the recent

example that I know the Park and Planning staff who knows far more about this than any of us, I think they're really trying to --

MS. ROBESON: Don't say that. It's okay. Go ahead.

THE WITNESS: But I was just going to reference, there's a big vacancy rate in kind of the office only centers that are even local. So I've just seen this happen many, many times on a personal level, and have been in lots of sessions with people who are experts on it that talk a lot about that.

BY MR. KLINE:

Q Well, all I'm trying to get you to do is sort of distinguish between the retail outlets and the retail, because you have had your hand in a number of retail operations where I have no doubt that people built office close to them.

But I just haven't seen any demonstration, and maybe it's to come, that the retail outlets in the fashion center will draw office. That seemed to me a bigger jump. And I'm asking whether your case will include any examples of that?

A I mean, I can't answer your question differently than I have.

MS. ROBESON: Anything else, Mr. Kline?

MR. KLINE: Probably I should thought of it, but that will be fine. Thank you.

MS. ROBESON: Okay. Good. I mean, not good, but Mr. Chen.

THE WITNESS: He already cross-examined me.

MR. CHEN: Yes.

MS. ROBESON: You must forgive me. I really was on a personal --

MR. KLINE: You've been to Cape Cod. We heard that.

MR. HARRIS: A good vacation.

MS. ROBESON: No, I had family business that I had to take care of. So Mr. Harris.

REDIRECT EXAMINATION

BY MR. HARRIS:

Q Two quick questions. You were asked about Hagerstown and Queenstown and the extent to which those outlet centers had or had not generated office development around them. Would you compare or contrast those locations with Clarksburg, in terms of office?

A Yes, from my perspective, they're no comparable at all. Over the long term, the reason I-270 was designated as a technology corridor was the access to the type of people that would work in those types of centers, the easy proximity, the easy access.

Hagerstown and Queenstown are demographically very different. I wouldn't have anticipated that you would see lots of office development around those. But one can clearly envision, as the Master Plan did, as we do, this becoming a very vibrant longer term employment district.

MR. HARRIS: That's really all I have then.

MS. ROBESON: Recross, Mr. Kline?

MR. KLINE: Yes, simply because Leesburg wasn't included.

RECROSS-EXAMINATION

BY MR. KLINE:

Q Leesburg does seem to be a little bit closer in. I agree Queenstown and Hagerstown are off the face of the earth from our point of view. But --

MS. ROBESON: Hey, I'm from Garrett County.

MR. KLINE: But they are lovely communities.

MS. ROBESON: Yes. Okay. Go ahead.

MR. KLINE: Cumberland is just a wonderful place.

MS. ROBESON: Go ahead. I'm sorry.

BY MR. KLINE:

Q But how does Leesburg fit into that formula? I mean, there certainly are, there certainly are office buildings in Leesburg. Are there any office buildings close to, I can't remember the name of the outlet center there?

A I don't know the answer to that question.

MR. KLINE: Okay. That's fine. All right.

MS. ROBESON: Mr. Chen, any recross?

MR. CHEN: No.

MS. ROBESON: All right. Mr. Harris?

MR. HARRIS: Yes. We have, our next witness is Mr. Bogorad.

MS. ROBESON: Do you need a minute to put a slide up or anything?

MR. HARRIS: I don't think he has a slide presentation.

MS. ROBESON: Okay.

MR. KAPLAN: I'll turn this off.

MR. HARRIS: Yes. Thank you.

MS. ROBESON: Raise your right hand.

(Witness sworn.)

MS. ROBESON: Okay. Mr. Harris.

DIRECT EXAMINATION

BY MR. HARRIS:

Q Mr. Bogorad, would you state your name and business address, please?

A Leonard Bogorad, RCLCO, which is five letters, R-C-L-C-O. 7200 Wisconsin Avenue, 11th Floor, Bethesda, Maryland.

MS. ROBESON: Can you spell your last name?

THE WITNESS: Yes. B as in boy, it's a strange

one. B as in boy, O-G-O-R-A-D, as in David.

MS. ROBESON: Thank you.

MR. HARRIS: We have introduced a resume, bio on Mr. Bogorad. If we could have, that would be Exhibit --

MS. ROBESON: 56.

MR. HARRIS: -- 56. Thank you very much.

MS. ROBESON: Any objections?

MR. KLINE: No objection.

MR. CHEN: No objection.

MS. ROBESON: 56 will be resume of Leonard Bogorad.

(Exhibit No. 56 was marked for identification.)

BY MR. HARRIS:

Q Can you describe your experience, in general, in terms of fiscal and economic impact analyses?

A Yes. I've conducted about a hundred fiscal and economic impact studies for both public and private clients in the Greater Washington area, including downtown Silver Spring, National Harbor, Chevy Chase Lake recently, in Montgomery County. Obviously, National Harbor is in Prince George's. And I've also conducted a number of studies, similar studies around the country.

Q Do you also have experience regarding retail and office market analyses and the impacts of one retail center

on another?

A Yes. I've conducted many retail and office market analyses and studies of mixed use developments as well in the Washington area, and elsewhere in the United States. And I've also analyzed the impact of shopping centers on other retail areas.

Among other things, I prepared a handbook on analyzing the impact of shopping centers on downtowns for the U.S. Department of Housing and Urban Development.

MR. HARRIS: Madam Examiner, we are going to offer Mr. Bogorad as an expert in real estate market and economic impact analyses.

MS. ROBESON: All right. Any objection?

MR. CHEN: Could you repeat that?

MR. HARRIS: Real estate market and economic impact analyses.

MR. CHEN: Thank you.

MS. ROBESON: Okay

MR. KLINE: Ms. Robeson?

MS. ROBESON: Yes.

MR. KLINE: I certainly have no problem stipulating Mr. Bogorad as an expert. The prehearing statement identified him, and on which I based the scope of my cross-examination questions said, he will testify as an expert in the field of fiscal impact and market analysis.

And I read that to mean, if this occurs, it will generate this much income per family, and it will be a benefit, and that would include some of the general provisions of the MXPD zone.

It says, respond to market demand, provide a positive fiscal impact on an area. I did not understand this to say he would be making a value judgment of how, using my phrase, build it and they will come. So I would object to his testimony, because it's beyond the scope of what I understood his testimony was going to be, and he has written to date, in terms of how the retail outlet center lures the office development, because that, I think is a land use issue, not an economic, fiscal impact.

MS. ROBESON: Mr. Chen, do you want to weigh in on this?

MR. CHEN: No. I have no problems with the nature of how he wants to characterize his expertise. But his expertise is limited to his prehearing statement. And Mr. Kline picked up on it quicker than me, because I was going to start objecting if we're getting past the fiscal impact analysis, or area that he has identified in his prehearing statement. Now, I don't know where we're going with this, but I think it's got to be that narrow.

MS. ROBESON: I am not going to narrow it like that. I know what he was -- your fiscal impact analysis

showed the amount of revenue that would be generated. Correct?

THE WITNESS: Yes, and expenditures. Yes.

MS. ROBESON: Yes. And now you're saying you're going to testify as to how the real estate market or the retail generates office.

THE WITNESS: Among other things. I consider that part of market analysis, which is what I do most of my life with.

MS. ROBESON: Okay. Well, what I'm going to do is, we have time -- I'm going to let it in because it's too important and you, it's going to be 10 days well in advance for you to prepare a rebuttal case. So I --

MR. KLINE: That's fair. Since this is strictly fiscal impact analysis. I think it's entering into an area --

MS. ROBESON: I saw that, too, and I wondered why it was in there, because it was mostly the revenue generated by these to local jurisdictions, and not necessarily the link between now. But I am going to let it in, and you will have a chance to rebut. If you want to reserve cross-examination to another, you know, 10 days, that's fine as well.

MR. HARRIS: Let me weigh in on this. I haven't said anything. But it's entirely within the scope of what

his expertise is, and what he was offered as. We're not expected to present his entire testimony in our prehearing statement.

MS. ROBESON: Well, what is your summary in your prehearing statement? In your prehearing statement you're supposed to give a summary of what is going to be testified to.

MR. HARRIS: ''Expert in the field of fiscal impact and market analysis, and explain how the project will respond to market demand and provide a positive fiscal impact.'' So it's not just the fiscal impact.

MS. ROBESON: Well, I'm going to give them an opportunity if they -- I'm going to let him testify as an expert in real estate market and economic impact analysis. I'm going to hear the analysis. I am going to let them, if they choose, to reserve cross-examination.

MR. HARRIS: The only problem I have with that is, it's my full intention to finish our hearing on Wednesday, as we discussed at the outset today. So I --

MS. ROBESON: Well, they can defer -- oh, I see what you're saying.

MR. HARRIS: They can cross-examine him all they want today. He's not -- the only report that he is presenting is the report that's been in the record for months.

MS. ROBESON: Okay. I see what you're saying. All right.

MR. KLINE: And we have no objection to that. We probably wouldn't have asked any questions on that.

MR. CHEN: That's right.

MR. KLINE: What he is adding in is what we would want to ask questions about.

MR. HARRIS: Well, you can ask those questions.

MR. CHEN: No, wait a minute. The report that was submitted doesn't get into this whole other area. You described the area that I presume, and based upon your reading of the report, as did Mr. Kline and myself. That report doesn't get into this other area whatsoever.

MS. ROBESON: Okay. This is what I'm going to do. You can, if you wish, you can reserve cross-examination to 8/14. But it's a bare bones statement in the justification, and the report may have led you a different way. If you wish, you can reserve cross-examination until 8/14, but I'm not going to delay it by the 10 days. All right. Okay. Mr. Harris?

BY MR. HARRIS:

Q Thank you. Were you retained by the applicants in this proceeding to analyze the fiscal impact of the proposed outlet retail, both in the County and in the State of Maryland?

A Yes, I was.
Q And did you submit a report on that?
A Yes, I did.
Q And is that Exhibit 23(d) as in David in the record?
A Yes, that's my understanding.
Q Can you explain what you did and what you found, as reflected in that report?
A Yes, I conducted a complete analysis of Montgomery County revenues and expenditures, and State of Maryland revenues that will result from development of the retail center over the next 20 years, including both direct and indirect impacts. And I also analyzed the likely employment that will result in the retail center.

And I then calculated the next fiscal impact on the County by year, and in total during this period. And we found that the County will receive a very substantial net fiscal impact of almost $39 million dollars over the next 20 years. And we found that the State will receive approximately $403 million dollars in revenues over the next 20 years.

We also found that the construction of the center will support approximately 2,000 temporary jobs in the State, and the operation of the center itself will support approximately 2,200 permanent jobs, including indirect

impacts and --

MS. ROBESON: What is indirect impacts? I had that question.

THE WITNESS: Yes.

MS. ROBESON: I looked for it, but I didn't see it.

THE WITNESS: Sure. So let's break it down. That's a good question. 1,660 of these 2,200 jobs would be at the center itself. So these would be, of the permanent jobs, would be actual jobs working, you know, people reporting to work at the center for managers of stores, to maintenance people, to clerks and so on.

And then in the economic activity that occurs, basically, in this case, paying the salaries and wages of the people who work there, those people take that money and in part spend money for different things, some of which are, a good chunk of which are within the County and an even larger percentage are elsewhere within the State.

And that money then generates additional pieces of jobs as they spend money. And it goes through the economy. It's basically a multiplier effect, is another term that's used. And there are very elaborate models that have been set up and used.

MS. ROBESON: That was my next question.

THE WITNESS: Yes. They're called input/output

models, and they trace things through an economy. And eventually, the multiplier effect dies out because, you know, spending is happening somewhere in a different part of the country, and some of it is obviously saved, and so on.

But it's a pretty, it's a very well-established methodology that estimates what the impact is of a given amount of economic activity. And I think the bottom line is that this is a major employment concentration, and will be a major employment concentration, and a lot of the jobs on-site and a range of jobs off-site. And those jobs that are resulting from this are also a range of types. You know, they are everything from lawyers and accountants to minimum wage workers, and so on.

BY MR. HARRIS:
Q Based on your expertise, in terms of doing market analyses for different developments, do you have an opinion regarding the potential of office development at Cabin Branch?

MS. ROBESON: No, I'm going to let -- I understand. You can note your objection. Well, say your objection.

MR. CHEN: Well, it goes back to what I said before. This is beyond what was presented.

MS. ROBESON: Yes.

MR. CHEN: And in order to not pose a problem, if

the Examiner will note a continuing objection.

MS. ROBESON: A continuing objection. Just for the record, as I -- the summary, the statement of justification was bare bones. But I don't see him as limited by his exhibit. And that's why I'm going to allow him to testify because have qualified him in the area that he was submitted on his resume. So just for the record, that's my clarification. And I will note your continuing objection.

MR. CHEN: Thank you.

MS. ROBESON: Okay, Mr. Harris.

BY MR. HARRIS:
Q Okay. Do you recall the question, Mr. Bogorad?
A Yes, do I have an opinion regarding potential for office development at Cabin Branch. I believe there is long term potential for office development. I think it is distinct from a location like Hagerstown or Queenstown, which really have no, there's no office demand to speak of in those corridors and in those general areas.

There is demand and will be more over time in the I-270 corridor, and it's clearly, you know, a lot of reasons why that's true. But I think it's also critical to recognize, and I see this in all the office market studies that I do, and so on, in this region, that the office market has been very challenged, particularly from Clarksburg

through Gaithersburg. And there's been very limited demand that's actually shown up there. And I expect this to improve in the long run, but not that fast, quite honestly.

To offer a few data points from Costar, which is the established source for these kinds of data, the average annual net absorption in the area from Clarksburg through Gaithersburg --

MS. ROBESON: Office absorption?

THE WITNESS: Office absorption, sorry, yes, has been only 74,000 square feet per year over the past five years in this portion of the I-270 corridor. 16 percent of that office space is vacant. Average rents are a little bit lower now than they were five years ago. And absorption has been declining every year since mid-2010, despite the economic recovery.

Why is this? It's in part because of the amount of office space that companies and government agencies are leasing has been dropping significantly. And there have been a lot of articles about this. One of the key reasons is that these office users, whether they are public or private sector, have been using a lot less space, leasing a lot less space per employee, with more open offices, more working from home, and so on.

So even when there is healthy employment growth, and we've had pretty good employment growth in this region,

we have not seen nearly the office demand that we've seen in the past. And so that makes the demand side of the picture challenging. It's not going to be easy to get office development in any particular location in this corridor.

The situation has been made even more challenging by the addition of substantial capacity, basically competition for office development in Germantown and in the Life Sciences Center in Gaithersburg, both of which I would consider for most tenants to be more desirable locations than Clarksburg.

So the absorption is going to be a lot more limited than we would all like. There is a tremendous amount of office capacity planned at Cabin Branch, even with subtraction of the proposed retail piece of that, which obviously would reduce the maximum somewhat. But there is still a tremendous amount of office space left. And it will be many years before that's all used up, given the market conditions.

BY MR. HARRIS:

Q Do you have an opinion regarding the impact of the proposed retail on the desirability of the remainder of the Cabin Branch employment envelope?

MR. KLINE: Could I ask for clarification, or more specification.

MS. ROBESON: Wait. Okay go.

MR. KLINE: Yes. I mean, there's two kinds of retail here. I guess I'm asking what kind of retail are you talking about.

THE WITNESS: Okay. Sure.

MS. ROBESON: Okay. Can we save their future questions for cross-examination?

MR. KLINE: Yes, ma'am.

MS. ROBESON: Thank you.

BY MR. HARRIS:

Q Let's try to -- I'll take the cue though. Do you have an opinion regarding the impact of the proposed specialty retail, sometimes called outlet retail being proposed at Cabin Branch on the desirability of the remainder of the Cabin Branch employment envelope?

A Yes. As I just said, it's going to be challenging to absorb the office capacity that's there. So I think the key thing is to recognize that any sort of competitive advantage is going to be very important in getting office to Clarksburg and to this location, given all the competition. And the competition is not just within Montgomery County. It's Northern Virginia, in particular. It's in Frederick County and other places.

But I've prepared many market analyses of office and mixed use developments, as I said. And I've seen a lot of these projects that are being proposed right now, and

what is being desired by developers and by tenants. And one thing that's clear is that the office, the sterile sort of office park, the office only kind of development, is really a dinosaur at this point.

That's not something that most office tenants or government agencies or others are looking to move into. Our development clients are steering away from those, and are doing everything they can to provide a mix of uses. And retail is typically one of the most desired uses, because it does liven up the mixed use development; create a mixed use development, provide services and options for those who are working there, and so on.

I think following up on the discussion in the previous testimony, I think it is important to recognize, you know, no question that it's a somewhat untested proposition that outlet retail would be the kind of catalyst that you would see demonstrated in places like Reston Town Center and Bethesda Row and so on that Mr. Kaplan talked about.

But we also have to recognize that we are talking about Clarksburg. We're talking about a place where those kinds of centers are not going to happen, for better or for worse. And so if we were going to --

MS. ROBESON: What do you mean, they're not going to happen?

THE WITNESS: There's just not market demand for a high density mixed use development like a Bethesda Row or Reston Town Center. And I could go into, you know, I could go on at length why that's the case.

And so if one said, all right, you're either going to have all office, an all office development, or you're going to have a, you know, a proven kind of mixed use development like Bethesda Row, you could wait for 100 years and it's not going to happen here. And so you would have an all office development which is not going to be competitive with a lot of other options that are being built.

And we're working with clients along the Dulles Access Road in Loudoun and Fairfax, and every one of those is planning a mixture of uses with significant retail, for example. And they're very much competing in Montgomery County with those locations, and not all that successfully in some cases.

And so to compete with those and with other locations, it's, you know, really important, I think, to have that mix of retail. And we have to have retail that there is a market for or it's not going to happen. And the kind of retail that there clearly is a market for in this area, one of those key types is specialty or outlet type retail as evidenced by two proposals for that kind of use here.

So we are going, you know, that's, we know we can get that kind of retail here. We know we're not going to get something like Reston Town Center here. And in my judgment, based on all of my work in market analysis on these kinds of developments, seeing what I'm seeing throughout the region in proposals for mixed use developments, I believe that the types of retail, the specialty outlet retail that's being proposed here, will be a significant advantage in attracting office to Cabin Branch.

And therefore, I would say that if you look ahead 10 years, 20 years, 30 years, there will be more office developed at Cabin Branch with this retail than without it. You may say, that's counter-intuitive, there's going to be somewhat less capacity for office. But as I said a minute ago, a few minutes ago, there is plenty of capacity for office here.

There's plenty of capacity, a number of other sites in Clarksburg and in Frederick and in Gaithersburg and so on, Germantown. But what's really important is having that competitive advantage. And I believe that having some of this office capacity sliced off for retail will actually improve the capability of this site to attract the office development.

BY MR. HARRIS:

Q There has been some testimony about the relationship between this retail and the Clarksburg Town Center retail. Do you have an opinion with respect to the impact of this proposal on the Clarksburg Town Center?

MR. CHEN: Is my objection noted?

MS. ROBESON: Yes.

MR. CHEN: This is land use.

MS. ROBESON: I think it is and it isn't because many of, the goal of the Master Plan was to have the town center at a certain time period vis-a-vis this. And I understand your objection, but I'm going to overrule it. Go ahead.

THE WITNESS: Yes. And I do think I'm answering this from a market analysis perspective. I do think that's, I defer to my planning brethren for land use opinions, but I do believe this is key element of market analysis. It's a part of this, answering your question, Mr. Harris.

The, and I have been evaluating, you know, every time I do a retail market analysis, I'm considering the impact and the effects of other retailers and retail concentrations. And as I said, I wrote a handbook on this for HUD a number of years ago that looks at the impact of retail on and other retail from a market perspective.

And when analyzing this question, it's critical to evaluate the specific types of retail that will be included,

as well as the locational characteristics of each area. And I don't believe that the retail that will be built at Cabin Branch under this proposal will significantly compete with the retail that is likely to be attracted to the town center, which is going to be much more neighborhood and community oriented, rather than serving a substantial portion of the outlet center's market will be regional and travel oriented, not that it won't get some shoppers for the types of value retail, and so on, that will be at Cabin Branch.

So I don't believe this is going to have a negative impact on the potential for the town center. And it's probably most important to think about the supermarket because that's the key element to the town center. That's what the town center really needs is a full scale supermarket.

Once that is signed up, I truly believe there will be significant demand and substantial demand for the types of retail that goes along with a supermarket, and it will be built and be a successful town center.

But I am concerned that there may well not be enough demand for another supermarket, as is currently planned for Cabin Branch, and if that were being sort of a threat that's hanging over the town center, that maybe there will be another supermarket at Cabin Branch, I think that

would make it more difficult to attract that critical supermarket to the town center.

So I think the commitment to not have a full size supermarket here is really important for the town center. And then again, much of the retail, most of the retail, really, at the town center, is not going to be overlapping with the types of retail that are at, planned for Cabin Branch, which certainly is planning to have some neighborhood related retail serving primarily, I would think, without the supermarket, the residents of Cabin Branch itself.

These will not be directly competing centers, and in my view, will not be detrimental to each other. And I also think it's important to take a kind of a statement that Mr. Flanagan made in his letter which we talked about a minute ago which is that this will be a source of vitality and economic activity for Clarksburg, which I think badly needs that. It will create jobs, and people who will, to some extent, be shopping at the town center. It will put Clarksburg more on the map as a retail area.

Some of the people who come to shop at outlet stores will be looking for interesting restaurants, unique kinds of things like that, that I expect will be at the town center. So I think on balance, this will actually be positive for the town center.

MR. HARRIS: No further questions.

MS. ROBESON: I just had a question. You don't have the benefit of this maybe, but in the Master Plan, I look on page 43 is a town center district land use plan. And it has R&D and office industrial park.

THE WITNESS: If someone could help me find --

MR. HARRIS: R&D is this.

MS. ROBESON: I'll give you a moment to read the legend.

THE WITNESS: Has it along 270, you're saying?

MS. ROBESON: Yes. And I guess my other question is, how is this going to impact that employment use, or if you know? If you don't know --

THE WITNESS: I really don't know what the, I don't know much, if anything, about those sites over there, who owns them, what the plans are.

MS. ROBESON: Okay. So your testimony is that the retail component in Cabin Branch is not going to compete with the retail of town center?

THE WITNESS: I mean everything competes a little bit, but not significantly and not in the way that would harm the town center or decrease the odds of having that town center built, correct.

MS. ROBESON: Okay. Any follow-up questions based on my question?

MR. KLINE: No, ma'am.

MS. ROBESON: Okay. Mr. Kline, do you want to reserve your cross-examination? I'm assuming yes.

MR. KLINE: The answer is yes.

MS. ROBESON: Okay. Mr. Chen, you as well?

MR. CHEN: Yes.

MS. ROBESON: Okay. And then on the 14th, Mr. Harris, you will get the opportunity to redirect as well.

MR. HARRIS: Yes. Thank you.

MS. ROBESON: You're welcome. All right.

MR. CHEN: If I may.

MS. ROBESON: Yes.

MR. CHEN: This last comment of this gentleman, about preparation -- I'll wait. I'll wait.

MS. ROBESON: I know I'm going to hear more on this.

MR. HARRIS: May we take a five-minute break before our next witness?

MS. ROBESON: Let's take a 10-minute break.

(Whereupon, at 10:56 a.m., a brief recess was taken.)

MS. ROBESON: Okay. Let me just check one thing. We're back on the record. All right. Just to remind everyone, we're not going to take a lunch because we are adjourning at 12:30 today. All right. So Mr. Harris.

MR. HARRIS: Yes. Our next witness is Mr. Chris Turnbull.

MS. ROBESON: Okay. Please raise your right hand.

(Witness sworn.)

MS. ROBESON: Okay. Go ahead, Mr. Harris.

DIRECT EXAMINATION

BY MR. HARRIS:

Q Would you state your name and business address for us, please?

A Christopher Turnbull, 210 Wirt Street, Southwest, Suite 201, Leesburg, Virginia.

Q And by who are you employed, Mr. Turnbull?

A I work for Wells and Associates.

Q And what is your profession?

A Transportation planning and transportation engineering.

MR. HARRIS: I've circulated to the parties here a copy of your resume. Can we have that marked as Exhibit No. 57?

MS. ROBESON: Yes. Any objections?

MR. KLINE: No objection.

MR. CHEN: No.

MS. ROBESON: That will be resume of Christopher Turnbull.

(Exhibit No. 57 was marked for

identification.)
MR. HARRIS: Okay. Mr. Turnbull, would you tell us a little bit about -- well, we're going to offer Mr. Turnbull as an expert in transportation and traffic engineering. I think both opposing counsel have used him before, so before I go through the preliminary questions I will just see if there is any objection.
MS. ROBESON: Any objection.
MR. KLINE: No objection to his qualification as an expert in the field.
MS. ROBESON: Mr. Chen, any objection?
MR. CHEN: I concur with Mr. Kline.
MS. ROBESON: All right. You are qualified as an expert in transportation planning and engineering.
THE WITNESS: Transportation planning, yes.
MS. ROBESON: What?
THE WITNESS: Transportation planning. I'm not a professional engineer.
MS. ROBESON: Okay. All right. Transportation planning.
BY MR. HARRIS:
Q Okay. Mr. Turnbull, did you have an involvement in the Cabin Branch project in the past?
A Yeah, I've been involved with the Cabin Branch since 2001.

Q Can you tell us a little bit about your history of involvement with the Cabin Branch project?
A We completed traffic analyses, the local area traffic review starting with the first submittal which was in July of 2003, which was approved for the phase one preliminary plan approval, which also included the zoning element of Cabin Branch.
We also completed an updated LATR for the phase two portion of the project which was approved in 2004. And then of recently, we've competed an LATR updated in April 2013.
MR. HARRIS: And I believe that LATR update from 2013 is in the record as Exhibits No. 23(b) and (c).
MS. ROBESON: Okay.
BY MR. HARRIS:
Q So, Mr. Turnbull, would you explain to us what you did in connection with preparing Exhibit No. 23(b) and (c), your LATR update?
A Well, we took a look at the transportation impacts of changing out the medical hospital and medical office use for specialty retail of 20 percent of the total commercial area which accounted for 484,000 square feet of specialty neighborhood retail.
Q And do you have an overall conclusion as to how that, how the traffic generation from that revised use would compare with the traffic generation from the previously approved use?

A Yeah. The specialty retail replaced the commercial uses and would generate fewer trips than was approved in the preliminary plan in November 2004. The other conclusions are that, you know, we also looked at the current traffic out at the critical intersections, and the existing intersections still operate below the critical lane volume standard of 1,425.
We included and updated background developments, mostly, well, all of which are on the east side, seven of which are unbuilt projects. So we included those traffic layered on top of the existing traffic.
And then we calculated the specialty retail trips in lieu of the hospital medical campus uses, and found that those, the overall trips of the project would be approximately 10 percent fewer during the a.m. and the p.m. peak hours.
We then completed a traffic analysis using the same assumptions that we did in the original approval, and we found that each of the critical intersections would operate below the CLV standard of 1,425.
The intersections on the east side, which was also part of the original site, would also operate better than previously analyzed due to the incremental decrease in those

trips. In addition, as expected, that the impact of the east side intersections would be further decreased if a regional retail distribution of trips is used for the specialty retail.
In other words, we are using the super district distribution as provided by Park and Planning for commercial use. And that kind of dictates how trips arrive to the site, having it be an outlet center, which draws from maybe a larger area, would maybe concentrate more on I-270, so there could be a change in the distribution coming to the site. So that's, you know, that's where you would anticipate a decrease in those impacts on the intersections on the east side, as there are fewer trips on that side.
This would not necessarily be the case if a similar project was developed on the northeast portion of Clarksburg, because that's where the trips are going to, specifically.
And we also did a supplemental analysis because retail trips operate as a peak during a Saturday. And although the Saturday retail trips increased from 700 p.m. peak hour trips, to 1,900 Saturday peak hour trips, the overall project total decreases by 6 percent.
So when we change out the retail for the commercial, we're still below the overall trip generation that was expected to Cabin Branch by 6 percent.

MS. ROBESON: It's just, but it's just concentrated differently.
THE WITNESS: Correct, during the --
MS. ROBESON: I'm looking for the, I remember the supplemental analysis, and I'm looking for the exhibit number here. What were the levels of service for the peak hour? When is the peak hour on Saturday?
THE WITNESS: On Saturday it's roughly from 11:00 to 2:00. So it's during the midday time frame.
MS. ROBESON: And what were you, I can't recall what your levels of service were?
THE WITNESS: They were all below the 1425, in fact --
MS. ROBESON: They were.
THE WITNESS: In fact, the analysis shows that the p.m. peak hour during the typical weekday is the most critical time period, because that's when all of the trips occur; that is, the office, the research and development, the retail, and the residential trips all occur. On Saturday, you get a big decrease in the commercial traffic because the employment associated with those don't generate trips during the weekend, per se, or not a large amount.
MS. ROBESON: I see. I understand. Okay.
BY MR. HARRIS:
Q Would you turn to your Saturday analysis, and just

answer the hearing --
MS. ROBESON: Do you by any chance have the exhibit number for that?
MR. HARRIS: I thought that was 23(b), but let me find my exhibit list. I misspoke.
MR. ROBINS: It might be (c).
MR. HARRIS: (c). Yes.
MS. ROBESON: Oh, I'm sorry. I missed that.
MR. HARRIS: Yes. 23(b) and (c).
MS. ROBESON: I see it. I have it now.
MR. ROBINS: Is (c) the Saturday analysis?
MR. HARRIS: (c) is the Saturday analysis.
MS. ROBESON: Yes.
MR. HARRIS: And (b) is the LATR study.
MS. ROBESON: Okay. I'm sorry. Go ahead.
THE WITNESS: That's okay. The CLV's are summarized in table one, which is attached to the memorandum.
MS. ROBESON: Right.
THE WITNESS: Behind all the figures. But the most critical intersection is the I-270 northbound on and off ramp at Clarksburg Road. And they had a total CLV of 1,203. And I believe the p.m. peak hour had a CLV of 1,300, in that range. And as you go further to the west, the CLV's decreased for the critical intersections.

BY MR. HARRIS:
Q Okay. And do you have an opinion as to whether this revised or this development plan amendment then meets the County's applicable transportation standards?
A It could meet the transportation standards. It would be below the CLV, and it would not create an adverse impact to the surrounding network.
Q And is it within the traffic, all of the traffic allocation that has already been made for the Cabin Branch project?
A It is. It generates fewer trips than was previously approved with the project.
Q And do you know whether the Park and Planning staff and the Planning Board have reviewed your analysis, and if so what their conclusion is?
A They have reviewed it, and they concluded that it meets the standards for the LATR.
MR. HARRIS: I have no further questions.
MS. ROBESON: All right. Mr. Kline?
MR. KLINE: Thank you.
CROSS-EXAMINATION
BY MR. KLINE:
Q Bear with me because I only have 23(c). So if my questions are predicated on 22(b), I apologize. In 23(c) on page four --

A Is that the Saturday analysis?
Q Yes, sir.
A Okay. All right.
Q On page four in the paragraph titled, site trip generation, you talk about the development program or the report discusses the development program, lists the number of households, 500, only have this 2.420 square feet of commercial space, which includes 450,000 square foot outlet center. So the first question that comes to me, do retail outlet centers have a different trip generation rate than retail?
A They do.
Q They do?
A They do. ITE, the Institute of Transportation Engineers has a database associated with outlet centers. And generally those trips are fewer during the peak hours than typical retail, and for other commercial, like office.
Q Because I don't have (b) this question is going to be a little bit vague. In 22(b), which I guess is the LATR referenced, how much square footage did you allocate to retail and entertainment uses in terms of calculating the trip generation?
A The total square footage was 484,000 square foot is allocated to the retail/specialty retail.
Q Okay. If I understood that, so you're saying

34,000 square feet would be attributable to --
A A neighborhood retail type of trip generation, correct.
Q You heard my questions of Mr. Kaplan. How did you treat the 66,000 square feet of entertainment uses that were mentioned in the applicant's justification statement?
A I actually didn't see Mr. Kaplan's testimonies. I was scrambling across the street.
Q Did you have an opportunity to review the applicant's justification statement --
A I did not.
Q -- to participate at this time. Bear with me a second here. Thanks. Mr. Turnbull, this is the applicant's justification statement marked as Exhibit No. 55. And I highlighted some things, so I'd have some questions to ask Mr. Kaplan. And basically, in the first paragraph I highlighted here, it talks about a 450,000 square feet employment based retail with 14, including 14,000 square feet of restaurants and substantial marketplace food court.
A Yes.
Q And then further on it talks about, as time goes on, maybe construction 66,000 square feet of entertainment uses to be added. Is that broken out in any way in terms of your trip generation rate?
A Not the 66,000 square foot. But if the

entertainment uses came out of the 450, it would, in the eyes of ITE, it includes those type of entertainment uses within the retail component. So if you had like a --
MS. ROBESON: But I thought you said that retail outlet centers had a different trip generation rate?
THE WITNESS: They do. They do. But, and not typical for outlet centers to have like entertainment centers like a theater, for example. But it could have restaurants, those other types of components of entertainment which is encapsulated in the total trip generation, because it's an average of a lot of different studies, so it captures a lot of types of different uses for outlets.
So I'm not sure what the 66,000 would, and I did understand there is a discussion about an amphitheater of some sort that might be part of the entertainment. If that's the consideration in this, the amphitheater would not necessarily generate peak hour trips that would be attributable to the critical time periods.
BY MR. KLINE:
Q So your 66,000 then is included within the category of retail?
A Right.
Q I didn't write fast enough when you made a comment but we're back on 22(c) now. The trip generation from the

new mix of uses, I think I heard you say that Saturday trip generation at Cabin Branch at build out would be 700 trips during the peak hour?
A Let me check my notes here. That relates directly to the retail trip generation. Previously, there as 120,000 square foot of retail. That generated 700 p.m. peak hour trips. And during the Saturday it's 1,900.
Q Okay. So the 484 is equivalent to 1,700? Is that what you just said?
A Well, I can look at the trip generation and see what the equivalency is.
Q It's not a trick question. I was trying to get the comparison of the two numbers.
A I think the overall comparison is, during a Saturday, Cabin Branch generated X number of trips with the approved Cabin Branch. And when you replace it with the outlet center, we're still 6 percent lower than what was previously approved.
Q Well, and that 484,000 square feet of retail in lieu of 120,000 would be the equivalent of how much?
A In lieu of 120 plus the hospital that was accounted for. So there is like 360,000 square foot of commercial development that's being converted over.
Q Okay. Understood. So it went from 700 to how many?

A Let me --
Q I know it's there, because I heard you say it before.
A Well I did. Unfortunately, it was a comparison of the previous. I didn't include that document in here. So there's a trip generation comparison for the Saturday is what I think that 700 is. So I didn't include the by right trip generation for Saturday. So that's where that came from, that 700.
Q All right. Let me try to back into it. You said that the total trip generation would be less with the new proposal --
A Right.
Q -- than the approved proposal --
A Correct.
Q -- by 6 percent.
A On Saturday.
Q On Saturday.
A Right.
Q So does that tell me that the number that I'm asking about is less than 700? Because I thought I heard you have a four digit number.
A No, the number of trips for the Saturday, for the retail component is a fairly large number.
Q Give me in order of magnitude. Three times, two

times, five times?
A Well, maybe 100 percent or something like that, or two times.
Q 1,400 or 1,500, something like that?
A Uh-huh.
Q And the last one is more of a, I mean, we all deal with the adequate public facilities harness. And what you're saying is, the levels of service are okay. And the transportation network can handle all the traffic no matter what, what form it is in?
A Correct.
Q But is there not a qualitative difference in terms of the traffic on Saturdays compared to the capacity of the networks? In other words, if I had bought a house in Cabin Branch and thought I was going to be driving to the grocery store on a Saturday morning, I'm now dealing with, apparently, twice as much traffic as I thought I was going to have before. And doesn't that change the character of the community, at least for the Saturday dimension?
A I'm not sure. I don't know that that would be a consideration, because the outlet is near the interchange. And if you were shopping, you may go local. So you may not be mixing with those folks. And there is also an expectation on Saturday that you do intermingle with those types of trips. I think the change comes in your behaviors,

is that you're not trying to get to work by 8:30 in the morning, so you're sense of urgency to get through the network is not as high.
Q So the numbers that we're talking about may be twice as much as under the approved plan actually differ. It may not be so much of the southern end, but it would be more traffic on the northern end than there is on the southern end, attributable to people visiting the retail outlet center?
A Sure.
Q Yes.
A I mean, it's still only 6 percent lower.
Q Right.
A So there was a level of traffic expected in the first place.
Q And I can tell, this is just my blank spot, but if we're 6 percent lower, why are we twice as much traffic? Six percent is the day long number?
A Uh-huh.
Q And the twice as much is just during the peak hours?
A Just during those peak hours.
Q Which is 11:00 to 2:00?
A Well, it's one hour in that time period usually.
MR. KLINE: Fine. Fine. No further questions of

Mr. Turnbull.
MS. ROBESON: Okay. Mr. Chen?
MR. CHEN: No questions.
MS. ROBESON: All right. I just have one question. How did you determine the peak hour?
THE WITNESS: Well, we actually completed traffic counts for a Saturday.
MS. ROBESON: On a Saturday?
THE WITNESS: On a Saturday, we actually counted, we counted --
MS. ROBESON: You did it the same way?
THE WITNESS: Yeah, we counted the traffic and we picked the highest peak hour during that time period.
MS. ROBESON: Okay.
THE WITNESS: And then we applied the peak hour numbers from the ITE.
MS. ROBESON: Okay. All right. Mr. Harris?
MR. HARRIS: Just one follow-up question.
REDIRECT EXAMINATION
BY MR. HARRIS:
Q Can you advise us whether Saturday counts are required under the County's transportation analysis, or whether this is something that was done beyond the requirements?
A Yes, we did this beyond the requirements. We

actually could have just done a trip generation comparison and just showed we're underneath the trips associated with the preliminary plan approval. So we kind of did one step above and beyond, partly to get a good sense of how the traffic will work with the retail center.
Retail is a very discretionary trip, and most retailers are very cognizant of that. And so their road network, they tend to have their road network in a very good order, if you will.
MS. ROBESON: Okay. Any redirect, Mr. Chen? All right. Mr. Harris?
MR. HARRIS: Okay. Our next witness is Gary Unterberg. It may take him a moment to set up here.
(Discussion off the record.)
MS. ROBESON: Okay, Mr. Unterberg. Please raise your right hand.
(Witness sworn.)
MS. ROBESON: Okay.
DIRECT EXAMINATION
BY MR. HARRIS:
Q Mr. Unterberg, would you state your name and business address, please?
A My name is Gary Unterberg, with Rodgers Consulting. We're at 19847 Century Boulevard, Suite 200, Germantown, Maryland 20874.

Q And what is your position with Rodgers?
A I am a senior vice president. My background is in landscape architecture and land planning.
MR. HARRIS: We have submitted what I think would be marked Exhibit No. 58, a statement of qualifications for Mr. Unterberg. And again, we would offer him as an expert in land planning. And I don't believe either person, counsel, has any objection to that.
MS. ROBESON: Well, I will let you speak for yourselves.
MR. CHEN: I don't.
MR. KLINE: No objections.
MS. ROBESON: Okay. You were right. 58 will be resume of Gary Unterberg.
(Exhibit No. 58 was marked for identification.)
BY MR. HARRIS:
Q Would you tell us a little bit about your particular experience with respect to Montgomery County Master Plans and the Clarksburg Master Plan in particular?
A I've been practicing in Montgomery County, in particular, for a little over 25 years. And more particularly, in Clarksburg for the last 15 years. More specifically, I've worked on Cabin Branch since the year 2000. And also I provided the zoning, Master Plan and land

use, the expert testimony for the original zoning case, G-806.
And then some of the other properties we have worked with, or clients we have worked with, in addition to Cabin Branch, which includes Adventist Healthcare, Winchester Homes, Toll Brothers, Cabin Branch Commons. We also have been working with LCOR on the Comsat property in Clarksburg. We've worked with the Linthicums who own two properties. They since have sold one and developed, which was developed by Pulte Homes.
And we've also work with Natelli Communities and Pulte on other properties in Ten Mile Creek. And also, most recently, we've worked on the Courts of Clarksburg. And I provided expert testimony for those zoning case, which is G-881. Also in Clarksburg, we've been very active with the Clarksburg Civic Association. And I attend most of the civic meetings and planning meetings throughout the year.
MS. ROBESON: When you say we, who is we?
THE WITNESS: Rodgers Consulting, as a company.
BY MR. HARRIS:
Q Okay. Would you take us through a little bit of a tour of the site via the exhibits that you have put up there. And then I think one of them needs to be marked as a new exhibit. It is a copy of the development plan amendment. The difference between it and what was submitted

previously is that this has on it the proposed binding element that the Planning Board proposed, and which we have accepted.
MS. ROBESON: About the 50,000 square feet limitations?
MR. HARRIS: That's correct.
MS. ROBESON: Any objections? Okay. So what date, does that have a date on it?
THE WITNESS: It is dated July 29th.
MS. ROBESON: Okay. I'm going to --
THE WITNESS: And it includes binding element number 10 which is from the landlord.
MS. ROBESON: I'm going to just label it, amended development plan, dated July 29th, 2013.
MR. ROBINS: Do you want us to put an exhibit number on it?
MS. ROBESON: I do. I thought he had done that.
THE WITNESS: No.
MS. ROBESON: Exhibit, can you just write Exhibit No. 59 on there?
(Exhibit No. 59 was marked for identification.)
THE WITNESS: Do you have a preference to which corner?
MS. ROBESON: Lower right. Thank you.

BY MR. HARRIS:
Q Okay, so using Exhibit -- sorry.
MR. KLINE: Could we ask, since it's just coming in, not that it's unexpected, but could we get a copy of it? Could you have -- I don't need it now.
MR. HARRIS: Sure.
MR. KLINE: Could Mr. Unterberg just e-mail, because I'm guessing we're still going to be talking to Mr. Unterberg on Wednesday.
MR. HARRIS: Probably.
MR. KLINE: I'd like to have those in hand, and copies to Mr. Chen and myself.
MS. ROBESON: And if you could e-mail one, send us an electronic copy, that would be helpful.
THE WITNESS: I can e-mail them. I do have a couple of extras today. I don't know if I have enough for everybody, but if that would be helpful.
MS. ROBESON: Well, if it's the only change, I can use the one in the file. But, so it's up to you. If you have it now --
MR. CHEN: If you've got it now, I'll take it.
MS. ROBESON: -- for Mr. Chen and Mr. Kline, that's fine.
MR. KLINE: I really wanted to see the text of the binding element more than anything else.

MS. ROBESON: Okay.
MR. KLINE: Because I'm assuming the ranges don't change at all.
THE WITNESS: Correct.
MR. KLINE: Yes.
BY MR. HARRIS:
Q Okay. So using Exhibit --
MS. ROBESON: I'm sorry.
MR. HARRIS: I'm sorry.
MS. ROBESON: Is the text identical to the Planning Board's recommending binding element?
THE WITNESS: It is. It is the text that's in their memo of recommendation.
MR. KLINE: Then I have it. Thank you.
MR. CHEN: And I'd like to still get it.
THE WITNESS: Okay.
MS. ROBESON: You're going to provide copies.
THE WITNESS: Yes, we'll provide copies. I can, well, I guess afterwards, I can dig out what I have.
BY MR. HARRIS:
Q Okay. So would you take us for a tour, using Exhibit No. 58 as the base, explaining the site and --
MS. ROBESON: Wait. I have Exhibit No. 59.
BY MR. HARRIS:
Q I'm sorry, 59.

A That's correct.
Q What did I miss?
MS. ROBESON: You missed Gary Unterberg, Mr. Unterberg's --
MR. HARRIS: Oh, yes. Thank you.
MS. ROBESON: I keep interrupting. I'll let you go this time.
THE WITNESS: The site itself. Cabin Branch as a whole is roughly 535 acres. The part of it that is zoned MXPD is 283 and a half acres. And on the eastern side we have I-270. To the north, which is just a little bit off the page, we have the Maryland Route 121. Then to the north and west which creates the western boundary, the existing Maryland Route 121. It's all the way down.
And then to the south, the southern boundary is West Old Baltimore Road that continues, and actually West Old Baltimore Road continues underneath I-270, but there is not an interchange there. Park entrance, Black Hill Regional Park is to the south, and that has its main entrance on West Old Baltimore Road which is closer to 270.
Of that 535 acres and those three roads that create this triangle almost all that is Cabin Branch. On the southern piece there is a small outlet of single family homes that are not part of the property.
When we come to the zoning, everything in orange,

this orange outline, those are 283 and a half acres, which is primarily the eastern half of the property. The western half, which is approximately 251 acres, is zoned RMX-TDR.
What I'd like to do is go through the history a little bit of the site and what's happened in the last 10-13 years or so. And what I'd like to do is go to this exhibit, which is the approval exhibit, which is already in the file. And I've got noted that 21(f) let me double check that--
BY MR. HARRIS:
Q 21(h).
A 21(h), which is the approval exhibit.
Q Yes. That's fine.
A Okay.
Q The approvals.
MS. ROBESON: Can you mark that 21(h) duplicate?
(Discussion off the record.)
THE WITNESS: Again, to orientate everyone, 270 is on the eastern side of Maryland Route 121, West Old Baltimore Road. We have a number of colors here, and also 283 and a half acres that's MXPD as outlined before.
The zoning was approved in 2003, and since then there has been, actually before the zoning there was a pre-application submitted to Park and Planning went through and made some recommendations that were carried through with the zoning. And then in 2004, a preliminary plan was approved

for the property, which was for the whole property. And the whole layout was shown, but approximately two-thirds of the density was approved at that time.
Subsequently at 2008, amendment to the preliminary plan was submitted and the full density was approved, which was 1,186 residential units, the 2,420,000 square feet of employment and retail, and also 500 senior units were approved. The APFO was passed, and so forth, and a 2008 amendment, which was the amendment.
Also, one of the requirements was to do an infrastructure site plan, which was an overall site plan that included roads, Maryland Route 121, it's relocated and comes through the site. Currently, it comes up around the top edge of the site.
The interchange at 270 is widened from two lanes to six lanes, to where it comes through as six lanes, a roundabout, come down four lanes, another roundabout, and then continues down, transitions to two lanes, and comes down to West Old Baltimore Road.
The infrastructure site plan included an overall water quality plan, since Clarksburg is a special protection area. A number of, well, all of the storm water management ponds at the time. And then also an overall forest conservation plan, which is also approved with that.
And subsequently, there's been a series of site

plans that have come through and approved. And these are all the colors, which is primarily the western half, if not two thirds of the property. As you can see, a number of them do overlap between the two zones, the MXPD zone and the RMX zone.

And as this breaks down, that the light brown or taupe color is Winchester phase one, the orange if Winchester phase two, the yellow is Winchester phase three. Also the pinks or the darker pink is Toll Brothers phase one, and then to the west is the lighter pink which is Toll Brothers phase two. All of these have been approved. A couple, actually, have been re-approved with amendments from 2010, 2007 to 2010, and the most recent was 2013.

Also part of the approval, the SMTM where the Gosnell property has also been approved, a site plan approved, which is the northern retail employment area, north of the new 121. And that has site plan approval. Also, the water tower tank location, which is this darker blue, has gone through mandatory referral and approval of Park and Planning.

And then also currently there's about 10 or 11 storm water management ponds that also have been approved. And in particular, ponds one, two, three, four, five, six, seven, eight, nine, 13 and 11 and the farm pond all have been approved and have met, particularly with the new storm

water regulations, the grandfathering deadline that was May 3rd of this year.

As far as construction, construction has begun. Mass grading for Winchester phase one is currently in progress. Pond 11 has been built. Pond five has been built. Pond six has been built. Most of this light brown or taupe area has been graded.

Broadway, which I the main north/south road, that was Second Avenue in the old development plan is currently, utilities are going in, has been graded. 121, the new 121 has been mass graded. And that's partly graded and in operation.

Q Can you then take a little time and explain to us how the new DPA compares with the approved development plan?

MS. ROBESON: Now, is that a duplicate exhibit there?

THE WITNESS: This is a duplicate exhibit. And this is the sign which goes back to --

BY MR. HARRIS:

Q I think number 6, certified development plan.

A This is number 6.

MS. ROBESON: Okay. Can you just write, just write EX 6 duplicate.

THE WITNESS: And the next one, which is going back to 20, 21(f) is a duplicate, which is this one.

MS. ROBESON: Okay. Just write, or Mr. Robins -- okay. Go ahead. It's faster for you to do it. I'm just, we're going to break at 12:30.

THE WITNESS: Okay. Exhibit No. 6, which is the signed development plan.

MS. ROBESON: Yes.

THE WITNESS: So this is the model that was signed is black and white, and so this is the approved, all the notes, numbers, et cetera. For discussion purposes, I have a color version, which is duplicate 21(f).

MS. ROBESON: Okay.

THE WITNESS: Which has the same notes and so forth. As we went through the hearings, we did use the color version. But what we did do with the zoning, we labeled E for employment, TH for townhouse, which carried through on the black and white.

MS. ROBESON: Okay.

THE WITNESS: So that's why you see, Exhibit No. 6, you see the gray fuzzy area. So for comparison, duplicate 21(f) is the color version of the approved development plan. And then on the left is new Exhibit No. 59, which is the latest version of the development plan.

MS. ROBESON: Okay.

THE WITNESS: And what I'd like to do is walk you through a couple of the differences. As from the first

glance, you can see they look the same. We have a chart, A, B, C, D, and a maximum yield summary. That has stayed the same, so the same format. Our orange line that shows the 283 acres is the same on both. The coloring is the same.

One of the things Park and Planning did ask us to do is, particularly as we go back to the previous exhibit which is 21, 21(h), every, on the new development plan, which is Exhibit 59, everything that has site plan approval, we've updated the line work.

So this is the zoning line. Everything west of the MXPD zone, the 251 approximate acres has site plan approvals. We've updated that line work mix and so forth. We have two main north/south streets. One that's the western edge of the zoning is known as Broadway, which was formerly known as Second Avenue, or A-304. It's now Broadway. We've updated the nomenclature.

And then we also have a second north/south street, which is Cabin Branch Avenue, which goes through bubbles B and C. And that was, on the old plan, First Avenue. And those are relatively the same location. Again, I mentioned Maryland Route 121 relocation.

Also to the southern portion, which separates area C and area D is A-302, which was and still is in the Master Plan, Newcut Road. And there will be a future interchange, which is not part of the Cabin Branch approvals, which is

now called, here it's Newcut Road, A-302. The new name is Little Seneca Parkway, and the street that continues east is also Little Seneca. So Newcut Road is now Little Seneca Parkway. So those names have been updated.

As mentioned, we've updated binding element number 10, which is the language from the Planning Board memo recommendation for approval. And then what we've done is the format and charts have stayed the same, and the key component is that, for this discussion, retail was 120,000 square feet out of the 2,420,000 and employment overall with retail is 2,420,000 of which 120,000 is retail, and 2,300,000 was employment.

As noted on the new one, the not to exceed number is 484,000 square feet of retail, and 1,936,000 square feet of employment. Again, not to exceed 2,420,000 square feet.

MS. ROBESON: Is a hotel part of that 424,000?

THE WITNESS: 484,000?

MS. ROBESON: I mean, yes.

THE WITNESS: A hotel is not. In particular, I will mention the Gosnell site plan that has approval.

MS. ROBESON: Yes.

THE WITNESS: And that resolution from Planning Board they have 87,500 square feet of employment approved which includes a hotel and two banks as employment. And then they also have, which has not changed, and we're not

changing the Gosnell SMTM property.

They also have 8,600 square feet of retail approved. And this case includes a gas station, a car wash, and a convenience store. So the Planning Board has already made that designation or clarified a hotel is employment and office.

MS. ROBESON: Okay.

THE WITNESS: So overall, that's the difference between the two, and also, accordingly, the numbers and the ranges in A and B, C and D have been updated to match the current layout that is proposed.

BY MR. HARRIS:

Q I think next we wanted to walk through the zone.

A Yes.

Q So would you, using the zoning ordinance, which it looks like you have on the --

A Dig out my --

Q Yes, dig it out. Yes.

A Keep going.

Q The MXPD zone, section 59-C-7.5 in the zoning ordinance.

A Yes.

Q Okay. First of all, are you familiar with the MXPD zone?

A I am.

Q Would you summarize for us any conclusions you have with respect to how this DPA conforms with the standards and purposes in the MXPD zone.

Q To start with, the property, the 283.5 --

MR. CHEN: Excuse me. Madam Examiner, I understand that he may testify and give an opinion as to compliance with the zone, standards of the zone. I'm a little bit off base here as a general question, tell us about what you think about compliance with the zone because this zone has lots of standards in it. I think it's pretty amorphous to say, what is your opinion about compliance when we're talking about this type of a zone? It should be tied to the standards, I submit.

MS. ROBESON: What was your question, Mr. Harris? I thought you said the purposes.

MR. HARRIS: Would you walk us through the purposes and standards of the zone. I think we're talking about the same thing.

MR. CHEN: Are you doing the same thing? Okay. Fine. Fine.

MS. ROBESON: That was my understanding, too. All right. Proceed.

THE WITNESS: The property itself, the 283.5 acres, is zoned MXPD. It was zoned in 2003. At that time, the development plan was found in conformance with the zone

which includes chapter 59-D-1.61, 59-C-7.5, and also 59-D-3. And at that time it was found to be an integrated mix of uses of all types, comprehensively planned with the emphasis on mix of uses.

MR. ROBINS: Excuse me, Mr. Unterberg. The reporter is having a little trouble hearing. I just want to make sure that you can speak up a little.

(Discussion off the record.)

THE WITNESS: Also, and that talks to the zone itself. And then also as the number, various plans have moved forward, this preliminary plan, the infrastructure site plan, and the site plan that have been in the MXPD zone, they have all been found in conformance of the zone.

And then in particular, the July 18th staff report from Park and Planning that was from the hearing, which states on pages 20 through 28, that is all documented, point by point how we comply with the zone itself.

MS. ROBESON: Are you adopting that as your own finding?

THE WITNESS: I'm adopting that as my testimony and in agreement with that.

MS. ROBESON: Okay.

THE WITNESS: Particularly since the property is zoned and we need to meet the statutes of the zone.

BY MR. HARRIS:

Q Okay. In terms of the Clarksburg Master Plan, I think you testified about, what is your familiarity with the Clarksburg Master Plan?
A Very familiar with the Master Plan, and as I mentioned before, in addition to the Cabin Branch, the number of properties in Clarksburg that we've had in the Master Plan.
Q And can you tell us whether the DPA is, in your opinion, in compliance with the use and density recommendations of the Clarksburg Master Plan, and whether it conforms with County plans and policies?
A I believe it does, and also with the particular use and density recommendations of the '94 Clarksburg Master Plan. The staff report, again, the July 18th, 2013, planning staff report on pages 13 through 20 specifically show how we are in compliance with the use and density of the Master Plan. And I also would adopt that as my testimony.
Q Can you give us any supplemental comments you would have beyond the findings that the staff and the Park and Planning made on that topic?
A A few things. Overall, as has been discussed with the Planning Board and is also included in the Master Plan, Master Plans are a guide and a snap shot over time, and the best prediction. And this was the 1994 Master Plan which

next year will be 20 years old. They are not meant to be straightjackets in that flight.
Also, from the Master Plan itself on page BII, which talks about the timing, talks about how it should be flexible over time, the Master Plan. That specifics --
MS. ROBESON: Is that in the introduction?
THE WITNESS: Yes.
MS. ROBESON: Okay.
THE WITNESS: The Clarksburg Master Plan, it's one of the preambles.
BY MR. HARRIS:
Q And has it been your experience that Master Plans are interpreted more flexibly over time, and if so, on what do you base that conclusion?
MR. CHEN: Objection.
MS. ROBESON: Basis.
MR. CHEN: I think it's pure speculation. Unless you can give a list of every time he's been in a case where a Master Plan has not been followed, if there is that foundation, fine. But this question is improper without a foundation.
MS. ROBESON: Mr. Harris, can you repeat the question for me?
MR. HARRIS: Do you know -- I don't remember what I said, but I think it was implied. Is it your

understanding that Master Plans are interpreted more flexibly over time, and if so, can you give us examples of your experience?
MS. ROBESON: I think he's giving examples. I'm going to let it in.
MR. CHEN: He has not given any examples. The only two were --
MS. ROBESON: Mr. Unterberg, are you going to give more than two examples?
THE WITNESS: Yes, I have one specifically that I was going to be speaking on.
MS. ROBESON: More than two?
THE WITNESS: I can discuss more than two, yes.
MS. ROBESON: Okay. Well, I'm going to let it in for the weight it deserves. I understand your point, but I'm going to let it in. We have taken testimony like this. Whether it's persuasive or not is another matter. So I'm going to let it in for the weight it deserves. Okay. Go ahead.
THE WITNESS: Well, and let me give two examples, and one in particular is a recent case, which was The Courts at Clarksburg, and wherein the Master Plan flexibility was taken into account. And specifically, this is from the hearing examiner's report.
MS. ROBESON: In 881?

THE WITNESS: G-881, yes. And this is from page 65, and I quote,
"The hearing examiner finds the proposed development substantially complies with the use and density recommendations of the Master Plan. When one interprets the Master Plan, due consideration for its goals and objectives, and in light of development standards since adopted and according to case A-881."
So that was when the use and density, the intent is there, and purpose over, in my words, over a period of time when things have changed.
And I will give as a second example, I will use Cabin Branch as an example. And this goes back to 2003 where the Master Plan specifically recommends that A-302, which at the time was Newcut Road, which is now Little Seneca Parkway, the Master Plan specifically recommends that this road continue all the way west, through the property to 121.
And at that time the better idea and interpretation of the Master Plan is that we should not do that, and primarily because the environmental weight was given to the stream valley, which is the Cabin Branch or the western stream valley. So that road was removed from the approvals for Cabin Branch to move forward. So that's

another example how the Master Plan has been interpreted and something has changed along the way.
MS. ROBESON: And what's changed as far as this?
THE WITNESS: As far as Cabin Branch?
MS. ROBESON: Well, what, in the past we've taken changed circumstances which means, well, maybe the exact vision couldn't be accomplished, but this will accomplish the overall goal. What is preventing the exact vision from being accomplished here?
THE WITNESS: Actually, as I continue, we're going to get to that.
MS. ROBESON: Okay.
THE WITNESS: And the different options that were available and how we got to 2003.
MS. ROBESON: Okay.
THE WITNESS: And how we are justifying where we are going today.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q So why don't you go to the general recommendations in the Master Plan and how you believe this development plan amendment conforms with the general recommendations?
A Okay. What I would like to do is go through those, which is a number of them.
MS. ROBESON: Okay. Where are you in the Master

Plan?
THE WITNESS: We are, well, I will start with page VII and though there's a series of these. I'll quote the page as I go, because we go from page six to page 10.
MS. ROBESON: Okay. Now, I do not have a full copy of the Master Plan in the record. What I've done before is taken judicial notice of what is on the Park and Planning website. But if someone would prefer to have the hard copy in the record, I'll need somebody to supply one.
MR. HARRIS: We'll be happy to do that. I can't give you mine now.
MS. ROBESON: I know.
MR. HARRIS: You wouldn't want it anyway. It's all dog-eared from years of use.
MS. ROBESON: Okay, It's just that I've had people object to taking judicial notice of what's on the website. So I just said --
MR. KLINE: Before you leave there, two things. One, because I think we do want you to have it, because I have a feeling you're going to be looking at those and it will be a lot easier to find it in a book than it will on a computer screen, but didn't I see you holding a copy at the first day of hearings for the plan itself out of your library?
MS. ROBESON: We, for some reason, we have had

Master Plans in the library disappear. And all I could find was one of the drafts, and I was not able to find the -
MR. KLINE: I think we all agree that it would best that you have your own copy.
MS. ROBESON: Well, I printed a bunch out, but not everything.
BY MR. HARRIS:
Q Okay. Let's go, you know, through the pages that you wanted to site in terms of the general recommendations in the Master Plan.
A Okay. And I will note that, also, which I think I already mentioned, in the stack of pages, 13 through 20, also walk through a similar list for reference.
We'll start off with page VII, which is on the preamble of the Master Plan and quote,
''It's recognized that circumstances will change following adoption of plans and that the specifics of a Master Plan may become less relevant over time.''
The Master Plan was adopted in 1994, which is 19 years old. June of next year it will be 20 years old.
If we go to page six of the Master Plan, and these are all general or overall goals of the Master Plan, II,
''The plan emphasizes the importance of I-270 as a high technology corridor for Montgomery

County, as a region, in the region, and preserves key sites adjacent to I-70 for future employment.''
MR. CHEN: That project, you said II?
THE WITNESS: Page six.
MR. CHEN: I'm on page six. I don't see II.
MS. ROBESON: No, he said the first quote was from page VII.
MR. CHEN: Yes.
MS. ROBESON: Page seven, Roman numeral.
MR. CHEN: I got that. I got that. But he's on page six now, I think?
MR. HARRIS: It is page six, yes.
MR. CHEN: Where is he reading from? He said II.
MR. HARRIS: He didn't say II.
MR. CHEN: I'm sorry. What did he say?
MR. HARRIS: Number eight.
MS. ROBESON: I don't think he said II for the second page.
MR. HARRIS: Number eight.
MR. CHEN: Okay.
MS. ROBESON: So you're on page six of the Master Plan.
THE WITNESS: Yes, which is number eight.
''The plan emphasizes the importance of I-270 as a high technology corridor for Montgomery

County and the region and preserves key sites adjacent to I-270 for future employment options.'' This is a key component for Cabin Branch, and it is a part of the employment corridor that's identified along 270 as the western portion, and with the 2,420,000 square feet that have been approved, with this proposal of the 20,000 or 20 percent to be retail of 484,000 square feet.

It leaves 80 percent, which is the 1,936,000 square feet for, specifically for the employment, and to accomplish this goal. And also the zone itself speaks to this, where 20 percent is allowed for retail, thus leaving the 80 percent for the technology and office employment corridor.

Go to page 10. Double check it. This is at the top of page 10.

''To promote a healthy economy, including a broad range of business, service, and employment opportunities at appropriate locations.''

Also if you go further down the page, the second from the bottom,

''provide an attractive land, provide for attractive land uses that encourage opportunity for social interaction and promote community identity.''

I believe that this plan also does that, particularly with

the mix of plans, and as noted in the Park and Planning staff report. We're trying to get the greatest mix possible with the parameters of the zone, and also to move forward with a technology corridor and employment corridor, we need the variety of mixes to accomplish that. And we believe adding to the retail will do that.

And page 16, top of the page.

''The plan envisions Clarksburg as a town and a larger scale than proposed in the 1968 Clarksburg Master Plan, but smaller than corridor, city center, Germantown.''

This particularly applies to Cabin Branch, because Cabin Branch as a whole is on the west side of 270. It has the mix of uses that include residential employment, retail, public uses, senior houses. So as a whole, that mix is coming together to make the project as a whole.

BY MR. HARRIS:

Q Does this DPA change the amount of development or the scale of development that has been approved under the prior development plan?

A It does not. We still are capped at the 2,420,000 square feet. We're clarifying the uses, particularly the retail use and within the parameters of the MXPD zone and the Master Plan.

Let's go to page 16. Well, we are on page 16.

The bullet second from the bottom,

''Recognizes the importance of civic spaces and public uses to development of a town concept.'' Again, Cabin Branch, one of the key components of Cabin Branch are the civic spaces, and I'll walk through the green spaces, the civic spaces, and the organization of the plan in a little bit. Let's go to page 18.

Q How about back to page 16, the bullet above that.

A The one that says, strives to maintain an identity for Clarksburg separate from Germantown or Damascus?

Q Yes. Do you believe this development plan amendment does that?

A I do because with the addition of the retail, the specialty retail, in addition to our neighborhood retail, this would give Cabin Branch and Clarksburg as a whole kind of a spot on the map, which is unique for the area, and thereby accomplishing or helping to accomplish this.

Let's go to page 18. Where did this one occur on the pages? Has everyone located that? It speaks to, the Master Plan speaks to significance and concerns regarding natural environment and developing in a responsible and sensitive manner.

Q Well, let me ask you this, whether --

MS. ROBESON: Yes.

THE WITNESS: I understand.

BY MR. HARRIS:

Q Generally, what does page 18 recommend, in your opinion?

A Well, page 18, as the title says, is the natural environment, speaks to the importance of the natural environment. And this has been one of the key features of the plan from the beginning. There are two stream valleys on the plan. One is the eastern stream valley, the Little Seneca stream valley. The second is the western stream valley, which is the Cabin Branch stream valley. Both of these have been identified and set aside.

Overall, we've tried to treat the plan comprehensively. That speaks to an overall water quality plan, an overall forest conservation plan. And then as each site plan moves forward, those plans are updated with those specifics.

The other thing is we are, Clarksburg is in a special protection area. About half to two-thirds of this site is technically in the special protection area. We have proffered from the beginning that the whole site should be treated as a special protection area to meet this goal.

Page 20 speaks to, the plan recommends a multiple purpose greenway system along the stream valleys. This goes to what I was just speaking of. And I'll point out on the plan, again, the eastern stream valley, Little Seneca, has

been set aside as green space. The western tributary, Cabin Branch, has been set aside as green space.

You will also have, which is more evident details of the site plans, there is a number of green connections east to west. And this one shown in this view is known as Tribute Parkway, which is a common park system that connects our local park to the stream valley park greenway with housing on either side. So there is a number of connecting greenways from east to west within the plan itself. Page 28.

MS. ROBESON: Mr. Unterberg, this will be your last point. Okay. Because it's 12:25.

THE WITNESS: Okay. The -- let's see. I copied these all out of the Master Plan, but I should have highlighted these on each page so I could cross-check. Page 20 speaks to, the plan establishes a mixed use and interconnected system of streets in each neighborhood to encourage pedestrian travel and reduce dependency on the automobile.

The Exhibit 59 shows this pretty well. We've embraced from day one that this would be a traditional neighborhood design, grid street system. We have north/south streets and we have east/west streets. And this grid system does not stop at the residential or the employment.

In particular, which we'll be speaking to more of on Wednesday, Wellspring connects our school site and local park with the greenway along the street. And that street continues through into area B on the development plan, and then also area A, which is our residential or mixed use, and then our employment areas. And all our streets do interconnect. And overall, we have a grid system for the streets, which complies with this goal.

MR. HARRIS: Okay. Do you --

MS. ROBESON: I think that's all we're going to be able to get in.

MR. HARRIS: Okay.

MS. ROBESON: So with that, I would like the parties, if you could, check your calendars to see if September 4th is available. And we can do, and your witnesses, and we can do, we can make the final arrangements Wednesday.

Also, I think Mr. Harris and Mr. Robins, that you were going to submit statements from the other owners of the MXPD consenting to the binding elements. I just don't want that to fall through the cracks. I don't need them yet, but I did want to remind you. And so we will try to September 4th, and will make the final determination the 14th. Anything else before we continue?

MR. CHEN: Are we here on Wednesday, or upstairs?

MR. HARRIS: I think upstairs.

MR. CHEN: Okay.

MS. ROBESON: Yes.

MR. HARRIS: Seventh floor.

MS. ROBESON: Seventh floor. Yes. Anything else? Okay. With that, I am going to adjourn this case until, continue this case to August 14th at 9:30 in the seventh floor. If for any reason the seventh floor changes, we have one backup hearing room, and we will post that notice at the front door, or the door to the garage. All right. Thank you.

(Whereupon, at 12:28 p.m., the hearing was concluded.)

C E R T I F I C A T E

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

Application of Adventist Healthcare, Inc. and Cabin Branch Commons, LLC.

DPA 13-02

By:

_____

Teresa S. Hinds, Transcriber

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OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

FOR MONTGOMERY COUNTY

APPLICATION OF ADVENTIST HEALTHCARE & CABIN BRANCH COMMONS	**DPA 13-02**

A hearing in the above-entitled matter was held on July 29, 2013, commencing at 9:41 a.m., at the Office of Zoning and Administrative Hearings, 100 Maryland Avenue, Rita Davidson Memorial 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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Steven Robins, Esq.
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For the Respondent:
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Jody S. Kline, Esq.
Miller, Miller & Canby
200-B Monroe Street
Rockville, Maryland 20850

C O N T E N T S

Witnesses:	Direct	Cross	Redirect	Recross
Jonathan Sachs				
By Mr. Harris:	38			
By Mr. Kline:		42		
Kathy Hulley				
By Mr. Kline:		46		
By Mr. Harris:		48		
Elizabeth Buffington				
By Mr. Harris		54/69		
By Mr. Kline:		63		
By Mr. Chen:		70		
Marilyn Balcom				
By Mr. Chen:		75		
Michael Knapp				
By Mr. Kline:		80		
Barry Fantle				
By Mr. Chen:		85		
By Mr. Kline:		86		
Ibi Sofillas		88		
Ron Kaplan				
By Mr. Harris:	97			
By Mr. Chen:		136		

E X H I B I T S

Exhibit No.		Marked/Received
43	Letters to Planning Board	8
44	Affidavit of Posting	50
45	Slide Presentation	101

P R O C E E D I N G S

MS. ROBESON: This is a public hearing in the application of Adventist Healthcare, Inc. and Cabin Branch Commons, Inc., requesting an amendment to the Development Plan approved by the District Council on September 9, 2003, in LMA G-806 which requests an amendment to increase the amount of retail space from 120,000 square feet to 484,000 square feet, and to decrease the amount of office space from 2,300,000 square feet to 1,935,000 square feet on property consisting of 283.5 acres east of Clarksville Road, west of I-270 and northwest, north of West Old Baltimore Road in Clarksburg, Maryland.

All right. Are there -- my name is Lynn Robeson. I'm the Hearing Examiner in this case. I'm going to be taking all the testimony and evidence. I prepare a report and recommendation to the County Council, who makes the final decision on the case. Could the parties identify themselves for the record?

MR. HARRIS: Good morning, Ms. Robeson. I'm Bob Harris of the firm of Lerch, Early, Brewer, representing the applicant.

MS. ROBESON: All right.

MR. KLINE: Good morning. Jody Kline with the law firm Miller, Miller & Canby with offices at 200-B Monroe Street in Rockville, representing the Peterson Companies,

LLC.
MS. ROBESON: All right.
MR. CHEN: Good morning. My name is Bill Chen. I'm an attorney representing Wood Cobb (phonetic sp.), individually.
MS. ROBESON: All right. Is there anyone in the audience who is not represented by one of the attorneys at the table? Okay.
Seeing none, are there any preliminary matters? Let's start with Mr. Harris and then we'll get to everyone.
MR. HARRIS: Yes, ma'am. First thing, I wanted to introduce an exhibit that is really a packet. These are the letters and e-mails that were submitted to the Planning Board as part of the, their deliberation. I think there are --
MS. ROBESON: Are these the ones that are already attached to the Technical Staff Report?
MR. HARRIS: Some are, but some aren't. When they did their Staff Report, there was still 10 days before the hearing, and so a number of letters came into the Planning Board subsequent to that Staff Report.
MS. ROBESON: I see.
MR. HARRIS: So there is some overlap and, but there are a number of other ones there as well. I think that is a total of 77 letters and e-mails in support.

MS. ROBESON: All right. Any objections?
MR. KLINE: No objection.
MR. CHEN: Ms. Robeson, on behalf of my client, the issue that we have with these documents, as long as the Examiner recognizes, and I'm sure the Examiner will, that the standard by which the District Council will consider this application is not a plebiscite. My client is unable to organize 77 letters to come in, but my client has as much an interest in this matter. I suggest and submit as to any of the signatories to letters or the e-mail senders. So, accordingly, Ms. Examiner, so long as the Examiner recognizes that this process is not a plebiscite process, I have no objection to Mr. Harris submitting these documents for the record and I'd only ask what is the exhibit number you're going to assign to it?
MS. ROBESON: Do you have a copy of the exhibit list?
MR. CHEN: We were just handed one copy. Do you need a copy?
MR. HARRIS: I think I have another one. Hold on.
MS. ROBESON: I was going to make that point. I will take them in for the weight it deserves, understanding that 43, this will be 43, letters in support. Now we don't know -- are some of these duplicates, or are these everything that came in in that 10 days after the Staff

Report?
MR. HARRIS: There are some duplicates, Ms. Robeson.
MS. ROBESON: All right. I'll just mark it letters in support of application, letters to Planning Board.
(Exhibit No. 43 was marked for identification.)
MS. ROBESON: All right. So that will be 43. All right. Anything else?
MR. HARRIS: Yes, ma'am. Out of respect for Mr. Kline, but in the interest of --
MS. ROBESON: You don't have to respect him. No.
MR. HARRIS: But I do. I do. However, I do want to object to his participation in this proceeding. The rules of procedure clearly provide that clients represented by attorneys are to file pre-hearing statements 10 days before the hearing stating the grounds and submitting any reports identifying the witnesses they're going to call and a summary of their argument.
As you're aware, I received a call just Friday, one business day ago, from Mr. Kline indicating that he was going to come and appear here in opposition on behalf of the Peterson Company. The Peterson Company, Mr. Kline had known about this case since it was filed. In fact, they knew we

were going to be filing maybe even before we did because we talked with them about it. Mr. Kline certainly is knowledgeable about the rules of procedure here and this puts us at a disadvantage.
I would note that the Peterson Company doesn't own any property that's affected by this Development Plan Amendment. They do have, as news reports have indicated, a desire to build a similar type facility across I-270 on property that's zoned for residential use. The Peterson Company has been quoted in the press as saying that only one of these projects could go forward. And despite the fact that they've got a long road ahead of them, they need a master plan amendment, they need a rezoning, they need water and sewer approval. They need water quality plan approval. They need --
MS. ROBESON: Wait. Are you going to introduce this as --
MR. HARRIS: Yes, ma'am.
MS. ROBESON: Okay.
MR. HARRIS: Yes, ma'am. In any respect, they have a long road to go and they have indicated through their actions and through their words that they're trying to either slow us down or stop us from proceeding. And I don't think their interest in whatever competitive, business competitive goals they have is a legitimate interest in the

decision in terms of the standards under the MXPD zone. They will delay this proceeding and I think it's entirely inappropriate for them to come in at the eleventh hour and want to participate. So we would note our objection to that.

MS. ROBESON: Mr. Kline, I assume you want to respond?

MR. KLINE: Yes, probably so. Well, as Mr. Harris said, it's no surprise my client has had a long, had an interest in this application itself. In fact, even your staff asked me probably a month ago was I going to be involved and I thought not simply because that wasn't the role the Peterson Company wanted to take in this application, wanted to just go, let it go its course until the Planning Board came out with its recommendation to you which we thought was inaccurate and just embarrassing and for that reason the higher ups at Peterson Companies felt that they had to have their specific position expressed to you. And within minutes after being told, entering their appearance, I called Mr. Harris and advised your office.

Mr. Harris will not, I'm sorry; the applicant will not be prejudiced in this case simply because you're just going to have Mr. Chen and I asking questions. I'm sure the applicant is capable of warding off an attack from both of us. I have requested to file, I'm sorry, to call in

services of an expert witness. If we finish today, you're not going to see an expert witness testifying for me. If we don't finish today, then I'm going to have to get that witness lined up far enough in advance so the applicant is not prejudiced in its ability to present its case.

With regard to what the applicant has done to try and complicate Peterson's efforts to move forward through his process, I will say it at the appropriate time in the hearing, not in a procedural request now, but I will state that the applicant is not prejudiced by my participation. Mr. Chen and I will coordinate so we will not be asking duplicative questions and it may take a little bit longer because we're both here, but I think you'll get a better record because of that. Thank you.

MS. ROBESON: All right. Mr. Chen, do you want to weigh in on this or is this beyond your client's concerns?

MR. CHEN: The only observation I would make is that I appreciate Mr. Harris's objection and certainly if Mr. Kline were sitting here today with an expert sitting in the audience and a report to give you today, I think Mr. Harris's position would be very well taken, but that is not the case. As I understand from what I've heard now, Mr. Kline is here on behalf of an interested party and his participation in this proceeding today is purely, as I hear it, cross-examination. I think that is permissible by the

rules. Again, I am -- had Mr. Kline represented that he had a witness, an expert to present today and a report to present today, I think Mr. Harris would be correct, but that's not what I've heard. What I've heard is that Mr. Kline wants to cross-examine witnesses and I think that is entirely permissible under the rules.

MS. ROBESON: Mr. Harris.

MR. HARRIS: Two things, Ms. Robeson. First of all, the Planning Board hearing was on July 18. By 1 o'clock on July 18, Mr. Kline and his client knew what the Planning Board's decision was. In fact, they knew the staff's position which was the same a week prior to that. It took them a week and a day to decide to enter their appearance here, leaving me no time other than the weekend in which to prepare for this, totally inappropriate under the rules.

And I am hearing two things. I am hearing he only wants to participate to cross-examine, but then at the same time he's saying he's going to introduce an expert witness. Both dimensions extends the duration of this case which we could finish today but for that involvement. And, you know, it's just inappropriate to do that. I would note beyond that that the rules of procedure provide for having, if there are multiple opposing parties, to have them combine their cross-examination through one attorney. And so Mr.

Kline and Mr. Chen --

MS. ROBESON: Where is that in the rules of procedure? I haven't, I have never had that happen.

MR. HARRIS: That is --

MR. KLINE: You have the authority, Ms. Robeson, to basically designate and I've only seen that done when you have --

MS. ROBESON: I thought that was a spokesperson.

MR. KLINE: Yes, right, correct.

MS. ROBESON: No, that's -- okay. We'll continue with your -- that is, go ahead with your argument.

MR. HARRIS: So in any respect, I thought I had the rules here.

MS. ROBESON: That's all right.

MR. HARRIS: Okay. Steve, see if you can find the rules. Thank you, Bill.

MR. CHEN: It's a spokesperson.

MS. ROBESON: Yes, that is different than --

MR. HARRIS: Okay. In any respect, we could finish today but for his involvement here. I don't think, as I said, his client's interest is a pertinent issue here and the extreme tardiness in entering his appearance complicates our case for us and unfairly.

MS. ROBESON: All right. Well, a couple of things. Unfortunately, the Planning Board's recommendation,

plus there was a corrected Staff Report and that didn't get out until Friday. So, you know, they may have understood or it may be clear, but they're bound by the written recommendation as opposed to sometimes the written recommendations are more specific.

Mr. Harris, you, I thought, were the one that wanted an additional hearing date because you thought we wouldn't get finished today. But assuming, you know, I'm really not -- what we have done in the past, especially when the Planning Board report and then you even have a supplemental Staff Report, when I looked at the supplemental Staff Report, it had some substantive changes. It wasn't just see Item C below, there were some things on APF and because of that what we have done in the past when this happens is that we, if it goes beyond today, we set another hearing date within the time frames of the rules of procedure so that the, you're correct, if he proceeded on his case-in-chief today, you would be prejudiced. But if we have another hearing date, I don't see the prejudice, especially in light of the fact that the Staff Report and the Planning Board recommendation came out, were substantive, or the Staff Report was substantively changed and the Planning Board recommendation. And I was a little confused about some of the changes in the Staff Report, but in any event, it was late in the day.

So I am going to let him participate today. Now what I'd like you to do, we can consider additional hearing dates provided, you know, if we don't finish today and I'm going to read some off to you. Now because of another case that's pending, we don't have a lot of Mondays and Fridays. So some of these are Tuesdays and Thursdays which may mean that you have, you know, that there are Planning Board or Council.

MR. HARRIS: They're all on recess.

MS. ROBESON: For August, yes.

MR. HARRIS: Yes, ma'am.

MS. ROBESON: Yes. I have some September days too. So what I have is Friday, August 16th; Monday, August 26th; Tuesday, August 27th; and Thursday, August 29th. So let us -- so I would like you, when we take a recess, you're going to have to coordinate with your witnesses I'm sure, check those dates. And if this goes beyond, we will set another hearing date for one of those dates. Yes, sir, Mr. Chen?

MR. CHEN: Pardon me. Thank you. Examiner Robeson, I thought you also said you had some possible September dates? Do you want to give those?

MS. ROBESON: Yes, but the -- it's very difficult. We have this monster case and it's very difficult to go into September.

MR. KLINE: This one doesn't qualify for that?

MS. ROBESON: Not yet. If you keep your cross-examination limited, it will not. So I would like to get the August dates because it's very difficult to schedule in September.

MR. CHEN: We're going to take a break and we can check things at that time?

MS. ROBESON: Yes.

MR. CHEN: I want to do it right now, but what is your preference?

MS. ROBESON: Well, I would like to, the deal is, colloquially, that we will proceed to see how far we get today and if we don't finish today, then we will set a date. You know, we'll take a break at lunchtime and you can check then because then I think we'll have a pretty good sense of where we're going, all right? And I'd like to get started now. Is there any other -- yes, sir?

MR. CHEN: I do have an additional preliminary matter, if I may?

MS. ROBESON: Yes.

MR. CHEN: By the way, just as a footnote to your prior comments about the Staff Report, that came to my office, I don't know about your office, but it came to my office by e-mail after business hours. Now I had been in depositions Friday. I didn't get to see it until Saturday

and, quite candidly, I do have an expert that we were disadvantaged in the sense of getting this out to my witness to look at and extrapolate, to pull into the analysis that he had previously done.

Now I've gotten to him on literally weekend notice, but your comments are very well taken with regard to when that report and the amendment to the report came in. As I say, I didn't even get a chance to look at it until Saturday and was able to immediately contact, fortunately, my expert to say, hey, look at this. That's just the way things go, but your comments are well taken.

MR. HARRIS: Ms. Robeson, may I respond to that briefly?

MS. ROBESON: No, just --

MR. HARRIS: Okay.

MS. ROBESON: -- are you going to make -- I mean, yes, in a minute --

MR. HARRIS: Okay.

MS. ROBESON: -- but --

MR. CHEN: I do have a motion to make, but I was just making an observation on your comments --

MS. ROBESON: Well, if he's making --

MR. CHEN: -- about the statement.

MS. ROBESON: -- an observation, I don't want to -- okay, you can go say something --

MR. HARRIS: It's not --
MS. ROBESON: -- but I do want to move forward.
MR. HARRIS: It's not an accurate observation. Everything that was in the Staff Report was discussed on July 18th in a hearing where Mr. Chen was present. There were no surprises there and there's nothing in there that required him extra time.
MS. ROBESON: Okay. Point taken. Mr. Chen, what is your motion?
MR. CHEN: I think that this application needs to be dismissed and at the very least they cannot take any evidence on it today as reasons, therefore, let me explain. You have in the file Exhibit No. 2. Exhibit No. 2 is the application. Let me give it to you.
MS. ROBESON: I have it.
MR. CHEN: The applicant in this proceeding, if you look at the bottom, has signed as Adventist Healthcare, Inc. Now I acknowledge and know that at the very top it says Adventist Healthcare, Inc., and Cabin Branch Commons, LLC. I understand that. But the application has to be signed by the applicant and the only signature on this is on behalf of Adventist Healthcare, Inc.
More significantly, much, much more significantly if you look at your exhibit, I think it's 5, which is the District Council resolution approving original zoning and

development plan, you'll see that on the first sentence of the resolution the District Council notes and states that the applicants are Adventist Healthcare, Inc.; then FFTM-1 Limited Partnership and then King Farm Partnership, LLP. Now this application, the original application, was prosecuted as one applicant. In fact, if you go to page 2 of the District Council resolution, it states in the very top paragraph, the next to last sentence, it states, quote, the applicants propose to develop the entire Cabin Branch community as a single plan development with residential, employment, retail and service uses, end quote.
Then in the next paragraph, the first sentence states, while each of the property owners retains a right to proceed with the development of its property independently, the development team approached the whole of the Cabin Branch community as a single project. Now when you go to the language contained in division, excuse me, Division 59-D1, the development plan provisions, and you go most specifically to Section 59-D1.74(a), the first sentence says, filing, which is the title, and then it says, any proposal by the applicant.
Now when you read the entire section on development plans and development plan amendments, it's talking about the applicant. The applicant in this proceeding are three separate entities of which Adventist

Healthcare is but one and they prosecuted this as an applicant, as a single project. Now you have in front of you one of the three original applicants.
I looked in your record, in fact, most recently I looked in it about a half an hour ago because I saw there was a statement in there, I think it's Exhibit 4 from Toll Brothers, about how they apparently have no objection, but I don't know how Toll Brothers relates to any of the other two applicants or entities that were the applicant. I have not seen any evidence that, number one, indicates that there's any participation in this proceeding by two of the entities that were part of the original applicant. Beyond that, they must be, they or, and I would concede their successor and interest demonstrated the successor interest, they must be part of the application process and, indeed, it's because it is one project and quite simply in that circumstance this application is, in my opinion, fatally defective. In fact, it even precludes taking anything on his application without the participation of those two other entities or their success as they've shown in the record. That's where I am.
MS. ROBESON: Mr. Harris.
MR. HARRIS: Creative, but largely inaccurate and I don't know where the law is on any of that. I don't believe it supports that. Adventist Healthcare controls the land that is the subject of this change. That's a given.

They were an applicant in the original proceeding. They also control the Cabin Branch Commons property. They're a part owner of that. And so they are the right applicant.
Properties have shifted ownership here over the years. FFTM doesn't own anything more. King whatever it was doesn't own anything more. And the fact that these owners applied together for the rezoning certainly doesn't mean that individual property owners can't pursue development of their own property in the way they see fit. This property has been subject to, I think, 14 site plans and each of them processed individually by the respective owners without the others' participation. You know, and, well, you know --
MS. ROBESON: Okay. Mr. Kline?
MR. KLINE: I probably would have just approached it a little bit differently than Mr. Chen. I understand that the original three applicants have morphed into different entities, so I guess my question would be are all of the successor entities of the original applicant's parties to this application and in the context of asking that I see in the applicant's justification statement there's a reference to something called SMTM Gaznel (phonetic sp.) zone, property zone annex PD that has site plan approval. So my question is do they no longer own that land or do they still own MXPD land because I would say

anybody who owns MXPD land would be a successor or the original applicants and you have to have all the applicants in order to participate.

I understand why Cabin Branch or, I'm sorry, Adventist basically owns the court it's changing, but there presumably are other binding elements, other things that could flow from that that would affect other property owners and I guess I'd like to know that SMTM has basically agreed to be bound by all the things that are going to occur if they're still a party. And I guess my question is do we have all the parties that still own, MXPD-owned land as applicants in the case?

MS. ROBESON: Do we have all the MXPD? Well, and let me put it this way, do we have all the parties who are subject to, will be subject to this amendment? In other words --

MR. HARRIS: They are not applicants. Each owner of the property in Cabin Branch has written a letter in support of this application.

MS. ROBESON: No, wait, wait. That's not what I mean. Do we have all the applicants that are subject to MXPD?

MR. HARRIS: Do we have all -- no.

MS. ROBESON: All the owners, all the owners of the MXPD?

MR. HARRIS: Do we have them as applicants here?

MS. ROBESON: Yes.

MR. HARRIS: No. The applicants are as Mr. Chen correctly stated, Adventist Healthcare and Cabin Branch Commons. Their properties are the ones where this retail change would occur.

MS. ROBESON: So there's other applicants within the MXPD zone?

MR. KLINE: Other owners.

MS. ROBESON: I mean other owners; I'm sorry, other owners of the MXPD zone?

MR. HARRIS: There are, Winchester Homes, Toll Brothers and the FFTM. Actually, that, yes, that one does still exist. I beg your pardon. I was thinking that was Jody's old client.

MR. KLINE: The Fowlers?

MR. HARRIS: The Fowlers, Fowlers, yes. Right. But the Gaznel entity, SSTM, still does exist. They own property that's separated from this by Maryland Route 121 and it's not involved in this application. And they have sent in a letter of support.

MR. CHEN: May I be heard?

MS. ROBESON: Yes.

MR. CHEN: I have the highest regard for Mr. Harris and Mr. Kline, but I object to what you've heard them

both say just now about ownership. That type of information which is factual from legal counsel in this type of a proceeding, and if we have a break I'll give you a cite on it, it's a decision within the last five or six years of the Court of Special Appeals, that information from legal counsel is not properly before you at this time.

Now having said that, having said that, the fact that there may have been site plan approvals does not mean anything. We're talking about the development plan, the overall plan for the MXPD zoned area. And what we've heard already this morning is, number one, not all the property owners, just the property owners, are parties to this proceeding, but apparently there are still some successors in interest that I've heard some representations that have been made. Mr. Kline made one representation of which I think is improperly before you. But even if you accept it, even if you accept that there are successors, they nonetheless still must be an applicant and they're not. That's where we are.

MS. ROBESON: Well, thank you. I am not going to dismiss this out of hand for sure because some of this may be corrected. If what you're saying is true, I did not bring 59D. No, I don't want to look at it now. So you can give me your legal cite. What's your legal cite?

MR. CHEN: I apologize. I don't have it printed

out, but I'll get it to you. If we're going to have a break for lunch, I think I can --

MS. ROBESON: And what's the proposition that this stands for?

MR. CHEN: That legal counsel in these, in this type of a proceeding, in fact, I believe in that case it was a special exception administrative adjudicatory hearing.

MS. ROBESON: What can't they do?

MR. CHEN: They cannot give factual information to the Board and in that particular case one of the errors was that legal counsel was not sworn.

MS. ROBESON: Well, but I could -- well, you may be right. I haven't read the case. I'd like it before lunch. It, well, yeah, we'll take a break, but I know that there are cases saying that it's okay to rely on counsel's representations.

MR. CHEN: I appreciate that. In fact, I used to be of that same understanding until, it's a decision written by Judge Shurp (phonetic sp.) and --

MS. ROBESON: Is it a Court of Special Appeals?

MR. CHEN: Yes, it is Court of Special Apps and I'll try to get it to you at the break if there's a time when I can pull it. I'll --

MS. ROBESON: Yes, because if you're going to say dismiss it out of hand, I'm not going to do it without

reading your case. Well, I'm not going to do it, but --
MR. CHEN: And I'm, please, I'm not saying that the application can't be amended --
MS. ROBESON: Yes.
MR. CHEN: -- okay? My issue is these entities must be parties and, in fact, they must be parties to at the very minimum the presentation of the evidence because it does impact and this is supposed to be an overall project and they either have to be here to participate to say, you know, we have no problems with this or they have to appear before you and say that they are a property owner, they are subject to it, they are the successor in interest and that they have no objection to what is being questioned by the amendment.
MS. ROBESON: Okay.
MR. CHEN: But that requires an amendment to the application.
MR. HARRIS: I'm just, when Mr. Chen was talking earlier about where what he just said is in the zoning ordinance --
MS. ROBESON: Well, where -- can you cite to 59D again?
MR. CHEN: Yes. The, first of all, what I said was that I'm relying upon Division 59D-1, which is the development plan also.

MS. ROBESON: Right.
MR. CHEN: When you go through that and it starts with Section 59D-1.1, when you go through that and read the entire section, you then come to 59D-1.74 which deals with the nature of this proceeding which is a proceeding to amend and approve the development plan after it has been approved by the District Council. And the opening words in that section say any proposal by the applicant. Now the words the applicant as used in that section turn back to everything in that section, Division 59D-1. It talks about the applicant, the applicant, the applicant and in this particular case what happened, and I think I understand why, three entities chose, chose to seek the rezoning, chose to have a development plan approved under one umbrella of all three and they were the applicant, technically under the law they were the applicant. They remain, as we sit here today, those three entities remain the applicant.
MS. ROBESON: Well, it's whoever their success -- according to your theory --
MR. CHEN: Yes, they could be.
MS. ROBESON: -- it's whoever their successors are.
MR. CHEN: Yes. Yes. I was coming to that. They remain today, either those three, or their successor. Please, I'm not saying that some entity that no longer

exists --
MS. ROBESON: Yes.
MR. CHEN: -- must be resurrected. I'm not saying that. And I appreciate that there could be a successor, but naturally in that particular case then the successor becomes an applicant and there is evidence in the record showing that they are the successor.
MR. HARRIS: Madam Hearing Examiner, each of them was individually an applicant. They were not a joint venture. They were not a partnership. Each was an applicant. There were multiple applicants. And I still have not heard Mr. Chen say where in the zoning ordinance it says every applicant has to join in a development plan amendment. It doesn't say that.
MS. ROBESON: Okay. I understand both sides, all right? So with that, are there any -- I hesitate to ask, but are there any other preliminary matters? Yes, sir, Mr. Kline?
MR. KLINE: I would just ask this. I know that on occasion your office has conversations with the Park and Planning Commission to help get, understand your interpretation of the materials that have been transmitted here. That may well occur before the hearing. But I would ask that any communications with Park and Planning from your office after this point in time be on the record so that we

can basically participate in that.
MS. ROBESON: That's fine.
MR. KLINE: Thank you.
MS. ROBESON: All right. Anything else? All right.
MR. HARRIS: Oh, excuse me. There is one other thing. Again, I want to correct Mr. Chen. The rules of procedure under cross-examination say, it doesn't only talk about a spokesperson, it says the Hearing Examiner may require that a spokesman for allowing parties to designate to conduct cross-examination. I --
MS. ROBESON: Where are you?
MR. HARRIS: I'm on Rule 4.4. And so in light of that, I would -- and so as to keep this hearing moving and not avoid any further, you know, delays, I would request that you ask or appoint one of the two of them to conduct the cross-examination.
MS. ROBESON: I'm not going to do that because they each have clients with different interests and if I require them to -- I understand your concern, especially after 4831 West Lane. But I understand your concern, but they each have clients with different interests and it is within my discretion and I don't want to have an appealable issue. And I think it's better to -- I would request that, what I am going to say is the cross-examination, I'm going

to be relatively strict about staying within the scope and relevance, but I'm not going to require them to funnel questions through one attorney. Yes, Mr. Kline?

MR. KLINE: Can I just get a clarification where we are on Mr. Chen's, maybe not the motion, but the discussion? Are you waiting for us to basically give you some ammunition as to whether that we have all the proper parties before us?

MS. ROBESON: Yes. Well, I'm going to look at it. I wish that you had, Mr. Chen, you had made the motion earlier so we didn't have this delay, but I want the case from the Court of Special Appeals and I did not bring 59D with me and I don't want to recess the hearing just so I can read it. So that will be my lunchtime homework, all right?

MR. KLINE: Yes.

MS. ROBESON: Your lunchtime homework, no, you're -- we'll take a break at some point and you're going to get me the case, correct?

MR. CHEN: I'm, at break I'm going to run back to my office and jump into my files to pull the case.

MS. ROBESON: Well, no, no, no. You don't have anyone you can call?

MR. CHEN: No, I don't. No, I don't, I don't have someone I can call.

MS. ROBESON: Well, where is your office?

MR. CHEN: On the other side of the parking lot.

MS. ROBESON: Oh, okay. I'm just checking because I'm thinking --

MR. CHEN: Yes.

MS. ROBESON: And it's not going to be --

MR. CHEN: I'm two minutes away.

MS. ROBESON: -- an hour break before lunch.

MR. CHEN: No, no, no, I'm two minutes away, two minutes away.

MS. ROBESON: Okay. All right. Anything else? Yes, sir?

MR. HARRIS: Would you entertain a brief opening argument?

MS. ROBESON: Yes, I am going to do that. So with that, before we get to that, any other preliminary matters?

(No audible response.)

MS. ROBESON: All right. Mr. Harris.

OPENING STATEMENT BY ROBERT HARRIS, ESQ.

MR. HARRIS: Thank you, Madam Hearing Examiner. I would start by saying there is even a question whether any DPA is even required here. The MXPD zone allows 20 percent retail within the commercial component and the existing approved development plan gives major flexibility for the Planning Board at the time of preliminary planning site plan to define what the uses are within that undefined commercial

envelope.

There is no need in a development plan to define each and every use that's going to be located within an MXPD property and, in fact, in this own case the hotel that has been approved at site plan for the, what we would refer to as the Gaznel property on the north side of 121 is not mentioned in the development plan anywhere, but yet it has been approved through preliminary plan and site plan approvals. Even the hospital that was going to go here before is not identified in the development plan.

The, when we met earlier with Park and Planning staff they asked us to seek a development plan so that it was clear what we were doing and that's what we did, but there really isn't even a requirement for that. To the extent a development plan amendment is required; this is quite minor in nature. The MXPD zone is already in place, properly zoned. All the findings applicable to the MXPD zone have been made by the District Council. We're talking about the same 283 and a half acres, no change in that, and we're talking about the same total density. It's the same residential development, same commercial development that was approved in the development plan.

The, in terms of the justification for the development plan amendment, I think it's substantial. Planning Staff took five months prior to the Planning

Board's hearing to evaluate this. Their Staff Report was not based on a knee-jerk reaction at all, but after their thorough evaluation they provided their full support for this in a 44-page, detailed Staff Report, not including the various attachments.

As you have in the record, Exhibit 43, there were 77 letters and e-mails in support of this. There were, I think, three, maybe four letters of opposition to it. But the Planning Board went through a really thorough discussion. I think it was a three hour plus hearing on the 18th and in the end unanimously supported this with Commissioner Presley. I think her word was, I enthusiastically support this. And I would also note that the chair, Francoise Carrier, was the zoning hearing examiner that heard the original MXPD and the development plan. So she had personal, intimate knowledge not only of who the applicants were in that proceeding, but in every dimension. And as all of us know, she is one thorough person and doesn't forget anything. And so the fact that she was in support told me a lot.

Under Maryland law and zoning hearing examiner precedent, the Planning Board's support and in particular its interpretation of the master plan is entitled to great weight and that's the Watkins case, Watkins v. Secretary of the Department of Public Safety. And so we have here

unanimous Planning Board support that's entitled to great weight. Unfortunately, we're going to spend a lot of time going sideways, I think, with claimed experts who are going to try to discredit the Planning Board, but I think they've got a tall task. I also note the quantity and, indeed, the quality, the substance of the letters of support that you, the Zoning Hearing Examiner, have gotten. I think as of this morning there are 98 such letters of support and they come from people like, from people like former council member Mike Knapp (phonetic sp.); from Barry Shandel (phonetic sp.), the head of the Clarksburg Civic Association; Cathy Holly (phonetic sp.), who is very involved; Dave Flanagan, who is developing the town center talking about it not impacting them; Marilyn Balcom (phonetic sp.) from the Gaithersburg/Germantown chamber. And, as I say, letters of support from all of the other property owners in the Cabin Branch community, the most affected properties. So this is a very compelling case.

On the other hand, what we have is opposition from a competing business interest, the Peterson Group, that does not even own their land and as I said earlier, way far behind us in terms of their development approval process. And we've got an individual who owns a property in the historic district more than a quarter, maybe even more than a half a mile away from this and separated by I-270. Under

Maryland law, I don't believe that either of them has a special interest in this that entitles them to party status. And, but in any respect, they have been allowed to participate here and I, you know, I think their testimony will be considered for what it's worth. But it's a compelling case and we're going to spend a lot of time going sideways on it to my regret. The only other thing I would say is the applicant agrees to the binding element that the Planning Board has recommended as it's worded there. Thank you.

MS. ROBESON: Thank you. Just to clarify, I don't think you need, you need a grieve status to appeal, but the test for a party is much different. So --

MR. HARRIS: That is my point. I agree with that.

MS. ROBESON: Okay. Mr. Chen.

MR. CHEN: Madam Examiner, I defer to the presentation of the opposition.

MS. ROBESON: All right. Mr. Kline.

MR. KLINE: You actually, despite all the blue suits in this room, you're actually going to find this a pretty easy case to digest and --

MS. ROBESON: That's good.

OPENING STATEMENT BY JODY KLINE, ESQ.

MR. KLINE: That's a good thing. And it's as simple as if you can recall the opening statement that you

read, that you either read or stated at the beginning of the hearing, the proposal is to increase the amount of retail from 120,484 and reduce the amount of employment from whatever number it was, whatever number it was. And the premise on which you're going to hear us objecting is very clear language in the master plan that says there will not be more than 120,000 square feet of retail development in the Cabin Branch neighborhood. So what has been described as being minor in nature is a jump from 120,000 to 484,000, which I do not believe any reasonable person would consider to be minor in nature.

I wouldn't have said this but for the preceding comments and that is as the applicant's justification study points out is that the, let's say that some of the moving parties and the people participating, I'm sorry, attending here today are basically the ultimate developers of the property. Though the application is filed in the name of the property owner, Simon Properties, New England Properties, if I have that correct, and other entities are basically going to be the developers of a retail element shopping center on this property on behalf of, presumably as contract purchasers from Adventist Hospital who, as the material you got, has explained that we were going to build a hospital there once and because we did not get our certificate of need, we now have X-hundred thousand square

feet of land that we can't do anything with. It's an albatross on our, around their neck, and some clever developer came in and said, hey, Peters and Company has announced they're going to do this on the east side of I-270, why don't we go ahead and do it on the west side of I-270 because we've got property that's available. So I would argue that, well, actually I'm not going to argue. I'm just going to say there's competing interest on both sides from a competition point-of-view. So I'd just soon not talk about that.

But I will just say that the letters that you've got in your file from employees of Adventist who don't live anywhere close to the property who are saying you need to help us out because we've got to get this albatross off around our neck is basically not a reason to go ahead and rezone the property to, in a way that's contrary with the master plan.

MS. ROBESON: Mr. Harris, your first witness?

MS. HARRIS: My first witness would be Jonathan Sachs from Adventist Healthcare.

MS. ROBESON: Mr. Sachs, please raise your right hand.

(Witness sworn.)

MS. ROBESON: Okay. Go ahead, Mr. Harris.

BY MR. HARRIS:

Q Mr. Sachs, would you state your name and business address for the record?
A Yes, Jonathan Sachs, 820 West Diamond Avenue, Gaithersburg, Maryland.
Q And can you inform us who employs you and what your position is?
A I'm the director of public policy and community engagement with Adventist Healthcare.
Q And can you briefly describe Adventist Healthcare?
A Yes. We're a non-profit, faith-based healthcare hospital system. Our two hospitals in the Maryland area, Washington Adventist Hospital, Shady Grove Adventist Hospital, we've been in the community for over 100 years and we're the largest employer in Montgomery County, largest private employer of Montgomery County.
Q How long have you been employed at Adventist Healthcare?
A I'm starting my ninth week.
MS. ROBESON: Welcome.
THE WITNESS: Thank you.
BY MR. HARRIS:
Q Have you had occasion to study the history of the Cabin Branch project to any degree?
A Yes, I can tell you what I know. In the late 1990's, we began to see growth and demand for healthcare in

the up-county and we saw a future need for a full hospital, you know, between Shady Grove Adventist Hospital and Frederick, about 25 miles around there, saw a growing population in Germantown, Clarksburg, Urbana, lots of places, up-county and we saw problems with limited land sites and saw land up-county starting to be sold and purchased quickly and we decided that as an organization we had an obligation to begin planning for a hospital. We bought approximately 170 acres along I-270 at Cabin Branch. We had a plan for a hospital, MOB, outpatient centers, nursing, senior housing and other employment and we had to wait to seek a CON to get the numbers of people who live up there to get the necessary zoning and site plans.
Winchester and others own the remainder of the 535 acres of the Cabin Branch tract. With other Cabin Branch property owners in 2000, we began what turned out to be a very lengthy development approval process for mixed use neighborhood with all types of housing, retail, employment, entertainment and medical and a hospital and we spent seven years and hundreds of thousands of dollars getting water and sewer, category change for Stage 3 MXPD zoning, a development plan that would allow uses for mixed employment and retail, preliminary plan of subdivision, infrastructure site plan, water quality and forest conservation plan and many related approvals. We also agreed to co-fund an

obligation for infrastructure which, you know, I understand totals more than $100 million.
We had land use approvals to seek a CON and we entered into that process. We had a competitive review at the state with the Holy Cross site in Germantown. Unfortunately, we were not awarded the CON. It was given to Holy Cross versus us in that comparative review.
MS. ROBESON: All right.
BY MR. HARRIS:
Q Since the loss of the hospital opportunity, have you explored other uses for your land?
A Well, we're not, we're not a developer, we're a healthcare company and, you know, we're looking to do something, you know, different where a ton of money tied up in land. But we're also, you know, had a pro rata share of the infrastructure costs which was starting to approve for our organization and we want to, you know, rededicate our capital that we have tied up into healthcare. You know, we're a non-profit healthcare company. We have fixed rates from the state. The Maryland Hospital Associations released a report that says that, you know, those rates are not keeping up with inflation over at least the last three years and hospitals in Maryland absorb the full 2 percent cut from sequestration. So we're looking to reinvest in healthcare.
We were seeking a purchaser for at least part of

the land that we had in Clarksburg. We didn't have interest. In 2012, we had expressions of interest in retail and outlet. We had four interested parties in building such a center on that land, including Peters Inn and the Tanger Outlets and after careful evaluation of all of them, as we were going through the CON process, we spent a lot of time interacting with the community and learning about what their needs were in Clarksburg. We selected Streetscape New England Development and Simon, we felt that they had the best record working with the community and delivering on their commitments to a community. We thought that they had the best product and they had the best prior performance and we thought that it was the best for Clarksburg and Montgomery County.
Q Did you participate in outreach efforts with the community about your plans and if so what was the response that you got?
A We did. We did and we had, you know, an overwhelmingly positive response. Recently I was at the presentation in front of the Economic Development Committee of the Gaithersburg/Germantown Chamber of Commerce where we had a very, you know, warm welcome encouraging us to get started and get moving on this project. Park and Planning, the community and business leaders seemed enthusiastic about the project.

Q Just one follow-up then. Did you say that the Peterson and Tanger Outlet parties were, did submit an expression of interest in buying the land?
A Yes.
Q Okay.
MR. HARRIS: No further questions.
MS. ROBESON: Mr. Chen.
MR. CHEN: I have no questions.
MS. ROBESON: Mr. Kline.
CROSS-EXAMINTION
BY MR. KLINE:
Q Mr. Sachs, can you recall the date or the time in which Adventist became aware that it would not receive the certificate in need, thus making this property sort of surplus?
A I can't, no, I mean I think it was late 2011, but I'm not, I'm not positive.
Q Thank you.
MS. ROBESON: Redirect?
MS. HARRIS: No, thank you.
MS. ROBESON: Okay. Next witness, please.
MR. HARRIS: Madam Examiner, it's clear that this case is going to go on for awhile. I was, when I originally scheduled it there was no opposition and, but I had arranged with a number of community residents to give up their time

to come and speak to the Hearing Examiner. They are here now and I would ask permission to interrupt our direct case to let some of those folks speak so they can get onto their daily lives.
MS. ROBESON: Any objections?
MR. CHEN: No.
MR. KLINE: No, I mean assuming --
MS. ROBESON: Okay. That's fine.
MR. KLINE: -- that the same courtesy would be extended if --
MS. ROBESON: Yes.
MR. KLINE: -- people come on day two or they --
MS. ROBESON: We do try to accommodate people. All right. That's fine.
MS. HARRIS: Okay. Thank you. Okay. Marilyn -- Marilyn? Okay. Yes?
MS. HULLEY: No, Kathy Hulley.
MR. HARRIS: Oh, Kathy? I'm sorry. I beg your pardon.
MS. HULLEY: Good morning.
MS. ROBESON: Good morning. Please raise your right hand.
(Witness sworn.)
MS. ROBESON: Thank you. Go ahead.
MS. HARRIS: She's not my witness, so --

MS. ROBESON: Oh, she's not?
MR. HARRIS: Yes.
MS. ROBESON: Oh, I'm sorry. Please state your name and address for the record.
MS. HULLEY: My name is Kathy Hulley. I live at 21809 Diller (phonetic sp.) Lane in Boyds.
MS. ROBESON: Okay. If you would kindly make sure the court reporter has the spelling of your name --
MS. HULLEY: Yes.
MS. ROBESON: -- before you leave?
MS. HULLEY: Yes.
MS. ROBESON: Or did you sign the sign-up sheet outside?
MS. HULLEY: No, but I can on the way out if you want me to.
MS. ROBESON: If you could sign the sign-up sheet with your e-mail address and print clearly your name?
MS. HULLEY: Okay.
MS. ROBESON: That's good too. Okay. I'm sorry. Go ahead.
MS. HULLEY: I've lived in Clarksburg for 33 years. I've been associated with the civic association and the master plan since before its inception.
MS. ROBESON: Which civic association, Clarksburg?
MS. HULLEY: Clarksburg Civic Association.

MS. ROBESON: Okay.
MS. HULLEY: I'm a secretary back in 1990 and the master plan was adopted in 1994. At that time, FDA was going to build on that land and we would have had a perfect Government town, but that didn't happen and the Clarksburg, the hospital fell off, so we didn't have that either.
I view this project as being a plus for Clarksburg. It's in an ideal best position, I believe. It's -- Clarksburg needs something that will draw people from out of the town center to that area. I live on the very southern part of the planning area and it's certainly something that would draw me to go to Clarksburg, otherwise I would have no real -- the town center is not going to be what was promised in the master plan. The master plan has changed a lot.
The retail has changed a lot. Originally the town center retail was to go first and then Clarksburg Village got the, because of the tie-ups with the town center put the Newland, Clarksburg Village got to go first. So I see this as being a great -- if this doesn't go forward, it could be in limbo for years. I was on the Germantown forward master plan committee and they've approved so much more commercial for that area that Clarksburg is going to be way behind again. It's millions and millions, hundreds of millions of -- I'm not quite sure how much, but a great deal. And so

Clarksburg, which would have been developed, is going to be down the line yet further.
MS. ROBESON: Okay.
MS. HULLEY: So --
MR. HARRIS: Okay.
MS. HULLEY: -- and the interchange will be built, which we need. It's got to be built before any building can be occupied.
MS. ROBESON: All right. Do you have any --
MR. KLINE: No, ma'am.
MS. ROBESON: Okay. Mr. Chen, cross-examination? Mr. Kline?
BY MR. KLINE:
Q Ms. Hulley, you used the phrase, I think the phrase was out of the town center, so it sounded to me like you were saying that this facility would basically draw people out of the town center because it's not, it's not --
A No.
Q -- reaching its vision?
A It would draw people who were in the whole area of the Clarksburg planning area to that town center area, town center district.
Q Town center as we describe it in the master plan?
A Well, there's two things that people get confused in, especially in Clarksburg, is the town center which is

the area which is very densely populated and then there's the over-broader area which is the town center district. And this is just outside the town center district --
Q Right.
A -- but right adjacent to it.
Q Okay. Well, but I understood your phrase to be it would draw people out of the town center because the town center is immature --
A No.
Q -- or not developed? No?
A It would draw people who are out of the town center to the town center. It would take people away from the town center.
Q Okay.
A It would draw people into the town center.
Q Then what's the significance of your comment that the town center has not developed the way it was promised in the master plan?
A Because the original vision for the real town center was to have, it was to have retail, commercial and, what's the word I want to --
Q Residential?
A No.
Q Civic?
A Civic.

Q Yes.
A And it's not going to have what was promised. So if you don't have the civic and the areas to draw people in, then it's not going to be the viable town center that it was going to be originally.
Q And maybe it's not a question you can answer, but why is it not going to reach that vision in the master plan? What's the changed circumstance that's going to keep it from fulfilling that image?
A Because it's my belief that too much residential was allowed and then the area that was left for the commercial and, commercial and civic was reduced.
Q Thank you.
A And --
MR. KLINE: I have no further questions.
BY MR. HARRIS:
Q Ms. Hulley, are, you know, you saying that you believe this project would have a positive impact on the town center?
A Yes, because it would draw people to, adjacent to the town center and into the town center.
Q Thank you.
MS. ROBESON: Anything else?
THE WITNESS: I believe, too, that once it's built, a lot of people in Clarksburg will shop there and not

need to go elsewhere.
MS. ROBESON: I see -- thank you, you can, you may be excused. I see some people standing at the doorway. Are they your witnesses, Mr. Harris, or --
MS. HARRIS: One is a -- no, no, no, some of them are, yes.
MS. ROBESON: Just an interested citizen?
MR. HARRIS: Yes.
MS. ROBESON: Okay. And is anyone else there going to testify?
MR. HARRIS: Yes, ma'am, at least two of them. There are community witnesses that we've met with, so they do plan to testify.
MS. ROBESON: Okay. All right. Is there anyone sitting in the audience that is a civic or individual that wishes -- are you for the case or against -- for the --
MS. BUFFINGTON: I'm not against the case per se, but I would like -- I'm a business owner in the center of Clarksburg and I would like to speak. I didn't know all these witnesses were coming to speak.
MS. ROBESON: Okay. All right. And how many do you have there?
MR. HARRIS: One, two, three, I think three speakers.
MS. ROBESON: Okay. Then let's have, ma'am, you

can come forward. And then we'll take, I'm sorry, I don't have your names.
MS. BALCOLM: Marilyn.
MS. ROBESON: Okay. And then we'll take the two of you that want to testify. Okay.
MR. HARRIS: Before we do this, I should have done this, I have the affidavit of posting.
MS. ROBESON: Oh, yes, that will be 44.
(Exhibit No. 44 was marked for identification.)
MR. HARRIS: Thank you.
MS. ROBESON: Exhibit 44. Come forward and have a seat.
MS. BUFFINGTON: Okay.
MS. ROBESON: Thank you. All right. Please raise your right hand.
(Witness sworn.)
MS. ROBESON: Can you please state your name and address for the record?
THE WITNESS: My name is Elizabeth Buffington, known as Betty Buffington, and my Clarksburg address with my business is 23315 Frederick Road, Clarksburg, Maryland.
MS. ROBESON: And did you sign the sign-up sheet outside?
THE WITNESS: I signed in, yes.

MS. ROBESON: Yes. Okay. What would you like to say?
THE WITNESS: Well, my husband and I bought land in Clarksburg for commercial development to develop our new real estate office, Remax Realty Center there in 2006 and it took us over six years to develop it. And in the process of developing it, the community told us they wanted a restaurant there. So in addition to moving our -- we built a 14,288 square foot commercial building in the historic district in the center of Clarksburg.
MS. ROBESON: Okay.
THE WITNESS: Through some of the people here, I believe, you know, Kathy Hulley opposed us at the time, but finally did agree to say that it was okay for us to have a building there. But, anyway, we went through many hoops and we went through the Historic Commission to build the property. So after all this time, we do have our building built. We started to occupy it in August a year ago and we first put our Remax office there and then we built the Bennigans. We had to do the Bennigans because, ourselves, my husband and I did, because no one else would step up to the plate because Clarksburg is known as a difficult area to develop in.
So, anyway, at this time I am sitting as one of the lone businesses in the historic district that has any

viability. And the reason I wanted to speak on this is we were very excited when we heard that the Peterson company was going to develop adjacent to the historic district in outlet center. And at that time I didn't know about the Simon property which was proposed across Route I-270. And the reason I feel that this plan for Peterson, I have nothing against the Simon mall or anything else, I'm sure it would be nice, is that it draws things away from the center of Clarksburg and sort of puts it on the fringe. And Ms. Hulley said, it is not adjacent to the center of Clarksburg, it is all the way across 270. It's going to segregate and make shopping difficult for those in the center.
The plan that David Flanagan has for the neighborhood grocery store mall --
MS. ROBESON: Okay.
THE WITNESS: -- and --
MS. ROBESON: I don't know names, so --
THE WITNESS: Okay.
MS. ROBESON: -- is that Elm Street that, the owner of town center?
THE WITNESS: The Elm Street plan --
MS. ROBESON: Okay.
THE WITNESS: -- for the town center would be walkable within the historic district to the Peterson property which is, you know, adjacent. It would be like a

15-minute walk which is good planning to me because, you know, Clarksburg was supposed to be walkable, it was supposed to have a vibrant, commercial district. The Peterson project will bring sewer to that historic district which currently has many, many failing sewers, septic systems, which is actually polluting the creek, the 10-mile creek at this time. So that, plus the transportation center was going to come there. Peterson was going to help put that in, you know, which is something that the citizens long wanted and now there won't be any reason to bring it there. There isn't enough commerce there in the center of Clarksburg to bring a transportation center. So the sewer, the walkability to the two commercial centers, these are some of the reasons that I, you know, I favor the Peterson project over this one which I think will marginalize Clarksburg because right now we have a grocery store which is on the fringes up near Route 27, Harris Teeter being built. It's a small neighborhood thing.
MS. ROBESON: Okay.
THE WITNESS: And then if this one were to go through, then we have this one way on the other side and the center of Clarksburg has nothing.
Oh, the other thing that Peterson was going to do was to put that bypass in.
MS. ROBESON: Okay.

THE WITNESS: You know, and if they don't do it, that won't come through either.
MS. ROBESON: What bypass?
THE WITNESS: The bypass around the historic district will --
MS. ROBESON: I see. Okay.
THE WITNESS: Which will take traffic, you know, more or less around the historic district so that it's not so congested on Route 355.
MS. ROBESON: Okay.
THE WITNESS: Which it is right now. So those are --
MS. ROBESON: Okay.
THE WITNESS: -- other three important benefits the Peterson Group would have had that I feel -- that's why I'm, I'm just not liking the way the design is going right now.
MS. ROBESON: All right. Mr. Harris?
BY MR. HARRIS:
Q Ms. Buffington, is it safe to say that you want at least one of these projects, one of the outlet centers, but that your preference was for the Peterson one?
A Correct.
Q And do you have any feel for how long it will take the Peterson project to come to fruition?

A Well, I don't know how long it takes anybody to develop in Montgomery County. I know it took us six years to build a 14,000 square foot building.
Q So would it be your assumption that to build a 400,000 square foot retail center would take at least six years?
A I don't know.
Q Do you -- were you present at the Planning Board hearing on July 18th?
A That was the one where you were --
Q Correct, yes.
A -- approved? Yes.
Q Yes. And did you hear Gwen Wright talk about how the Peterson project would be bad for the town center, but that the Simon property, Simon development would be good for the town center?
MR. KLINE: Objection. I don't believe that's an accurate characterization.
THE WITNESS: She, she --
MR. HARRIS: Okay. I'll quote it.
THE WITNESS: She didn't say that. She didn't say that --
MR. HARRIS: I'll quote it.
THE WITNESS: -- exactly.
MR. HARRIS: Let me quote it then.

MS. ROBESON: Is this from the transcript?
MR. HARRIS: It is my transcription.
MS. ROBESON: Mr. Harris, I'm not going to allow that in without any more documentation.
MR. HARRIS: Okay.
BY MR. HARRIS:
Q Did you hear Ms. Wright speak?
A I did.
Q Did she support the Peterson project or criticize it?
A She didn't name anything directly. I'm not sure which project she was talking about.
Q Did she support the Simon project?
A I didn't hear her support or not support anything particularly.
Q Did you hear the Planning Board?
A I did.
Q Did they support the Simon project?
A Yes, they voted to let it -- they voted to let it go forward, the amendment.
Q And did they hear arguments from Mr. Cobb and his attorney that those two individuals believed it would be adverse to the town center?
A I'm not sure what you mean.
Q Did Mr. Cobb testify?

A Yes.
Q Did Mr. Cobb testify in opposition to the Simon property?
A He testified in addition to, yes, he did.
Q And was part of his opposition a claim that it would be adverse to the town center?
A Yes.
Q And did the Planning Board agree with him or disagree with him?
A They didn't express their agreement or disagreement.
Q Okay. Has Peterson Company said that they're going to pay for sewer to come to the town center or to the historic district?
A They said they would provide it, yes.
Q So they, your expectation is that they will pay the cost --
A Yes.
Q -- for that? And that is all the way up to your properties?
A Well, my property has sewer.
Q Okay. So you -- but for the other historic properties, that's what you're looking for?
A They will bring -- it's my understanding that they will bring them to the point where the citizens can connect,

yes.
Q Without a cost to the citizens?
A Well, you know, I mean these things -- yes, I'm assuming that they're going to bring the main sewer in so the citizens don't have to pay for that whole, big thing to be brought in.
Q Okay. And the same question with respect to the bypass, is it your understanding that they're going to pay for the bypass?
A Yes.
Q Do you believe that --
A And they actually, they proposed to bring it through Gateway instead of bringing yet another road, because the historic, the people in the historic district do not want to move the old schoolhouse where that inter-connector road would go through and it would have to move it. So the people in the historic district don't want that.
Q And so part of your basis for preferring the Peterson is your understanding that they will pay for the sewer to the historic district and they will pay for the construction of the bypass?
A Correct, through Gateway. They propose it to go through Gateway. And so it doesn't disrupt the historic district when, you know, so it comes in without disrupting the historic district, comes in and avoids, you know, a lot

of traffic in the historic district. I think, I see all kinds of benefits to it.
Q If -- are you aware that they are, Peterson is telling the community that they'll have their center built and open by 2015?
MR. KLINE: Objection. We're getting into dueling shopping centers here and that's not the purpose of this hearing.
MR. HARRIS: That was the whole basis --
MS. ROBESON: Well, that's --
MR. HARRIS: -- of her testimony.
MS. ROBESON: -- that is the gist of her testimony, but Mr. Harris, you know, what people say -- I don't care what people -- I think it's a little far.
MR. HARRIS: Normally I would not care, Madam Examiner, but --
MS. ROBESON: I understand.
MR. HARRIS: -- but her preference, my position is that that center, if it is every approved, will be years off and I'm trying to understand whether that would affect Ms. Buffington's support.
MS. ROBESON: Well, why don't you ask her to assume that?
MR. HARRIS: Okay. Let's --
MR. KLINE: Let me ask you this. I would -- don't

think we should go down this line because then I'm going to be compelled to basically go ahead and cross-examination, cross-examine their witnesses on their press releases, on their time schedule and have to disprove what they're saying.
MS. ROBESON: Well, the --
MR. KLINE: And we don't want to get into public relations.
MS. ROBESON: No, the problem is, Mr. Kline, that she's saying she prefers your client's center because it's better, it will come soon, it's better for Clarksburg.
MR. KLINE: And that's a valued -- did she say it's coming sooner? She said as value judgment it would be better. I'm not sure she said it's coming sooner.
THE WITNESS: Well, what I --
MS. ROBESON: Well, what's your position? Does it matter to you the timing?
THE WITNESS: Ms. Robeson, it, the timing, you know, Clarksburg has been delayed from getting all kinds of benefits for so many years. I've been involved, my husband and I have been invested and involved in this property since 2006 and we've seen Clarksburg citizens, Mr. Fantle who is about to speak, he knows all of the disruption there was in Clarksburg and why the town center never even got developed. So people there don't have anything, but it's not like, oh,

if I can deliver this six months sooner than you can, then you'll take me because I'm faster. I don't get that argument.
MS. ROBESON: Well, what if it's five years sooner?
THE WITNESS: Well, you know, that's something that is not up to me. I think that both -- I'm told by, you know, council member Rice that both projects can finish at the same time. And I don't think the timing is that big of an issue.
MS. ROBESON: All right.
MR. HARRIS: Have you had discussions --
THE WITNESS: Because if you do poor planning --
MS. ROBESON: No, go --
THE WITNESS: Because if you do poor planning and you don't make the center of Clarksburg, the vision of Clarksburg was for the center to be vibrant, for it to be the commercial center, not to have it on the fringes and that's what's happening right now. It's going on the fringes.
MS. ROBESON: Go ahead. Do you have other questions?
MR. HARRIS: Yes.
MS. ROBESON: Go ahead.
BY MR. HARRIS:

Q What did Mr. Rice tell you about this, the Simon project?
A He didn't tell me anything about the Simon project.
Q You just said that he said both projects could go forward at the same time?
A Yeah. Let me correct that. His staff person, Sharon St. Pierre, told me that Craig said this is, you know, that both projects could finish the same time.
Q So you had a discussion with Sharon St. Pierre about the --
A Yes, I did.
Q -- the timing of -- okay.
MS. ROBESON: When was that?
THE WITNESS: It's been about a month ago.
MS. ROBESON: All right.
THE WITNESS: It was when Craig was going to have his meeting with the Clarksburg citizens. It was right, the night before that.
BY MR. HARRIS:
Q Do you know whether other people have had such discussions with Sharon?
A No.
Q Have you had any discussions directly with Craig?
A No.

Q Have you had discussions with Peterson about their project?
MR. KLINE: Objection.
MS. ROBESON: Yes, what -- she can have discussions with Peterson.
MR. HARRIS: I have no problem with that. I'm -- I want to find out the nature of those discussions.
MS. ROBESON: No, I don't. I don't see how that's relevant.
MR. HARRIS: I want to find out when they told her they were delivering.
MS. ROBESON: We'll ask her. No, don't go there.
MR. HARRIS: Okay.
MS. ROBESON: Just ask it.
MR. HARRIS: Okay. No more questions.
MS. ROBESON: All right. Mr. Chen?
MR. CHEN: No questions.
MS. ROBESON: All right.
MS. ROBESON: Mr. Kline?
MR. KLINE: I have a simple one.
CROSS-EXAMINATION
BY MR. KLINE:
Q You said you bought your property in Clarksburg six years ago?
A In 2006, seven years now.

Q Did you have an opportunity to take a look at the master plan and the structure of the master plan?
A Of course, we were battling, interested in that.
Q Okay. Would I be inaccurate in describing it as being the town center was the core and the new cut neighborhood now known as Clarksburg Village, I guess, the Cabin Branch were subordinate, what I think you called fringe development?
A Well, Cabin Branch wasn't -- when we purchased, they were still trying to get the hospital in over on that side of 270 and it wasn't until lately that this happened.
Q But the principle focus in the master --
A But --
Q -- plan or the hierarchy we're talking was focused on the town center?
A Correct.
Q This was the development of the town center?
A Yeah, and that's why we bought that property. We though it's great. It will be right in the center of the town and it's going to be good planning and it's going to be walkable and the whole thing and then, you know, we have a different --
Q And the way --
A -- thing coming along.
Q -- the town center was going to basically get on

its feet earlier was the staging element in the master plan?
A Right.
Q And that --
A Right.
Q -- they are requiring 90,000 square feet of development, retail development in the town center before you could do the new cut or Cabin Branch?
A Right.
Q That was changed in 2011? But do I understand your testimony to be you're concerned that that hierarchy of uses will be a diminished --
MR. HARRIS: Objection. He's leading the witness here with --
THE WITNESS: No. Let me just say this --
MS. ROBESON: Well, she's not his witness, but --
THE WITNESS: Yeah.
BY MR. KLINE:
Q I will make it a little bit more precise. In your opinion, does the Cabin Branch proposal detract from the structure in the master plan the way it was organized and intended to be played out from development?
A Absolutely.
Q Okay.
A Absolutely.
Q And why?

A Well, because the town center is not going to be the town center anymore and I don't know who will develop that property and make the town center vibrant if it doesn't go the way it's, you know, scheduled to go with Peterson.
Q Thank you.
A I don't know who else will come in and build something over in there.
MS. ROBESON: In the town center?
THE WITNESS: No, other than this neighborhood grocery store which is a 12-acre whatever plot, it will have another grocery store.
MS. ROBESON: Okay.
MR. KLINE: I have no further questions, but I do have a proposal and that is it sounds like we're going to spend a lot of time on who is going to get there first. I'd have no problem with basically us giving you a matrix that suggests what we each think is the development pattern for each of our properties so that we don't have to go through what do you think, who is going to be there first.
MS. ROBESON: Well, I guess the thing is who, who is on first is relevant because part of, I think what you're arguing is whether the, whether this is going to defeat the goal of the town, having the town center. And that's what -- she is not represented by you --
MR. KLINE: Okay.

MS. ROBESON: -- and she brought it up because that's what she feels. And so I do think at some level the impact of this development on the town center is on the table. I don't know if the timing of the two of them has anything to do, but I think that, you know, when you have an, someone that's not your witness bring it up, then I think that it's, he's entitled to cross-examine on it.
MR. KLINE: Well, I'm my suggestion is to try and get each of our best arguments in front of you so we don't have to waste time asking witnesses at this point, that's all.
MS. HARRIS: I would be interested in submitting that.
MS. ROBESON: Well, I guess my question is for you, Ms. Buffington?
THE WITNESS: Buffington? Yes.
MS. ROBESON: Is, does it make a difference to you which comes first?
THE WITNESS: Does it make a difference to me which comes first?
MS. ROBESON: For instance, say these guys go first. I mean --
THE WITNESS: These, Simon?
MS. ROBESON: Why --
THE WITNESS: Well, the reason it makes a

difference is because if Simon goes first, nothing is going to happen in the town center for a long, long time. And I'm going to be, I --
MS. ROBESON: But, okay, but and why is that? Why is nothing going to happen in the town center?
THE WITNESS: Because they're going to have such a huge -- they, you know, they're, what, doubling at least the amount of retail that was to be over there on that side and there won't be, there won't be enough of merchants. It's a 14,000, there's 14,600 or whatever citizens in Clarksburg, so how are you going to get another commercial developer to come in there and develop that town center when you've already got this humongous development going around over across 270 on the other side? It's just not going to happen in my opinion. You know, I'm going to, I'll be sitting there with my little restaurant by myself in my real estate company and all the money that me and my husband have invested in Clarksburg and hope that the citizens will finally allow David Flanagan to build his grocery store complex and it just seems to me that not only is it bad for my business --
MS. ROBESON: Well, there is a letter of --
THE WITNESS: -- but it's --
MS. ROBESON: Okay.
THE WITNESS: -- it's not good for the district.

MS. ROBESON: I'm not going to go there.
THE WITNESS: It's not good -- it doesn't, it doesn't conform to the vision of Clarksburg.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q A couple of follow-up. The 1994 master plan doesn't call for an outlet mall on the Peterson site, does it?
A No, it calls for development of -- it doesn't say outlet mall or not outlet mall. I don't think it matters. It's just the commercial development.
Q And the same is true for the Cabin Branch project, it also recommends MXPD zoning there and general commercial development, right?
A Right.
Q The Peterson site is in stage 4 of the master plan, isn't it?
A Yes.
Q And the Cabin Branch property is in stage 3? Yes?
A Okay. If you say so.
Q Do you want -- do you know?
MS. ROBESON: No.
THE WITNESS: That's okay.
MR. HARRIS: May I --
THE WITNESS: I mean that's fine. I take your

word for it.
MS. ROBESON: But --
BY MR. HARRIS:
Q And was stage 3 expected to proceed before stage 4?
MS. ROBESON: If you know? You don't have to --
THE WITNESS: I don't know.
MS. ROBESON: Okay.
MR. HARRIS: Fine.
MS. ROBESON: Any follow-up questions? Yes, Mr. Chen.
MR. CHEN: Thank you.
CROSS EXAMINATION
BY MR. CHEN:
Q Ms. Buffington, you just made a statement a moment ago about Mr. Flanagan and a grocery store?
A He has a grocery, a neighborhood grocery store shopping center planned hopefully. But he calls his situation, I guess he named that part which he bought for a dollar because it was so contentious and all the citizens and Kathy Hulley --
MS. ROBESON: Okay.
THE WITNESS: -- they all got up and objected to it, so the last developer went away. So David Flanagan named his third try, okay, try, because he paid a dollar for

it. And they're trying to get a neighborhood grocery store retail --
MS. ROBESON: Right.
THE WITNESS: -- small development in. The citizens have not yet approved it, what he wants to do. He's trying. So --
MS. ROBESON: Did that answer your question --
MR. CHEN: Yes.
MS. ROBESON: -- Mr. Chen?
MR. CHEN: Yes, it did and I have another question.
MS. ROBESON: Okay.
BY MR. CHEN:
Q A moment ago -- thank you very much, ma'am. So that the Flanagan -- is that Elm Street?
A Yes.
Q And their project in the town center --
A We support that, absolutely, I do.
Q And that project is for a grocery store?
A It's a neighborhood grocery store, little mall.
Q Okay. Now a moment ago Mr. Harris asked you questions about the master plan. Is there any mention in the master plan to your knowledge of any outlet mall either in any place in the planning area?
A Not really, no, I haven't seen that.

MS. ROBESON: Okay.
MR. CHEN: Thank you. No further questions.
MS. ROBESON: All right. What I'm going to do is this. Because it is a basis for -- you may be excused.
THE WITNESS: Thank you.
MR. KLINE: Thank you.
MS. ROBESON: Thank you for coming and being cross-examined.
What I'm going to do is this. Do you, are you going to provide direct evidence, the timing of the Peterson property?
MR. KLINE: I had not planned on doing that, no. I didn't consider it to be an issue.
MS. ROBESON: Well, what was your matrix that you proposed?
MR. KLINE: Well, because apparently we're going to be arguing about what are the various timing, so I just suggest that that's going to become an issue. We'll go ahead and give it to you so I don't want to have to spend time --
MS. ROBESON: Well, I guess then the cross-examination could be limited to whether the timing makes a difference to their opinion, all right?
MR. CHEN: Well --
MS. ROBESON: Yes, sir? I'm not limiting it in

advance depending on what people say. I'm just saying we don't have to go through the whole history via cross-examination, all right? Ma'am, do you -- I know your first name but I don't want to say, just Marilyn come up. So would you come up. She's not represented by you, Mr. Harris?
MR. HARRIS: No, ma'am.
MS. ROBESON: Please raise your right hand.
(Witness sworn.)
MS. ROBESON: Please state your name and address for the record.
THE WITNESS: I'm Marilyn Balcom. My work address is 910 Clopper Road, Gaithersburg, Maryland.
MS. ROBESON: And have you signed in in the sign-up sheet?
THE WITNESS: I did not, but I will.
MS. ROBESON: Could you sign-in on the way out? All right. What would you like to say?
THE WITNESS: Okay. I do have a statement. I'm speaking on behalf of my board, so I just want to get it out before --
MS. ROBESON: And your board is?
THE WITNESS: Oh, I'm the president and CEO for Gaithersburg/Germantown Chamber of Commerce.
MS. ROBESON: Okay.

THE WITNESS: Thank you for the opportunity to speak. I'm here today to express the support for the chamber for the Cabin Branch project plan amendment.

The applicant did make a presentation before our economic development committee and our board of directors, after reviewing the project, has approved and has voted to support the project. We believe that the additional retail services in the up-county will benefit all aspects of the community, not just Clarksburg, but the up-county. It's a project that will bring retail services to the area that currently don't exist in Montgomery County. So to go to -- go to an outlet retail, people go to Virginia or drive right by Clarksburg on their way to Hagerstown in Washington County for this type of experience.

We think the project will serve as a catalyst for other employment at Cabin Branch, restaurants, stores, entertainment opportunities for the citizens of Clarksburg, but also the whole county region and also the workers, employees that work in the area. We also note that the project already has approval for roughly 2.5 million square feet of commercial uses as the water and sewer lines and constructing the public road improvements that will serve the project. That was one of the issues that my board looked at was transportation infrastructure. And with the completion of the interchange, we felt that that was

critical.

This project is, can be brought online very quickly without public expense and we think that it's important to move forward in a timely manner on the project. We understand that the project has received the necessary environmental approvals which was another issue that our board was interested in and that there will be no adverse environmental impacts.

Clarksburg has waited a long time for retail and restaurants. We feel that it's a timely project that could be built in a timely manner and we would look at, ask for your recommendation for approval of the project.

MS. ROBESON: All right.

MR. HARRIS: No questions.

MS. ROBESON: Mr. Chen?

MR. CHEN: Thank you.

CROSS-EXAMINATION

BY MR. CHEN:

Q Ms. Balcom, did I mispronounce your --

A Balcom is right.

Q Thank you very much. During the course of your statement, I wrote down and I put in quotes, I hope I got it right, I believe you stated, quote, retail services that currently do not exist in Montgomery County, is that correct?

A That's correct.

Q Okay. What are you referring to, ma'am?

A The outlet mall.

Q So it's your understanding that the proposed development plan amendment would be for an outlet mall?

A Yes.

Q Thank you very much.

MR. CHEN: No further questions.

MS. ROBESON: Mr. Kline?

MR. KLINE: No, thank you.

MR. HARRIS: Thank you very much, Ms. Balcom.

MS. ROBESON: Thank you.

MR. HARRIS: Mr. Mike Knapp is here and I would like to have him speak --

MS. ROBESON: Okay.

MR. HARRIS: -- if I could? Thank you.

MS. ROBESON: Please raise your right hand.

(Witness sworn.)

MS. ROBESON: Okay. Did you sign the sign-in sheet?

THE WITNESS: I did.

MS. ROBESON: Thank you.

THE WITNESS: Thank you.

MS. ROBESON: Go ahead.

THE WITNESS: My --

MS. ROBESON: Now just --

THE WITNESS: Sure.

MS. ROBESON: -- so I, this is clear for the record, he is not your witness either?

MR. HARRIS: That is correct.

MS. ROBESON: Okay. Go ahead, Mr. Knapp.

THE WITNESS: Thank you very much. My name is Michael Knapp. I'm testifying today as a resident of Germantown in the up-county of Montgomery County and as a former county council member representing the Clarksburg community. I have remained active in the community in many respects and have retained a keen interest in the future of the communities that I had the honor to represent in the county as a whole. I respectfully ask to support the, for the proposed development at Cabin Branch.

Unfortunately, through no fault of its own, Clarksburg has struggled to achieve the master plan and community vision of a mixed-use village where one can live, work, shop and play. For a variety of reasons, housing retail and infrastructure development have taken inordinately much longer to achieve critical mass required to sustain the growing community. In spite of these challenges, the residents of this community have continually sought opportunities to stimulate economic activity, raise housing values and create places to shop, work and play in

conjunction with the places where they live.

As the last and newest city in the corridor city's concept of creating employment centers along the I-270 corridor, there is not yet significant demand for employment space in Clarksburg and, unfortunately, I am fearful that with the Governor's and the County's announcement this week that the corridor city's transit way will only be funded for planning to Watkins Mill, this demand will continue to face challenges. However, I believe that a major retail facility in Clarksburg will help simulate other employment growth in Clarksburg while at the same time providing the types of amenities and services many in Clarksburg have been waiting to see for so long. Unfortunately, however, there always seems to be a reason for delayed activity in Clarksburg and we can no longer afford to do this.

Retail with a reasonable draw I don't believe will detract from town center neighborhood retail and, in fact, I think would serve as a catalyst for other types of development in the community as well as the town center itself. I have been concerned given the development in Gaithersburg and in Urbana and Frederick that their commercial development is leap-frogging Clarksburg. In fact, there is devoid, we're moving from Gaithersburg up to Urbana and that we're going to bypass Clarksburg all together for any type of development.

I believe there's to be future office and R&D employment here. Clarksburg first will require stores and restaurants to support that employment and the creation of a reasonable destination to help to generate sufficient economic activity from the outside to support the stores and restaurants, thereby providing time for the local population to increase and provide a sustainable base of support on its own.

I believe the County should approve the development for Cabin Branch that would enable the type of retail to be developed there as the first phase of a major, mixed use employment area. Now, it's my understanding that the property is already zoned MXPD, which would enable early construction of the proposed retail, the property of subdivision approvals, as well as water and sewer service and grading of the site and infrastructure when installation is underway.

I also understand the traffic allocation already has been made for the Cabin Branch project through the subdivision approval and that road improvement is necessary to serve the entire Cabin Branch project. They're planned and funded by developers such that traffic issues will be taken care of.

All environmental approvals to enable the development of Cabin Branch have been issued and ensured.

It appears as though this is a site for the type of use and development proposed by Simon and streetscaping can proceed at the earliest possible date.

The residents of Clarksburg have struggled valiantly for the past decade to obtain a toe hold that could lead to the implementation of the broader vision of their community. I believe that the approval of this project can provide a critical step for future activities that will make Clarksburg a community it aspires to be and it's time for us to stop finding reasons not to do things in Clarksburg. Thank you very much.

MS. ROBESON: Thank you.

MR. HARRIS: No questions.

MS. ROBESON: Mr. Chen?

MR. CHEN: No questions.

MS. ROBESON: Mr. Kline?

MR. KLINE: Well, I would not want to pass up the opportunity.

CROSS-EXAMINATION

BY MR. KLINE:

Q Just so you know, this is what goes on down here when you've got to sit upstairs.

A I know. I never got to come in here before. It's nice.

Q It's a simple --

MS. ROBESON: So far.

THE WITNESS: That's okay.

BY MR. KLINE:

Q It's actually a simple question.

A Yes, sir.

Q If we're to have a regional outlet with a regional draw in Clarksburg, would it make sense, would it not make sense to have one that would be at the CCT station to basically try and give that as an impetus to pull the CCT up from Watkins Mill?

A I've always struggled with the use of transit for any kind of retail use just because I struggle to see how that works. But that being said, my general premise is any activity is going to be getting more activity and so I don't see one at the exclusion of the other. I think a transit draw will certainly enable certain retail to occur and I think other retail activities will allow other activities to occur. I don't see any mutual exclusivity in either going forward.

Q Thank you, Mr. Knapp.

A Thank you.

MR. KLINE: No further questions.

MS. ROBESON: Okay. Anything else?

MR. HARRIS: No, ma'am.

MS. ROBESON: Thank you very much --

THE WITNESS: Thank you very much. I appreciate it.
MS. ROBESON: -- for your testimony.
MR. HARRIS: Let's see, Mr. Fantle, Barry Fantle please.
MS. ROBESON: And he is not your witness?
MR. HARRIS: Again, not my witness, correct.
MS. ROBESON: Okay. Please raise your right hand.
(Witness sworn.)
MS. ROBESON: Please state your name and address for the record.
THE WITNESS: Barry Fantle, 12711 Clarks Crossing Drive, Clarksburg, Maryland 20871. That's in Clarksburg --
MS. ROBESON: Okay.
THE WITNESS: -- Town Center.
MS. ROBESON: Okay. And have you signed the sign-in sheet?
THE WITNESS: Yes.
MS. ROBESON: Good. All right.
THE WITNESS: As I stated, I am a Clarksburg town center resident. I'm also president of the Clarksburg Civic Association, but I'm here today speaking as a resident. I've lived in Clarksburg for almost 11 years.
I support the Planning Board decision to allow the Cabin Branch development to move on to the next step and I

urge the Hearing Examiner to also. I think this is a good use of the land. The Planning Board says that it's consistent with what the master plan says, so I see no reason to not recommend this.
I think, you know, as a resident of Clarksburg we waited a long time for retail and the County doing anything to delay things I think is just not good. We've waited a long time and we deserve retail. Numerous residents, they always complain about having to drive down to Germantown for things or even further. An outlet mall in general I think is good for Clarksburg. It will draw people form all over, from Germantown, Frederick, Urbana. Living in Clarksburg, we drive to Leesburg sometimes to shop at outlet malls.
There's been a lot of talk of an outlet mall detracting from town center. I'm not a retail expert, but I've talked to Elm Street about it and what they have said is that the only thing they feared most would be another grocer coming in and there will not be a grocery store in Cabin Branch.
We've listened to the Planning Board testimony, the Gwen, I can't remember her last name, talked about retail begetting more retail. So I think an outlet mall would not harm town center in that respect. We talked a lot about walkability. I think even if the Peterson project were approved, I don't think walkability would be used by

the residents of town center. You're just not going to walk to an outlet mall and buy three boxes full of shoes, clothes, purses and then walk all the way back to town center. The people in Clarksburg Village would certainly not walk to the outlet mall and the same goes with Aurora Hills.
I heard it mentioned that I objected to the Clarksburg town center retail design. We supported the approved plans that were in front of the planning board. Elm Street has since re-designed those plans and has not presented them to the Planning Board. He's had community meetings and we have done nothing to oppose those plans. So we're not holding up any development in Clarksburg town center. Newland, when they were there, could have started any time they wanted to.
Town center is supposed to be 193,000 square feet of retail, so there will be plenty of room, I think, for an outlet mall somewhere and for Clarksburg town center. And Clarksburg town center on the current time frame is slated to be completed, I believe, by 2018. That's what the developer, Elm Street, is saying. And that's pretty much -- that's it.
MS. ROBESON: Okay. Questions?
MR. HARRIS: No questions, but thank you for coming.

MS. ROBESON: Mr. Chen?
MR. CHEN: Thank you.
CROSS-EXAMINATION
BY MR. CHEN:
Q Mr. Fantle, you've referenced to discussions you've had with Elm Street Developers?
A Yes.
Q Who would that be?
A David Flanagan and Kate Coubet (phonetic sp.).
Q And I believe you stated they've told you that their concern is the establishment of another grocery store?
A That is correct. I believe he said that in public at some of these community meetings.
Q And --
A And you don't see him here speaking against either of these plans actually.
Q Yes. You also stated, and I put it in quotes, I want to make sure I've got it correctly. You said, there will not be a grocery store in Cabin Branch, end quote, is that correct?
A That is what we've been told.
Q Who has told you that?
A I believe the Cabin Branch Developers in the public meetings have told us. I think Dave Flanagan has also told us. They also, the Planning Board limited the, I

think they limited the size of retail I know on the outlet area. It's 50,000 square feet I think. They did leave the 120 the same, so I guess there could still be a grocery store, but they've said they're not going to put one there.

Q That's all I've got. Thank you very much.

MS. ROBESON: Mr. Kline.

BY MR. KLINE:

Q What I think I heard you say down at the Planning Board was you're not speaking in opposition of either of the potential retail outlet sites, is that still correct?

A That is correct.

MR. KLINE: No further questions.

MS. ROBESON: Okay. Anything else?

MR. HARRIS: No. Thank you very much.

MS. ROBESON: Thank you for coming. Okay. Is there any other individual --

MR. HARRIS: I think there are two more.

MS. ROBESON: Yes? Yes, ma'am?

MS. SOFILLAS: Hello.

MS. ROBESON: Good morning. Please raise your right hand.

(Witness sworn.)

MS. ROBESON: Okay. Please state your name and address for the record.

THE WITNESS: Ibi Sofillas, 2220 Canterfield Way,

Germantown, Maryland.

MS. ROBESON: Is that Ibi, I?

THE WITNESS: Ibi, I-B-I.

MS. ROBESON: Okay. Did you sign the --

THE WITNESS: Sofillas.

MS. ROBESON: -- sign-in sheet?

THE WITNESS: Yes, I did.

MS. ROBESON: Okay. Go ahead.

THE WITNESS: Okay. I also have a statement as well --

MS. ROBESON: That's fine.

THE WITNESS: -- that I'm going to read. My name is Ibi Sofillas. I'm a real estate broker, business owner and mother of three children who have attended school in Clarksburg. For years there has been buzz amongst my friends, clients and neighbors about potential retail development in Clarksburg. As someone who is very involved in my community, I've reviewed the facts about all of the Clarksburg development proposals.

I believe the facts show the Clarksburg Premium Outlets at Cabin Branch is the best proposal for Clarksburg. First, the Cabin Branch Outlet Center's existing time line will allow this project to be open by the end of 2015, beginning of 2016. That means more jobs, more investment and greater benefits for Clarksburg communities sooner

rather than later.

Second, I believe the location of the Adventist Healthcare property is a good location for the development on this scale. Building on this site will not impact 10-mile creek and after personally meeting the development team, I'm satisfied that they are ready to make the necessary investments and the road improvements that will provide direct access to the property. It's a shovel-ready development that will bring long-term benefits to Clarksburg and its residents.

The current retail proposal at Cabin Branch can help make Clarksburg more vibrant now and this will ultimately make the town center and the rest of Clarksburg a more viable neighborhood. I am, therefore, recommending approval of this project as it is a major step to our making Clarksburg the livable community that the residents want.

MS. ROBESON: All right. Thank you.

MR. HARRIS: Thank you. No questions.

MS. ROBESON: Mr. Chen?

MR. CHEN: Please spell your last name, ma'am.

THE WITNESS: S-O-F-I-L-L-A-S.

MR. CHEN: A-S?

THE WITNESS: Yes.

MR. CHEN: And your first name is?

THE WITNESS: I-B-I, Ibi.

MR. CHEN: Thank you very much.

THE WITNESS: Yes.

MS. ROBESON: Mr. Kline?

MR. KLINE: No questions.

MS. ROBESON: All right. Thank you. Thank you very much for coming --

MR. HARRIS: Thank you very much.

MS. ROBESON: -- out.

MR. HARRIS: And then I think we have one more witness, Mr. Way.

THE WITNESS: I think he stepped away.

MR. HARRIS: Oh.

THE WITNESS: He's in the building, inside, but he stepped away.

MR. HARRIS: Okay. All right. Well --

MS. ROBESON: Okay. Who is your next witness?

MR. HARRIS: My next witness is Mr. Kline.

MS. ROBESON: Who is?

MR. HARRIS: Oh, Ron Kline.

MR. KLINE: Sure, I'll go get him. Do you want me to get him?

(Discussion off the record.)

MS. ROBESON: Yes, I was like --

MR. HARRIS: No, Tony Kline is going to testify.

(Discussion off the record.)

MS. ROBESON: Is he an expert or --
MR. HARRIS: No, he's one of the -- not the applicant --
MS. ROBESON: One of the applicants?
MR. HARRIS: -- he's one of the developers.
MS. ROBESON: Okay. Why don't you put him on? What I'd like to do is get through the citizen witnesses --
MR. HARRIS: Yes.
MS. ROBESON: -- if we can and then Mr. Chen can walk in his office and we'll take a break at --
MR. HARRIS: All right. Well, do we want to hold off a minute and see if Mr. Way is still here?
MS. ROBESON: Why don't we do that?
MR. HARRIS: Okay.
MS. ROBESON: Well, I tell you what, why don't we do this? Why don't we take the break now and how long do you think you need, Mr. Chen?
MR. CHEN: I'm going to run to my office, not walk.
MS. ROBESON: Well, how about, how about can you do 15 minutes?
MR. CHEN: Let me, I'll do my best.
MS. ROBESON: Okay. Well, let's do this --
MR. CHEN: I can't pull it this fast --
MS. ROBESON: -- 20, we'll do 20 minutes. We'll

be back at 11:40, all right? Thank you.
MR. HARRIS: Thank you.
(Recess)
MS. ROBESON: Are the parties ready?
MR. HARRIS: Yes.
MS. ROBESON: And the court reporter? Thank you, Mr. Chen. I -- that was quick. It's now 11:41 or two. Did you, well, we'll get to that later. Are you ready to proceed? Do we have the other person?
MR. HARRIS: The other gentleman left, so we do not have him, so we'll move on to Mr. Kaplan.
MS. ROBESON: Okay.
MR. HARRIS: Also known as Mr. Kline.
MS. ROBESON: He doesn't look like it.
MR. KLINE: You did have Mr. Chen run back, so I mean I guess I'd like to raise the issue of is this a hearing we can go forward with because you do or do not have all of the necessary applicants in front of you?
MS. ROBESON: I did review, I did review the --
MR. KLINE: 59B-1?
MS. ROBESON: Yes. And I believe it is that we can go forward with it and the reason is that an applicant, if you look at 59H as to who can be an applicant --
MR. KLINE: Right.
MS. ROBESON: -- anyone with a proprietary

interest in the property can be an applicant. Now that being said, I am going to ask Mr. Harris to -- I, to have all of the property owners. The key to having everybody sign off is that they all consent to be bound by the conditions, the binding elements of the conditions of approval, but the binding element. I know there's some in there, but I have no idea if it's all of the people. So I am going to ask you to have them, every owner, or submit binding, or --
MR. HARRIS: Consent.
MS. ROBESON: -- consent and agreement to be bound by the binding elements because that to me is the key. That's the reason for requiring people with an ownership interest to apply.
MR. KLINE: And that will require, if I can ask a question of Mr. Harris, that will require getting something from how many parties? Winchester?
MR. HARRIS: Winchester, Toll --
MR. KLINE: Madison Hill?
MR. HARRIS: -- and Gaznel.
MR. KLINE: And you have Toll already, in essence?
MR. HARRIS: Right. Right.
MS. ROBESON: I saw Toll and Winchester. I don't know if -- and there is --
MR. HARRIS: There is a letter from SSTM in there

as well that's Gaznel.
MS. ROBESON: Well, I'd like you --
MR. HARRIS: But it doesn't specifically say we agree to the, and so --
MS. ROBESON: And that's what I would like.
MR. HARRIS: -- so I understand what the mission is.
MS. ROBESON: Okay. Thank you.
MR. CHEN: If I may?
MS. ROBESON: Yes.
MR. CHEN: Obviously I understanding your ruling and abide by the ruling, but as I understand what you're saying, which I think supports our position, and that is all property owners subject to the development plan must sign onboard one way or another --
MS. ROBESON: Yes.
MR. CHEN: -- as to the amendment? Now my client's position is they cannot merely agree. They have to be an actual applicant. And the reason goes to the very reasons that you've stated. I'm not going to, we're not going to get into it any further, but I abide by your ruling.
MS. ROBESON: I understand.
MR. CHEN: I said that.
MS. ROBESON: And you're raising your objection

for any appeal. I understand that.
MR. CHEN: And I have the case cited if you want.
MS. ROBESON: I would like that actually. If the law has changed, I would like to know.
MR. CHEN: The point that I raised was I objected to the statements, if you recall, of both Mr. Harris and Mr. Kline because my position on that was that's testimony and that that testimony has to be under oath. Remember, I told you that at the time.
Now the case is Heard v. Foxshire, 145 Md. App. 695, 806 A.2d 348. It's a 2002 --
MS. ROBESON: I'm sorry, what's the Maryland cite?
MR. CHEN: 145 Md. App. 695.
MS. ROBESON: Okay.
MR. CHEN: It's a 2002 decision by the Court of Special Appeals written by Judge Sheer. If you go to page 707, the court says in pertinent part, however, we do not say that the evidence given by an attorney in those circumstances does not have to be under oath or that it can be given by way of statement or narrative as an advocate rather than as a sworn witness. It is imperative that evidence given before an adjudicatory body be under oath whether from an attorney or lay person, a lay witness or an expert witness.
They go on to say that in this particular case

that was before the court, the appellate court, that -- I believe it was a special exception -- that the evidence of record to satisfy the statutory standards in order to grant the special exception was dependent upon the testimony of the lawyer for the applicant. I mean I've seen that for decades and when I was a hearing examiner I didn't like it and when I've been on this side I've generally objected and wanted to cross-examination which would get everybody upset.
But be that as it is, in this decision the court ultimately held that because the record did not reflect that the testimony given by the applicant's attorney was under oath, that the burden of proof to satisfy the statutory standards in the --
MS. ROBESON: Okay.
MR. CHEN: -- zoning ordinance was not met, and therefore the grant was improper. I think I've got it right. I'm going to give you a copy of it and I'm going to give Mr. Harris a copy of it as well. It goes on to say on that very point, we cannot, and this is still at page 707 of Volume 145, we cannot conclude from the record that Schlosberg (phonetic sp.), that was the attorney, a well-known attorney in land use, was sworn as a witness and that the words he spoke were spoken under oath. Because the record does not tell us that he was a sworn witness, we conclude that he was not. Therefore, we consider what he

told the Board to have been argument and not evidence that the Board ought to have considered and that the Board ought to have considered in its fact-finding function. Nor, in fact, can we ascertain from the transit who among the other persons who quote, testified, end quote, was sworn as a witness.
It goes on at page 709, this is the last quote I'll give you. Nonetheless, we observe that the better practice before administrative boards and agencies is for the presiding officer to be certain that each witness is sworn and identified individually as that witness takes the witness chair. It is incumbent upon a presiding officer to maintain an orderly process in the interest of fairness to all parties through litigation, as well as to persons whose direct or indirect interest may be affected by the outcome of the proceedings.
MS. ROBESON: Okay.
MR. CHEN: Hearing Examiner, here's a copy of the decision.
MS. ROBESON: Thank you.
MR. HARRIS: I don't believe I testified as a fact witness. I offered argument.
MS. ROBESON: Well, you were representing as part of a procedural motion what the status of the ownership was. Now has any of this gone to individual home sales or not?

MR. HARRIS: Not yet.
MS. ROBESON: Okay. Thank you, Mr. Chen, that was very helpful. All right. Mr. Harris, you're next witness.
MR. HARRIS: I call Ron Kaplan.
MS. ROBESON: Please raise your right hand.
(Witness sworn.)
MS. ROBESON: Okay.
DIRECT EXAMINATION
MR. HARRIS:
Q Mr. Kaplan, would you state your name and business address for the record?
A Ron Kaplan, Streetscape Partners, 1420 Springhill Road, McLean, Virginia.
Q And are you part of the development team involved in the project that's the subject of this development plan amendment?
A I am.
Q Can you give us a little background on your professional experience?
A I can and want to thank you, Madam Hearing Examiner, for the time you're devoting to this and what is going to be dwarfed by the time you do devote to this after we're done. I appreciate it because it's important and it's something that I'm very passionate about. I've been a Montgomery County resident and developer for two decades,

for 20 years and I've had the pleasure of focusing my career on creating mixed-use, pedestrian-oriented developments.

I started the division at Federal Realty that expanded that company from a shopping center company solely to run the integrated uses together and created things such as the project that I was in charge of, Bethesda Row, which was six blocks that we were fortunately able to gain control of and ultimately develop into what it is today. As I say, my background has been extensively in that I co-founded Streetscape Partners with a primary focus on residential and in Montgomery County have had the pleasure of creating Symphony Park, the town homes that are at the Strathmore site where we partnered with Strathmore Music Center and went on to win best new community northeast. We've won platinum awards. It's been a very well-received and gratifying thing because people are excited to live there.

And I would just share with you that this project appealed to us because of the impact that it can have on community. It's not often that one finds, certainly not in Montgomery County, something that is both of the scale that this is, that has what probably exceeds five years worth of pre-development approvals. It takes that long to get through all of the processes, which is as it should be, frankly, I believe so that you protect all the different interests.

But to come into a piece of property owned by a land owner, not just simply what our entire company is focused on, somebody like Strathmore Music Center, American Speech, Hearing and Language Association, these were entities that owned land that are doing good for their community. And Adventist Healthcare, obviously, by their very nature does that. So to be able to facilitate something, in this case helping them with the burden of some of the financial responsibilities, they have relative offsite improvements, it's simply unique to find something like this that is so well-received by the community and will have such an impact on the community. So it's something we're extraordinarily excited about and focused on.

Q Can you take us through a little bit about your knowledge of the Cabin Branch community and how you envision this development plan amendment advancing the objectives of that?

A I can. Is it fair to, you asked specifically about the development team and I spoke mostly about myself. I just realized that and apologize. But if I may, I'd like to expand because there's a few folks that are involved in this, a few companies. And is it okay to --

MS. ROBESON: Yes.

THE WITNESS: -- otherwise, as to facilitate that?

MS. ROBESON: And do we have a --

MR. HARRIS: Paper copy?

MS. ROBESON: -- hard copy of that?

MR. HARRIS: We do, yes.

MS. ROBESON: Is it in the record or --

MR. HARRIS: It is not in the record.

MS. ROBESON: Okay. Let's put it in the record so --

MR. HARRIS: Okay.

MS. ROBESON: -- and that will be 45. Do you have copies of that?

MR. HARRIS: I do.

MS. ROBESON: And how would you describe this? Project overview?

THE WITNESS: Yes.

MR. HARRIS: Yes.

THE WITNESS: Yes.

MS. ROBESON: Slide presentation, project overview. Do you want to reserve any objections or do you want to object or?

MR. KLINE: If I could ask, Mr. Harris, is it substantially similar to what you provided Park and Planning Commission --

MR. HARRIS: Yes.

MR. KLINE: -- or identical?

MR. HARRIS: No, it's not identical, but it's

substantially the same.

MR. KLINE: Thanks.

MS. ROBESON: Okay.

MR. KLINE: I'm okay. I shouldn't speak for Mr. Chen.

MS. ROBESON: Okay. That will be 45.

(Exhibit No. 45 was marked for identification.)

THE WITNESS: So when we first, we were working with Adventist Healthcare and working at their entire property. They have some age-restricted entitlements for residential and they really asked us to step back and look at their property holistically and give them our opinion about what might happen here. And, as I say, there were a few things that attracted us to this. One of them was not only was the community clearly clamoring, as you've heard from just a few, but you've heard in volumes, I think, and letters, clamoring for kind of some amenities, whether that be restaurants or other retail, gathering places equally important.

You also had an actual need for the retail, not just by the residents, but by the -- there's actually demand for this and often you lose sight in the planning world and you can do great plans, but they don't come to fruition even through best efforts if there isn't actually demand. And

the mere fact that we and even the Peterson Companies, you know, attempted to purchase this property is because there's real, genuine demand. So this is something that's very real and that's exciting. Nobody likes to go through these processes and then find out, whoops, something happened.

To try to assure and increase the certainty that this happened, we assembled a team of developers. One is a company that I had mentioned. I co-founded Streetscape Partners and these are just some shots of, a background from Bethesda Row, some of the things that we did that are really about community building and how one builds that, how you actually create livable, walkable communities.

But we also had the pleasure of partnering with a company called New England Development. And New England Development has Montgomery County experience for building quite significant things in cooperation with the community and this is Wisconsin Place where the Bloomingdales opened. There's a Whole Foods, there's office, there's residential, an incredibly complicated project. They bring an amazing amount of expertise and have been in business for many decades and really just share with us a passion for quality and you see it when you see these types of developments.

Together, we brought a third partner in which is a company called the Simon Property Group. Simon Property Group has the distinction of being the largest real estate

company in the world. It's sort of a funny thing to say. They have a division, one of a few divisions that is called their Premium Outlet Division, and within the narrower category of outlet development, they are the largest outlet developer in the world by quite a significant margin.

Size along wouldn't have attracted us to them, though, but they actually produce some of the highest quality outlet centers that you see and in the retail world the way that you measure that is by how productive those properties are and productivity is measured by sales per foot. And there is no competitor that has a portfolio that produces anywhere close by a very wide margin kind of the sales per square foot. So, you know, some people have these images of outlet centers that are down by the beach, as an example, and you know they can be fine, but they're not what one might want to bring to Clarksburg. So it's very important when we reached out to Simon we did that very specifically, one, because of the quality that they bring; two, because of the tenant relationship so that we felt very confident. You know, frankly, we're out talking in the community every day and I don't want to be representing things that I don't just wholeheartedly, if you ask me to surrender that, but just, you know, but I don't wholeheartedly believe that.

And I believe with my whole heart that we will

open this property 95 percent leased and bring 100 tenants or more probably to this community. And Ms. Buffington testified earlier how difficult it was to try to fill one restaurant space, so difficult that they, through an incredible entrepreneurial spirit actually went and opened it themselves, which is the right idea, unfortunately risky for them, but is the right idea because retail will beget retail. And so we looked at that and that mitigated one risk for us.

The other risk that gives me confidence about certainty is sometimes financial markets can change and we've seen that all. We just all lived through that. When you have a balance sheet and lines of credit where you can write a check for hundreds of millions of dollars, there's no need to raise third-party money. There's all these other risks in the real estate development business that were mitigated, frankly, by bringing Simon in. So it's another reason for the enthusiasm.

Mr. Harris just asked me to talk a little bit about the background on Cabin Branch. As I said, we started talking with Adventist Healthcare very broadly and they have a property that has, as I said, a lot of entitlements and a lot of approvals, frankly, we're the beneficiary of a lot of other people's work because that is a long process.

But what, again, drew us to it initially, today

there just, the honest answer, and it says it in the Staff Report from Park and Planning, you've heard people testify today, there's not tremendous demand for office today and there's a lot of entitlements in the area for commercial development. Fortunately --

MS. ROBESON: What do you mean entitlements?

THE WITNESS: There's, there's, like at Cabin Branch, 2.4 million square feet of employment, it's --

MS. ROBESON: Oh, I see. I see what you're saying --

THE WITNESS: -- that kind of, so there's pods identified for where if you had office tenants you could actually --

MS. ROBESON: Yes.

THE WITNESS: -- build office today.

MS. ROBESON: Yes.

THE WITNESS: The problem is, and you see it most clearly that the idea of stand alone office parks is really something of the past. People don't necessarily want to live where, don't want to work, excuse me, where they can only go to the deli in the bottom of their office building. They really do want to be in more active areas and you see all the development. Peterson did a wonderful job of that at Washingtonian. You mix these uses and they become more attractive. So we really see this not just -- the other

exciting thing for us is we really believe this opportunity will be the catalyst to a lot of other development and more jobs and really enlivening Clarksburg.

There's a community near to all of us, Rock Spring, which was just office building. It's got 30 percent vacancies despite being close-in to Bethesda because nobody wants to be there. It's just -- if your a CEO, you don't want to, your employees don't want to be there and you don't want to locate your office there. So we're excited because this has such a catalytic, we believe, opportunity to really enliven and start what should be the vision and was the vision for it.

It's interesting to me when one does a master plan, and this was done almost 20 years ago, the foresight that the people that did that master plan had was pretty extraordinary because as I say, people were building these standalone office parks and yet in that master plan they make it very, very clear and they encourage that the current zoning that existed at the time of that master plan be changed because it really isolated and said you'll do some residential and you'll do some things here. There wasn't even really room for retail and they said please change this to an MXPD zone and nine years ago they did. And that was really pretty prescient and, again, we're the beneficiaries of that hard work. So that hopefully answers some of that.

BY MR. HARRIS:

Q Have you seen changes in other master plans such as Germantown or the Life Sciences Center, also known as the Great Seneca Science Center, that affect your conclusions with respect to demand for office?

A There have been. They're not encouraging for office in Clarksburg, sadly, because they both were increases, significant increases. Germantown, I think, went from 8 million square feet to 24 million square feet of potential office product. So these are just competing other nodes. The Life Science Center increased its potential, I believe, from 11 million square feet to nearly 18 million square feet potential, staggeringly huge numbers.

MS. ROBESON: Well, I guess my question really is after reading the master plan, it seemed to me that the goal was to create an employment in the sense of office technology corridor regardless, and they say it is a long-term goal.

THE WITNESS: Uh-huh.

MS. ROBESON: Now whether particularly I think it's a great idea to target a particular industry, but it's, that's not my call and the question is long-term is this going to jeopardize that goal?

THE WITNESS: It's a great question and I'm, you're a little bit leading. I don't know if I'm a witness,

but it's almost a leading question because I appreciate the question because the answer is I would do the exact opposite in my opinion of jeopardizing the goal. You have very little hope of creating a standalone life science employment, meaning only office as you're defining it, center without amenities. It's just -- and I don't believe that was actually the exclusive goal of the master plan. The master plan really clearly calls for it, it encourages a rezoning to MXPD, which was implemented, which is a mix of uses. You just can't have these standalone parks. So the only way really --

MS. ROBESON: Is life sciences a standalone park?

THE WITNESS: Yeah, it's just, it's more narrowly defining the type of office tenant you might lease to.

MS. ROBESON: I mean because when you say office, the market is bad because they've added all that space, that bases long-term space.

THE WITNESS: I'm just trying to be very candid. I'm not a lawyer.

MS. ROBESON: No, it's okay. I just want to know.

THE WITNESS: Today there's not a lot of office demand whether for life science or other office users in Clarksburg. That's a fact. Absent creating great housing, great retail amenities, absent creating the amenities, Clarksburg will remain at a disadvantage compared to these

other competing places where office uses or life science uses could go because we have the real demand, because the citizens are really looking for this and have in kind of unprecedented numbers supported what we're trying to do and because we have the financial wherewithal and the experience to actually make this a reality, it really will be the catalyst to this happening. There's just no reason why if you don't have a nice place to walk out to, a plaza to gather in, a restaurant, food court, shopping, why somebody is going to say, hey, let me locate on that farm today and start it. So we were very careful. And I'll walk you through in some detail --

MS. ROBESON: Okay.

THE WITNESS: -- kind of our plans. We were really careful to look long-term and I appreciate your emphasis on long-term. When I did Bethesda Row, we did a 10-phase master plan just for the six blocks that we owned. And it was, and this was, I'm sorry to say to the citizens of Clarksburg, but this is just the reality, 15 years after we did that master plan, we finished Phase 10, but because we had thought ahead, we were able to do that. And then what happens is despite however much you may control, we controlled six city blocks. It's kind of unprecedented. There are other blocks and they suddenly came to life.

There's another interesting parallel of Bethesda

which is unlike in this case where we've had this great outpouring of support, we had nothing but opposition. Everybody said, if people recall, Bethesda was what was defined as, downtown Bethesda was defined as the Woodmont Triangle. There were 100 restaurants in the Woodmont Triangle and we were going to be the death of downtown Bethesda because where we were buying was a little bit of car repair shops, some industrial, but we were only, we were walking distance. We were only 10 blocks away. So we, clearly, by controlling that going to kill downtown Bethesda.

So we had, we didn't have 100 letters of support. I don't know that we had 100 letters of opposition, but we had a lot of opposition. But time and again, whether it's Montgomery County or development I've done in California, when you create it, it actually, it catalyzes the whole area and there was more office development as a result of it, residential prices have increased tremendously. The Woodmont Triangle has never been more successful even as the tenth phase of Bethesda actually finally got built. It's just, you can do, Urban Land Institute studies this. It's kind of the white paper generating group that looks at these things across the country. And you can bring them in. They would be very in support of that kind of concept as to how, how we ever have a hope of achieving that kind of office

use, if you will, though I think employment defined it more generally. But if you're talking specifically about office, you won't without the catalyst of the retail.

BY MR. HARRIS:

Q One further question before you get into the concept plan itself. Does this development plan amendment preserve any degree of opportunity for office development and if so, how, how does that relate?

MR. CHEN: I object to that. This gentleman may be a developer, may be a fine gentleman, but this question calls for a professional opinion and I don't think he is, at least he's not demonstrated yet the credentials to express that type of opinion.

MS. ROBESON: Well, I haven't qualified him as an expert because he's the applicant and experts are supposed to be, you know, objective. But he does have experience, so I'm going to let him answer.

MR. CHEN: Based upon his experience rather than being an expert witness?

MS. ROBESON: Yes.

MR. CHEN: Okay.

THE WITNESS: I'm not sure it takes experience to read a plan and the plan preserves a tremendous amount of office space, the development plan and --

MS. ROBESON: Yes, well, let me just clarify that

for the record too. I don't think that you need to be an expert necessarily. This is not a hypothetical question. The question is, or an opinion, the question is is this going to provide opportunities for office?

MR. KLINE: Can I actually follow his objection then and here's what I would say. Does he have experience in developing outlet centers because that's the premise, that the outlet center will basically be the catalyst.

MR. CHEN: They're asking for an opinion?

MR. HARRIS: No. I asked a question of whether this preserves space for office development.

MS. ROBESON: That's all --

MR. HARRIS: That's a factual question.

MS. ROBESON: That is all he asked.

MR. KLINE: If it's space, that's fine.

THE WITNESS: Absolutely. It's even part of the long-term plan on the property that we would be purchasing. So not only throughout the whole Cabin Branch plan, but specifically.

MS. ROBESON: And we is --

THE WITNESS: We being --

MS. ROBESON: -- the team?

THE WITNESS: -- the development team that I was --

MS. ROBESON: And exactly what is the land that

you will be, where is the land that -- well, I don't want to take you out of context and --

MR. HARRIS: We can come back to this question after he --

MS. ROBESON: You're getting --

THE WITNESS: And I'll address exactly where the land is so that you can see that.

MS. ROBESON: Okay.

MR. HARRIS: Okay.

BY MR. HARRIS:

Q Well, why don't you take us through the concept plan while people are interested in seeing that?

MS. ROBESON: The development plan.

MR. HARRIS: Development plan, I'm sorry.

THE WITNESS: The overall Cabin Branch area is actually 535 acres, 2.4 million square feet of commercial development, some public uses and when I initially started looking at the age-restricted, residential units. So we stepped back. And actually, for the record, I'd like to applaud Park and Planning staff actually. They requested that we do that and I think it was the right thing to do because it actually improved our thinking and we hired one of the, really nationally, they're actually an international firm, but regarded master planning companies to actually step back and really look at this for us so that we can make

sure that we were trying to anticipate how would this best -- we really see this investment as the first of many and, as I said, kind of catalytic. So the more planning you can do consistent with the master plan today, the better. And that's what they helped us achieve.

This is the north district of the Cabin Branch plan. I've just kind of zeroed in.

MS. ROBESON: And this would be, it's entitled north district on Exhibit 45.

THE WITNESS: And so what I'm just zeroing in on, just to make it a little bit more visible is this area up here.

MS. ROBESON: And this area, the transcript --

THE WITNESS: Sorry.

MS. ROBESON: -- when you read the record, it doesn't know what this area is. So the area --

THE WITNESS: So the northern, the northern-most portion really at the intersection of 121 and 270.

MS. ROBESON: It's at the southwest, or the southern quadrant of, southwestern quadrant of the intersection of 121 and 270. Okay. Keep going.

THE WITNESS: This area, once built out, should have some, close to approximately a million square feet of development. There is already a hotel that's been approved on this piece of property, some banks, entertainment uses

are planned, restaurant and food that I spoke about. The buildings that are in the exhibit that are red, the larger block buildings are where the specialty outlet retail would go, live/work units, multi-family units.

MS. ROBESON: What's live/work units?

THE WITNESS: Live/work is where you'll have office on the ground floor and the people may actually reside above, the actual owners --

MS. ROBESON: Okay.

THE WITNESS: -- of that space may actually reside above.

MS. ROBESON: Now the live/work units, are they along Clarksville Road in the blue?

THE WITNESS: That's correct. Those would be these units here.

MS. ROBESON: Oh, wait, that's not Clarksville, that's -- is that Cabin Branch? I forget what it's called, Cabin --

THE WITNESS: Cabin Branch Avenue.

MS. ROBESON: Yes, is that what you're referring to, and along Cross Street?

THE WITNESS: This street is Well Spring. It's Cabin Branch Avenue.

MS. ROBESON: Okay.

THE WITNESS: So along those two streets are where

you see some live/work.

MS. ROBESON: Okay. And where are the restaurants?

THE WITNESS: You'll have restaurants and I'd stress it's a preliminary plan.

MS. ROBESON: I know. I know.

THE WITNESS: You do these kind of things, so I don't want to -- but we envision these as restaurants.

MS. ROBESON: Okay. These are the smaller red buildings?

THE WITNESS: Yes, just to the west of --

MS. ROBESON: Okay.

THE WITNESS: -- the main entrance drive.

MS. ROBESON: Okay.

THE WITNESS: And importantly, and something I'm particularly excited about, we have a large amphitheater opportunity here also. One of the things we heard, and this wasn't in our initial thinking, but my whole company was formed on the premise of really partnering, whether it be with a land owner, whether it be with a community. And you'll see later when I show you the amount of outreach that we've done, we've learned a lot from the community and we've listened carefully and it really seemed like there was, there just is nowhere for them to have this kind of outdoor at the scale that we're talking about here.

One of the other things that we heard from the community was the importance of a town center. Town center plan calls, they actually use the same word, I would have named it something differently, but they say amphitheater. So when I first started hearing the community say they wanted an amphitheater, one of the first things we did was we tried to probe and clarify a little what that meant. We went to our partners at Strathmore and talked to them about different kind of uses and how town centers work. And in terms of being an expert on the comment I'm about to make, I will qualify myself as one, even though I am the applicant, having done Bethesda Row, I formed the group that did the first Bethesda Row Arts Festival. Activating community spaces is something I know quite a bit about. And having partnered with Strathmore and created for them an outdoor entertainment space where they could use things that we will donate back to the County, we heard that.

We also immediately went and sat down with Elm Street and said what is it you're planning because what we do not want to do is compete, we want to complement the town center development. That was at the premise of, you'll hear from the community they're looking for it. We want to catalyze that. And as you've probably seen in their letter of support, they fully understand that and say that we will, in fact, complement the town center development,

notwithstanding certain claims to the contrary. So this amphitheater --

MS. ROBESON: And that's in the lower left, the southernmost portion of that picture?

THE WITNESS: Yes, exactly right, right in this area. I've been told by the Park and Planning staff that are in charge of forests that this is one of the nicest forests she's see in Montgomery County that we'll have as a backdrop. So we tried to utilize the topography and the natural resources, something else we really believe a lot in.

And the other thing we did, this access to this is along a road that's going to mirror the already approved development of the street. So this street for the community that's going to be developed here, which is ultimately over 9,000 employees and 6,000 residents, literally parallels this, has a jogging path right alongside the roadway and creates this wonderful connection at this terminus where the amphitheater will be with other parks that are throughout the community.

MS. ROBESON: And that's shown in red on the plan, on this north district?

THE WITNESS: Well, the road I'm talking about here is this purple roadway.

MS. ROBESON: Purple? Okay.

THE WITNESS: Purple roadway.

MS. ROBESON: It looks red on the paper copy.

THE WITNESS: Yes.

MS. ROBESON: Purple/red.

THE WITNESS: Purple/red. And we spent a lot of time -- it's not, an amphitheater is one thing and that's a certain type of use and we've spoken of Blackrock and, as I said, got a lot of input to make sure that it was complimentary to the type of public space that was going to be developed at the town center which is a much different kind of space as I said.

And along the way in accessing that are some really wonderful public gathering spaces also. One of the gratifying things about Bethesda before it became really all that it is today, but very early on, was when people started saying, we'll meet you at the fountain. There's a small fountain in front of the Barnes and Noble at the corner of Bethesda Avenue and Woodmont, and that's community-building, things as simple as that which is why it's really gratifying.

To do these things takes a lot of experience and focus on what creates these gathering places? What makes one property more successful than another? What adds to a community more than the other? And it's got to do with doing sustainable development, it's got to do with

understanding environment and using it as a plus rather, as I said on this forest conservation part, you know, using what's there rather than trying to come on top of it.

It is, why I say the master plan was visionary, because the first thing an employment employee is making that every expert will tell you is about mix of uses and creating some public space. So when they encourage that MXPD, even though the land they were writing the master plan about didn't yet have a mixed use, they knew to encourage it and, fortunately, MXPD understood that 20 percent of whatever they approved should be retail as kind of a guiding principle. And when you look around the country, that is actually about the right percentage. It's a very good guideline.

So we stepped back and said how will this work, how do you integrate some neighborhood retail with our employment specialty retail? Where are the schools, the community center, future neighborhood retail, other employment centers, this would probably be the life science area in the long-term, and we created the overlay to the master plan that will help guide how this land over the next 20 years develops consistent with the master plan.

This starts to show you the benefit of mixes of use. What they become is active. They become places that people like to go to. It's self-serving from a developer

standpoint because it means that they stay leased. It means they generate sales. It means you get higher rent as you try to create a profit for the development in taking those risks. But it's not, it's just very real because it impacts your community.

These are some precedents that Simon Property Group has done and you can see why we were attracted to them in creating these, you know, outdoor fireplaces and fountains and really getting local artists who did some of the pretty wonderful little developments there and artistic insertions of kind of special places that you find as you wander through it. This is looking at precedence around how can you create really exciting outdoor spaces? What might you one day be able to do with that amphitheater space since we thought ahead and put it there? It could have just been parking if we hadn't really thought it through or, instead, it could be something like this on a summer evening for the community.

Very important is what's the existing public space network, what's the planned public space network, how will that interface with what we're planning today which is simply one small piece of, as we keep saying, a very long-term build-out, but the critical, catalytic piece. And by, obviously, our very important piece. So we researched where the existing bike networks, where might we be able to add

additional bike networks. And what we're talking about, they are not just on-road or sidewalk, but some dedicated bike lanes that actually are planned. That's another one of my favorite kind of how do you do a very natural outdoor space that people would enjoy?

BY MR. HARRIS:

Q Let me come back to the question I asked earlier. Do you have an estimate of how much non-retail employment this preserves as part of the current development plan?

A The development plan --

MR. CHEN: Objection.

THE WITNESS: -- amendment shows 1.9.

MS. ROBESON: Just a moment.

MR. CHEN: I object.

MS. ROBESON: And that is --

MR. CHEN: Is another opinion. You're taking everything in as experience, which I understand, but I just believe that this gentleman cannot sit here and based upon his experience say a given opinion as to the estimated non-retail employment that will be in this area. That's a number.

MS. ROBESON: I don't, I don't understand your objection. How --

MR. CHEN: How he's qualified to give -- and very, quite simply, and I apologize, I don't mean to interrupt the

Examiner, but as I understand the question, the question is give us a number of the -- I think the question is estimate the non-retail employment that will be in this neighborhood.

MR. HARRIS: I'm just asking him to subtract 484,000 from 2,420,000.

MS. ROBESON: Well, why don't you rephrase it and say how much --

MR. HARRIS: Can you subtract --

MS. ROBESON: -- permitted, how much permitted, non-retail --

THE WITNESS: The development plan amendment, as I read it, and I believe anybody that looks at it regardless of their expertise would read it says there's 1.9 million square feet of remaining employment.

MS. ROBESON: And you got that figure how? I'm just, I know how --

THE WITNESS: There's two --

MS. ROBESON: -- but I want to --

THE WITNESS: There's 2.4 million square feet of commercial --

MS. ROBESON: Permitted?

THE WITNESS: -- permitted, commercial, permitted. The development plan amendment takes out of that 484,000 feet of retail and that results in approximately 1.9 million square feet of additional office.

MS. ROBESON: Okay.

MR. CHEN: I was not objecting to that. I thought we were going to get a number of -- I thought we were talking about what was going to be the amount of employment, non-retail.

MS. ROBESON: Oh, oh.

MR. CHEN: That's where I, that's -- the way the question was posited, that's how I interpreted it.

MS. ROBESON: Okay.

MR. CHEN: Square footage I understand and I can see where he's coming from. You can certainly testify to that.

MS. ROBESON: Okay.

BY MR. HARRIS:

Q Does this plan in any way affect the employment development potential on the Comsat property across 270?

A It does not affect the legally allowable amount. It absolutely will have a posited impact in catalyzing the area.

Q Can you -- what are the positive aspects you see about this site in terms of being able to achieve this result in a timely manner?

A As I mentioned earlier, I have not been involved in a property that was so far along in the process, but still looked just like a piece of dirt. This is almost a

lay language behind the series of approvals, though there are folks here that are experts that could testify in, you know, voluminous detail the number of years it took and the amount of analysis and study that had to go into creating these approvals. But a few of them are stage 3 and the master plan is already open. The MXPD zoning was put in place nine years ago and allows 20 percent retail, exactly the amount that suggested an MXPD and exactly the amount that we're planning over the long-term.

The preliminary plan for employment use was approved. The water and sewer wasn't only approved, it's under construction for Cabin Branch. APFO looked at and analyzed the full development envelope, this 2.4 million square feet amazingly. The water quality plan was approved. The infrastructure site plan wasn't just posited and planned, it was posited, planned, submitted, debated and approved. The forest conservation plan is in place. Everyone of these is a separate process and a separate approval.

There's more than $40 million as a result of these plans for this much of development of required arterial road improvements. They will be developer funded. We already know that. There's no request for that coming from somewhere else, developer funded state and County arterial road improvements staged with the development and, in fact,

those aren't false promises, those are requirements and they're actually under construction. Route 121, as one part of this, actually gets straightened. That road bed is being graded as we speak. It's very exciting when you look at that and realize -- the interesting thing about the development process is when you start with a raw piece of land before you have any of these approvals, the only way to start a dialogue, to have a conversation with an approving body, Park and Planning, any of the bodies, is you have to come up with what you think could work from a -- what you think could work in all --

MR. CHEN: Excuse me. I apologize to interrupt. Are we outside Exhibit 45? I apologize, but I don't see --

MS. ROBESON: I don't understand, what do you mean outside?

MR. CHEN: I don't, I don't --

MR. HARRIS: That's --

MR. CHEN: -- that's part of exhibit -- in my copy I'm looking for it and I can't find it.

THE WITNESS: I decided to augment my comments with a few slides. I had many more comments than I have slides for.

MR. CHEN: Different exhibit. I'm not --

THE WITNESS: Not different exhibit --

MS. ROBESON: No.

THE WITNESS: -- I don't have an exhibit. I'm just speaking.

MS. ROBESON: This is, there is no -- I'm not aware of anything saying -- is your question has he moved on from this exhibit? I'm not aware of anything saying he has to confine his testimony.

MR. CHEN: I'm not saying that. I'm saying that which exhibit are we in because I can't find what he's --

MS. ROBESON: I don't think we're in an exhibit.

MR. CHEN: What are you looking at?

MS. ROBESON: Excuse me?

MR. CHEN: I apologize, but that's an exhibit, I believe. I mean I'm not objecting to the exhibit, but I just want to --

MS. ROBESON: I don't understand your objection. I don't think there's any formal process. He can supplement whatever he wants in his oral testimony.

MR. CHEN: I have no objection to oral testimony. If he's going to use a slide, it's got to be an exhibit because you are considering it.

MS. ROBESON: But he's not using a slide.

MR. CHEN: I thought he was going down the list?

THE WITNESS: I finished going through the list and I then started --

MS. ROBESON: Okay. I don't --

THE WITNESS: -- providing --

MS. ROBESON: -- want another objection like this because this to me is a baseless objection. This is baseless.

MR. CHEN: How do we address this exhibit then?

MS. ROBESON: You'll have full opportunity to address it. I don't even see what the basis of your objection is. I, you will have full opportunity to cross-examine on it.

MR. CHEN: I'm not objecting. I'm just trying to get the record clear if the gentleman is using a slide, it should be identified as an exhibit because the slide is part of the record and it's not part of what I thought was the exhibit that he was using, just Exhibit 45.

MS. ROBESON: What isn't part of the exhibit he's using?

MR. CHEN: The slide that was of, the slide that was up on the screen that's no longer on the screen.

THE WITNESS: That's part of this.

MS. ROBESON: Is the full, is all these slides in Exhibit 45 or not?

MR. HARRIS: The one that was up there is not in there, but he --

MS. ROBESON: Oh.

MR. HARRIS: -- he testified every word on that --

MS. ROBESON: Okay. You can't --

MR. HARRIS: -- sheet.

MS. ROBESON: -- do that --

MR. HARRIS: Okay.

MS. ROBESON: -- guys.

MR. HARRIS: Fine.

MR. CHEN: We'll just put it in the record.

THE WITNESS: That's, I apologize.

MS. ROBESON: Just put it --

MR. HARRIS: We'll get a copy and put it in the record.

MS. ROBESON: Okay. Because --

THE WITNESS: I didn't understand.

MS. ROBESON: -- if we want to make this go forward --

MR. HARRIS: Yes.

MS. ROBESON: -- just for your knowledge, everything that you have up there -- I'm sorry, Mr. Chen, I didn't understand what you were saying. Everything that goes up there has to be --

MR. HARRIS: Okay. We will put that into the record.

THE WITNESS: That's actually, for the record, that's not my attorney's fault. I added a slide and I didn't --

MS. ROBESON: Well, don't go slipping beyond what's in the record --
THE WITNESS: No, no, my mistake.
MS. ROBESON: -- or you'll just delay things --
THE WITNESS: Yes, I apologize.
MS. ROBESON: -- and we don't want that, all right?
MR. HARRIS: Okay. We will put it in, we'll try to get it this afternoon and have it for you.
MS. ROBESON: Okay.
MR. HARRIS: Okay. Thank you.
MR. CHEN: Will that be a number? Do you want to give a number to it?
MS. ROBESON: No, not yet.
MR. HARRIS: Well, once we bring it, yes.
MS. ROBESON: Because I'll just, when they bring it in, we'll give it a number.
MR. HARRIS: Yes. Okay.
BY MR. HARRIS:
Q I'd like you to briefly summarize both what you, well, did the Planning Board and its staff offer any comments at the hearing that you took as encouraging in terms of the attractiveness of this project?
A Besides the unanimous vote for it?
Q Yes.

A So that was slightly tongue and cheek.
Q Well --
A I apologize.
MS. ROBESON: Okay. Well, wait a minute. Just -- I know what the Planning Board approved.
THE WITNESS: Right.
MS. ROBESON: And I have their written recommendation and I don't see the need for him to go into hearsay about what the Planning Board said or didn't say.
MR. HARRIS: Fine.
MS. ROBESON: So let's move on from that.
BY MR. HARRIS:
Q Let's turn to community support. Can you summarize for us the extent and the substance of the community support that is in exhibits --
MS. ROBESON: Well, you don't even have to summarize that because you know what, I have read everything that I've gotten, every single letter I've gotten so far and I will read every single letter. So you don't have to summarize it.
THE WITNESS: So what I would like to say on the community support side, and I started to mention it, if you're planning a good development, it's not necessarily hard to stand up in front of people at a homeowner's association or a civic association and have them say that

sounds really great and thank you for coming and presenting. It's actually extraordinarily hard for those people to feel so motivated that they take the time to write a letter. That's actually like a giant leap. It doesn't sound like it but, you know, we're all busy and have families and somebody has got to go and actually say this is meaningful enough to me. So when I say that it's gratifying, I, this is one area I will agree with you. I'm absolutely not an expert. I don't have, I don't see all of the projects that you see come through or at Park and Planning. So I went and I asked three of the senior Park and Planning members because I just, I wanted the context, I wanted to know the answer. I said we have, you know, Park and Planning I think it was 77 letters of support that people have written and I think we're up to 93 that have written separately to the Zoning Hearing Examiner. I said can you put that in context for me because it's, you know, I'm personally gratified, but I just don't know where does that fall in context? All three of them used the same word. They said it's unprecedented.
MS. ROBESON: Well, I have to disagree and it's not unprecedented and many of them are form -- to me how the numbers of people that write in in support are not relevant. It's good to see, I'm glad they're excited, but it's not relevant to me. What is relevant to me is meeting the standards for a development plan amendment.

THE WITNESS: That's correct. That's right.
MS. ROBESON: And I don't -- if that is what staff said, I don't necessarily agree. But go ahead.
THE WITNESS: It was gratifying to me personally nonetheless because it's hard to get people to write in.
MS. ROBESON: I'm glad.
THE WITNESS: But I agree with you, this should be focused on doing the development plan amendment and, as I said, you know, it was really extraordinary to me how the master plan was written and that it recognized a need for these types of developments to be integrated and it's proven out across the country that that's, that is how these developments happen.
MS. ROBESON: Okay.
BY MR. HARRIS:
Q I have no further questions. Anything else that you wanted to add?
A If I may, I was struck by Mr. Knapp's testimony as he read his comments because as I heard them, I'm paraphrasing, I'm not quoting, but what I heard was this should happen as quickly as it can happen because people have waited a long time for it. He's been there as an expert in that area far longer than I. And there's this notion that, you know, you're competing properties, are we competing with town center, are we competing with Miles

Copolla (phonetic sp.), are we competing with --
MS. ROBESON: Miles Copolla?
THE WITNESS: Is a property that that Peterson Companies has under contract I believe.
MS. ROBESON: That your, Mr. Kline's client's properties? Okay. Sorry to interrupt.
THE WITNESS: And I firmly believe the development, good development and good community building does help catalyze other things. There is no reason why the Elm Street companies that controls the town center site would say, and I am reading here, especially outlet retail on either side of I-270 will have an equally positive impact on Clarksburg and the town center that he's planning to develop. That's true. One won't have more of a positive impact, both of them will. And one day both of them may actually be built. There are examples around the country where more than one outlet center exists in a community.
The challenge, it was so striking to me, the challenge that Ms. Buffington personally experienced in getting one retailer to go to Clarksburg is because there are no precedents. If you're a retailer, it is a risky proposition today if you're one retailer to go into Clarksburg because there's just -- who is doing what? What sales are generated? How are they doing?
When we open the Clarksburg Premium Outlets at

Cabin Branch and we're successful, that is going to make it easier. If Ms. Buffington was then trying to lease her restaurant, it will be easier in exactly the same way that the Woodmont Triangle expanded when Bethesda Row was successful, in the exact same way that the Leesburg historic district is successful with the Leesburg Outlets right down the road. These things catalyze areas. They generate a lot of jobs and the Peterson Companies is an excellent developer and I have no doubt that what they, once they get through their many, many series of approvals that we're fortunate to have and figure out exactly what, how much residential do they build and how much retail and what kind of retail, I have no doubt that our development will actually be a positive for them in helping theirs develop and they won't be the first developer to be able to essentially do a major expansion, if you will, a major, another project that capitalizes on the investment and risk that we took. We're simply on different timelines, so that's going to reduce risk, frankly, for them in the long-run.
But it's -- you see this around the country, you see areas where when they're successful, other employment comes. It won't just be the 1,500 jobs our phase I development will do. It will be the ancillary things that happen in the historic district, in the town center. So it's our pleasure and I really do appreciate it and

hopefully our enthusiasm, our thoughtfulness about how to do this, how to do it in a way that benefits the community and the passion that we bring to it has come through. So thank you.
MS. ROBESON: Thank you.
MR. HARRIS: Thank you.
MS. ROBESON: Okay. Mr. Chen.
MR. CHEN: Thank you.
CROSS-EXAMINATION
BY MR. CHEN:
Q Mr. Kaplan, a moment ago you used the word specialty outlet retail, do you recall that, sir?
A Yes, I do.
Q What do you mean by that?
A Are you familiar with Leesburg Premium Outlets?
Q Yes, sir, I've been there.
A So that would, that would be the best way for me to analogize what I mean by specialty outlet stores.
Q Okay. Is that, is the Leesburg Outlets a Simon development?
A Yes, Simon owns Leesburg Premium Outlets.
Q I asked -- you mentioned precedence also on, your slide showed some photos. Does Simon also have the Hagerstown Premium Outlets?
A Simon acquired from another developer, the

Hagerstown Outlets, yes.
Q And how about what are known as the Queenstown Outlets, is that also Simon?
A That is. They also acquired that property.
MS. ROBESON: Okay. If you don't know the answer, you can't --
THE WITNESS: No, no, I do, I'm just --
MS. ROBESON: Okay. I just saw you nodding with him, so do you --
THE WITNESS: No, but I do, I do know that.
MS. ROBESON: Okay. That's fine.
THE WITNESS: Thank you.
MS. ROBESON: Go ahead.
THE WITNESS: I promise not to answer something I don't know.
MS. ROBESON: Just checking. Go ahead.
BY MR. CHEN:
Q Sir, how long has the Leesburg Outlets been there?
A I believe 12 years.
Q Hagerstown?
A I don't know.
Q How about Queenstown?
A I also don't know.
Q Okay. You also mentioned the neighborhood retail center.

A I'm sorry, the what retail center?
Q I -- if I, you didn't hear me, it's the neighborhood retail center, I believe, on Exhibit 45? I don't have the -- the pages are not numbered
A It would be the north district.
MR. HARRIS: I think you would like him to put up the north district slide?
BY MR. CHEN:
Q Excuse me. There is a graphic, Mr. Kaplan, entitled, employment and place making.
A Is this the graphic you're referring to?
Q I believe it is. I apologize. My eyesight is horrible, but as I look at that, you have little circles for different areas and one of them says neighborhood retail center, do you see that, sir?
A Yes, I see two circles that say neighborhood retail center.
Q Yes, okay, thank you. You're right. How much retail will be in each of those centers?
A I can't answer that definitively.
Q Excuse me?
A I cannot answer that definitively right now.
Q Can you approximate?
A In what time frame are you inquiring?
A Any time frame.

Q Longer term, I believe, there will be significant neighborhood retail in these different areas as this plan is developed over time.
Q Okay. Is, as I understand the master plan, it calls for retail use, is that correct, sir, in the Cabin Branch neighborhood?
A Correct.
Q Okay. Is specialty outlet retail a subpart of retail use?
A I apologize, but I'm not --
MS. ROBESON: If you don't understand, just say so.
THE WITNESS: I'm, yeah, I'm not sure I understand your question.
BY MR. CHEN:
Q Okay. You understand that the master plan calls for retail use, is that correct?
A Yes.
Q Okay. Now is what you refer to as specialty outlet retail part of retail, the same thing as retail?
A It is a form of retail, yes.
Q Thank you. It's a form of retail. How much square footage will be in the outlet center?
A The final plans aren't done. We're not yet at site plan approval, so I could only tell you, but

approximately I'd anticipate 450,000 feet or so.
Q Okay. And what is the total amount of retail currently under the current master plan for this Cabin Branch neighborhood?
MR. HARRIS: Excuse me. Can you clarify whether you mean master plan or the development plan?
MR. CHEN: I apologize, I thought I said master plan, but I mean the master plan.
THE WITNESS: In my reading of the master plan, they talk about 120,000 feet of retail to be located west of, I apologize, I'm not sure, the dividing road or line, and they encourage a rezoning to MXPD which would allow an additional 20 percent of 2.4 million. So I don't know what that totals, but specifically they summarize all of that in the chart that has the number 120 if that's what you're looking for simplistically.
BY MR. CHEN:
Q Yes, that's the chart on page 67 of the master plan?
A I don't know what page number it's on, but there's a chart that shows 120,000 feet.
Q Square feet?
A Yes.
Q Okay. Thank you. And --
A To clarify, I don't believe that's what the master

plan -- I don't believe that was a limit on the amount of retail square footage given the encouragement of the MXPD's rezoning, but at the time they wrote it, they didn't have that rezoning done.
Q Okay. But the chart says 120,000 square feet of retail?
A Yes, that's a fact.
Q And how about the approved development plan, what is the amount of retail authorized under the approved development plan?
A I'm not allowed to look and ask somebody something, so I apologize, I don't know the answer.
Q Okay. You don't know?
A No.
Q Okay. And under the master plan, where is the neighborhood retail proposed to be located?
A My understanding is that again, and I really applaud the foresight that whoever was responsible for this almost 20 years ago had, the, it was not clear at the time that this master plan was written that the zoning would allow any retail. There were two different zones that existed, zoning designations that existed. And I believe there was a concern that since those zoning designations didn't specifically allow retail, that there was a risk there might not be any retail.

So the, they wanted to make sure that in the southern portion of the site on the west site where it was even more uncertain whether the zoning allowed any retail to happen, that in order to assure that at least some retail happened, they specified in that location that there would be, there would be retail.

Q And what was the amount specified at that location?

A That's the table that you were referring to earlier.

Q 120,000 --

A 120,000 --

Q -- square feet?

A -- feet.

Q Do you know what the approved development plan provided for as far as the location of the retail?

A Not off the top of my head.

Q Okay. You also stated that -- I've got this in quotes, but if I'm mis-quoting you, just let me know.

A Okay.

Q The Examiner will let you. You stated, and I believe you used the word fact, that not a lot of demand for office uses or life science uses exist, is that a fair statement for a clear reflection of what you stated, sir?

A It is and I'd love to clarify it, which is I am

not an expert and I only like to speak to things. If I say something definitively, I like to feel like I have some expertise to make that statement. So that statement is based on me having spoken with folks that know the leasing market better than I do and/or our landowners who have been trying to rent or lease space and it has been a long slog. That doesn't mean there isn't some, that doesn't mean somebody may not be able to lease some space. But everything that I have read, everything that I have heard, even everything I've heard today from some folks is that it is a very, very small market today.

Q Okay. You don't have any studies that have been conducted on that point though, have you?

A I don't personally have any studies, no.

Q You also, as I recollect your testimony, stated and used the word that the proposed amendment would be a, quote, catalyst, as I recollect your testimony, for development of office uses. Is that an accurate statement of your testimony, sir?

A It's an accurate statement and it's based on having seen similar things happen many times across the country.

Q Okay. So your testimony is based upon your experience of seeing, according to your testimony, similar situations?

A Of having seen it, as well as having, as I've mentioned, I've been a bit of a student and a little bit of a nerd about mixed use development, so I've read a tremendous amount about this and had the pleasure of working with some of the foremost experts in it internationally actually.

Q But, again, you don't have any study that has been conducted on that point?

A In my library? Yes, I have studies on that point but, no, not that I've submitted to the Zoning Hearing Examiner.

Q Okay. And you also referred to white papers that have been prepared, do you recall that testimony?

A I do.

Q Have you provided any of those white papers to the Examiner?

A I have not, Mr. Chen. I have tried to focus on the specific issue before the Zoning Hearing Examiner rather than try to impress anybody with what's been a very gratifying and fortunate career to have worked with some of the literally foremost experts worldwide in urban planning; master planning; having been asked and done significant pro bono work for the mayor's office of D.C. on master planning both around the southwest waterfront, around the baseball stadium; having been selected individually to advise them

and solely negotiate and formulate the master plan for what is now the largest development going on in D.C. which is called City Center on 10-square, 10 acres downtown; having advised the London Olympics on some of the things that they have done and the head, the CEO of the Olympic Park Legacy Corporation. So I feel very gratified and fortunate in my career to have had an opportunity to work with people who are far smarter and far more nerdy and have spent their lifetime reading white papers. So if that's something that the Zoning Hearing Examiner wants, I would have no trouble having those submitted.

Q Assuming the specialty retail outlet goes forward and the development plan amendment is approved and you get your 450,000 square feet for the premium outlet, how much will be left over for the neighborhood retail?

A In order to answer your question, can I ask you to define neighborhood retail for me?

Q Yes. I'm referring to the neighborhood retail, retail quote referred to in the master plan. Remember, you pointed out where it was supposed to go?

A There is neighborhood retail -- I have to repeat my question to you. Can I ask you to define for me so that I can answer your question how you would define neighborhood retail?

Q Yes. I would use the definition you used in the

employment and place making exhibit. Do you see where, the two circles that say neighborhood retail center, do you see that? How do you define that?

A The reason that I'm hesitating is your question presupposes a relatively simplistic answer that I'm uncomfortable giving because it's not a math question of 450,000. I believe what you're trying to lead the question to be is 484,000 feet minus 450,000 feet and what is that and that would be kind of absurdly and on its face overly simplistic and would lead to a misleading answer.

The reality is, and here's the real reality, when you create exciting, walkable community developed thoughtfully places that have restaurants and retail, and they're compelling enough to draw people from 10 or 20 or 30 miles away, the people that use them most frequently are the people in the neighborhood because they have easiest access to it. Some of them walk to it, some of them bike to it, and they use those restaurants and they use that retail and they shop there and they gather there and sometimes they just gather there and they don't shop there.

So there is within specialty retail elements of it that are by any definition neighborhood retail and, therefore, the math is not as simplistic as you're asking it to be. And I don't want to state something on the record that I don't believe or feel is misleading. So --

Q You do agree, though, that the master plan does have a numeric amount for retail, isn't that correct?

A I believe what I've stated. There's a table in there that is referring to a specific site where they wanted to assure that despite the zoning designation that existed at the time, which might have precluded retail, that they understood the need for retail and they said let's make sure there's at least this much retail and let's encourage a rezoning so we can actually get what's necessary to build a livable community. That's what I believe and I can't state it more clearly than that.

Q All I'm asking --

A That's what I believe.

Q -- is that the master plan does have a figure, a number, isn't that correct, sir?

A Yes, we've already designated -- I've already acknowledged that it has a table in there that says 120,000 square feet.

Q Similarly, doesn't the approved development plan also have a number?

A I assume that it does. You asked me what that number was. I said I couldn't tell you.

Q I understand that, but just -- can we agree that there are these numerical, numeric levels, isn't that right, sir?

A That's correct.

Q Okay.

A Absolutely.

Q And as I understand the proposal that is before the Examiner today is to increase the amount to 484,000 square feet, is that right?

MS. ROBESON: Wait, is that in the record?

MR. CHEN: Yes.

MS. ROBESON: It's in this exhibit?

(Discussion off the record.)

MS. ROBESON: Oh, okay, it is.

THE WITNESS: Unless the zero skipped.

MS. ROBESON: Go ahead.

THE WITNESS: It better be.

MS. ROBESON: Just checking. Go ahead.

THE WITNESS: Sorry.

MR. CHEN: Ms. Examiner, actually I wasn't being intentionally disrespectful earlier about that, but I just wanted --

MS. ROBESON: I didn't understand. That's good to know. I didn't understand your objection, but let's not delay on that. Let's keep going. He's admitted he doesn't know what the development, exactly what the development plan says, but the master plan says 120,000 square feet.

THE WITNESS: Correct.

BY MR. CHEN:

Q And the proposal that is before the, consideration for the recommendation of the Examiner is to increase the retail to 484,000, is that correct, sir?

A Yes.

Q Okay. Now -- and I'm just trying to get some clarity because the master plan and the approved development plan does have numeric numbers or levels. You are showing, as I understand it, on your exhibit an employment retail entertainment area which is, I understand, that's where the outlet, Premium Outlets will be located?

A Correct.

Q Okay. And then you are showing these two other -- is that word node? Is that a proper word?

A That's right.

Q Thank you. You were then showing two nodes for neighborhood retail center and there are two separate locations, correct?

A Correct.

Q All I'm trying to get an understanding of, sir, is after the Premium Outlet is developed, how much retail square footage will be available for those two nodes of neighborhood retail centers?

A The one node, as you'll notice, in the northernmost quadrant overlaps as, frankly, not for ease of

discussion, but for practical good building reasons that we've been talking about these mix of uses, these areas overlap --
Q Yes.
A -- so I can't tell you --
Q But that node, as I see it, that node is located outside the premium retail location that you ferreted out?
A There's property by another entity that has approved retail already on that site.
Q How much square footage are they approved for?
A I'm not sure.
Q Okay. And how much would be available then to the neighborhood retail node to the south?
A With the caveat that I believe the answer to that is 50 to 100,000 square feet is what I think potentially may ultimately be built there.
Q Okay. I also understand that the amendment does not propose a grocery store in this Cabin Branch neighborhood, is that correct?
A There had been a grocery store planned in the, potentially in the northern quadrant and we have agreed, to be totally clear on the record, we have agreed we will not build a grocery store.
Q So the DP, the development plan amendment would delete that as a use in the Cabin Branch neighborhood?

MR. HARRIS: Objection.
MS. ROBESON: Yes?
MR. HARRIS: I don't believe the development plan mentions grocery at all.
MS. ROBESON: It doesn't. He's asking you --
MR. HARRIS: He's saying it would delete it. It's not in here.
MS. ROBESON: Oh, I see.
MR. CHEN: I apologize.
BY MR. CHEN:
Q So that it's not part of the development plan amendment, is that correct, sir?
A I don't believe the development plan amendment lists the type of retailers. What I can tell you is we've made a commitment to the community, we've made a -- it would be completely inconsistent with everything I just shared with you today that we believe then that we would do something that would be harmful to the town center. We want to be complimentary. Somebody else, not me, but I believe it was a community member, testified that they had heard Elm Street specifically say that the one thing that would assure they didn't get built was if somebody built a grocery store. So we have committed not to build a supermarket.
Q Okay. Thank you.
MR. CHEN: That's all I have.

MS. ROBESON: I just have one question. I'm looking at your neighborhood retail and the bullets, the circle, employment and place making, this here. Is that --
(Discussion off the record.)
MS. ROBESON: That one, yes. Maybe I'm not reading it right. Is a portion of that neighborhood retail in the northern portion, is the area on the other side of 121 included in this development plan amendment, the area north of 121?
MR. HARRIS: No.
THE WITNESS: That's --
MS. ROBESON: No? I just, I'm trying to --
THE WITNESS: You're talking about the area right here north of 121?
MS. ROBESON: Yeah.
THE WITNESS: That's property owned, I can't say the official owner. I believe --
MS. ROBESON: All I want to know if whether it's part of this application.
THE WITNESS: No.
MS. ROBESON: Okay.
MR. KLINE: But it is part of this application. The development plan amendment covers the entire area zone MXPD. There may not be any changes being made to that, but it is part of the application because we're amending the

entire development plan. It runs for all the MXPD property.
MS. ROBESON: So, okay. So the area north of 121 is also within the original development plan, but not specifically part of -- okay. I understand what you're saying, but I'm going to, I need to get the pieces together --
MR. KLINE: I understand.
MS. ROBESON: -- for myself. So the area north of 121 was part of the original development plan to your knowledge or do you not know?
THE WITNESS: I don't feel expert enough to answer that question.
MS. ROBESON: No, it's fine.
MR. KLINE: Right.
MS. ROBESON: Okay. He doesn't -- you can get to it for me. I'm just trying to isolate all these parts, okay?
MR. KLINE: Okay.
MS. ROBESON: All right. You're finished with your questions?
MR. CHEN: Yes.
MS. ROBESON: Mr. Kline, do you have any questions on his testimony?
MR. KLINE: No, not, more than I'm going to be able to accomplish before I faint from not eating.

MS. ROBESON: We have to eat? Okay. All right. We will take an hour for lunch. We'll be back at, well, 55 minutes. We'll be back at 2:00. And are there -- before everyone leaves, before we go off the record, are there any other citizens that need to testify, because I'm willing to have Mr. Kline keel over if there are.

Okay. With that, we'll be back at 2 o'clock.

(Recess)

MS. ROBESON: Are the parties ready?

MR. KLINE: Yes, ma'am.

MR. RPBERTS: Yes.

MS. ROBESON: Okay. Let's talk -- we were going to talk about the date of another hearing. Have you all had the chance to confer?

MR. KLINE: Mr. Chen and I have had a chance to confer. We have not had a chance to talk to Mr. Harris who is not present when we returned.

MS. ROBESON: Right. I understand he's had a personal emergency.

MR. ROBINS: Should I identify myself?

MS. ROBESON: Yes, please.

MR. ROBINS: Okay. For the record, Steven Robins with the law firm of Lerch, Early & Brewer. I'm sitting in for Mr. Harris at this moment who had to leave on an unexpected personal emergency.

MS. ROBESON: Okay. Have -- are you able to commit to dates or not?

MR. ROBINS: I think I'm able to commit as best as I can to dates that we can come up with. I know that before Mr. Harris -- actually I received a quick voicemail just saying please pick out dates as soon as possible that are, that everyone agrees to.

MS. ROBESON: Okay. So with that instruction, we can pick out dates. Did you --

MR. ROBINS: And he was good with all the dates that you, that you gave.

MS. ROBESON: Okay.

MR. ROBINS: That's my understanding.

MS. ROBESON: Mr. Kline and Mr. Chen?

MR. KLINE: If I can go first?

MS. ROBESON: Yes.

MR. KLINE: On my calendar on -- you gave us the 16th of August?

MS. ROBESON: Yes.

MR. KLINE: I will be in Canada at that time. I will not be available on that date. I am available for 26, 27 and 28th.

MS. ROBESON: Okay. Mr. Chen.

MR. CHEN: I'm available on the 16th.

MS. ROBESON: And what about the 26th?

MR. CHEN: I'm in depositions every day, previously scheduled. It's a case. Quite bluntly, I've been taking, I've been in depositions for the better part of last month, so it's a pretty big case and, in fact, on the one day, the 29th, I've got two depositions. But these have been previously scheduled.

MS. ROBESON: How about September?

MR. CHEN: I've got depositions in September, but I've got more time in September than August because, yes, I do have depositions, it's just what day are we talking about?

MS. ROBESON: Well, let me do this.

MR. ROBINS: Is it possible to do half day, even if it's a half day during these August dates?

MS. ROBESON: Well, before you go there --

MR. ROBINS: Okay.

MS. ROBESON: -- let's, if we can, I'd like -- there may be some more August dates depending on if the Council hearing room is available, all right? I'd like to get this done in August. So if you don't mind waiting for -- we're going to go off the record and I'm going to call upstairs --

MR. CHEN: Okay.

MS. ROBESON: -- and see if we can get one of the other hearing rooms.

MR. ROBINS: That would be fine.

(Discussion off the record.)

MR. ROBINS: Do you have dates that you want to give me so --

MS. ROBESON: I don't have -- I have to call upstairs before I know what dates I can have for the 7th floor. The other option is sometimes we can get the first floor auditorium.

MR. ROBINS: Yes. And counsel is on recess for the whole month of August, so hopefully that will work.

MS. ROBESON: Well, that's what I was hoping. So let me go back and see if I can't figure that out. And are you gone, Mr. Kline, are you gone the whole week of the 13th, the 12th, or the 11th through the --

MR. KLINE: No, I --

MS. ROBESON: -- 16th?

MR. KLINE: No, I'll be departing on the 15th, returning on the 26th. So I am available on the 12th or 13th or 14th.

MR. CHEN: I have a huge deposition that is probably going to go at a minimum of a whole day on the 13th.

MS. ROBESON: How about the 12th? Oh, wait, I won't be here the 12th. That week is out for me actually. I'm out until the -- oh, no, I'm back on the 12th. So the

12th is a possibility.
MR. CHEN: I'm back on the 12th also. I could do a half day on the 12th.
MS. ROBESON: Well, do you -- and then, I'm sorry, Jody, what dates were you not available?
MR. KLINE: I'm not available from the 15th through, until the, through the 25th. So the last week of August and the first three days of the week beginning August 12th I'm available.
MS. ROBESON: And, Mr. Chen, why don't you give me the days in August that you do have?
MR. CHEN: I'm clear on the 14th.
MS. ROBESON: Okay. That's a possibility then?
MR. ROBINS: Yes. Yes, ma'am. Yes, Your Honor. Yes, Madam Examiner.
MS. ROBESON: Whatever you want to call me is fine.
MR. ROBINS: Thank you.
MS. ROBESON: Well --
MR. ROBINS: I understand. Do you want me -- I'm good the 14th.
MS. ROBESON: Okay. Any other -- okay then. Jody is gone. So are you good at all the week of the 26th?
MR. CHEN: Every day I'm in depositions, literally every day. I could probably, you know, suggest to counsel

half days. We could do, well, right now we have the 12th and the 14th, right?
MR. ROBINS: Right.
MS. ROBESON: Then let's pick the earliest September date.
MR. CHEN: I can do a half day on the 12th is what I was saying.
MR. ROBINS: And I would say even if it's a half day --
MR. CHEN: Yes.
MR. ROBINS: -- let's take it if we could.
MS. ROBESON: But morning or --
MR. CHEN: Pardon me.
MS. ROBESON: That's okay.
MR. CHEN: My client, Mr. Cobb, just told me his son is in surgery on the 12th. He cannot be here.
MS. ROBESON: Okay. So we have the 14gh. How about Tuesday, September 3rd?
MR. CHEN: I have a deposition.
MS. ROBESON: Okay, Mr. Chen.
MR. CHEN: I'm in -- I, this is a huge case.
MR. KLINE: Tell them what it is. They maybe know.
MR. CHEN: It's been in the press. It's a lawsuit involving the Fraternal Order of Police in Montgomery County

and their campaign activities during 2012 general election. And I mean we've been going hot and heavy for over two weeks now and --
MS. ROBESON: I know. I understand. The problem is I don't want to delay this case because they've been going on for quite awhile. Let me do this. Let me --
MR. CHEN: I'm good the rest of that week, by the way. The 4th -- I apologize to interrupt, Madam.
MS. ROBESON: You mean the 4th?
MR. CHEN: 5th and 6th I'm good.
MS. ROBESON: Jody, how are you?
MR. KLINE: We're good. Are those --
(Discussion off the record.)
MR. KLINE: Those dates are open for me.
MR. CHEN: Madam Examiner --
MS. ROBESON: Yes?
MR. CHEN: -- the following week --
MS. ROBESON: Yes?
MR. CHEN: -- I'm clear Wednesday through Friday.
MS. ROBESON: Are you clear Friday?
MR. CHEN: Which day?
MS. ROBESON: The 6th? Oh, that's Rosh Hashanah.
(Discussion off the record.)
MR. CHEN: No, Friday the 6th is not Rosh Hashanah.

(Discussion off the record.)
MR. CHEN: Rosh Hashanah is on Wednesday, the 4th.
MS. ROBESON: Okay.
MR. CHEN: I'm good, I'm good Friday the 6th.
MS. ROBESON: Jody, how are you Friday the 6th?
MR. KLINE: That is open, Ms. Robeson.
MS. ROBESON: Steve?
MR. ROBINS: What -- I'm a little confused from the date.
MS. ROBESON: Friday the 6th?
MR. ROBINS: Friday the 6th?
MS. ROBESON: Right now I've got Wednesday the 4th. Jody, how are you on Wednesday?
MR. KLINE: I am open on that day also, yes.
MS. ROBESON: Okay. Wednesday the 4th, or yes, Wednesday the 4th, Friday the 6th and, Steve, how are you on those days?
MR. ROBINS: I mean that's fine. It's really Bob's schedule that I need to check with and I'll make sure that he's good. But also the August 14th we're not giving up, are we?
MS. ROBESON: No. I'm looking for the second day.
MR. ROBINS: Right.
MS. ROBESON: So let me do this. Let me go make sure that I can find a room for August 14th, because the

Board will be in here, the Board of Appeals. So let me go make sure I can -- yes, sir?

MR. CHEN: I apologize. Mr. Cobb told me that on the 4th another family member is in the hospital on the 4th.

MS. ROBESON: Well, you know, at some point does he -- we're not even -- I'm going to keep the 4th open. If I can avoid it, I will, but I'm going to keep it open until I see room availability, all right? If I can do it the 5th and, or the 6th instead of the 4th, I'm fine, but I'm keeping it on the table.

MR. CHEN: Didn't we also have an August date?

MR. ROBINS: August 14th.

MS. ROBESON: August 14th.

MR. CHEN: Madam Examiner --

MS. ROBESON: Yes?

MR. CHEN: -- if you're looking at Wednesdays, I'm clear Wednesday the 21st, August 21st. Oh, that's right, I'm sorry, you're -- okay.

MS. ROBESON: He's in Canada. How about the 28th?

(Discussion off the record.)

MR. CHEN: I'm in depositions on the 28th.

MS. ROBESON: Okay. So right now I have got August 14th, we'll try for Friday, September 6. I'm going to keep September 4th on the table until I can find room availability. So with that, let me go check with the powers

that be --

MR. ROBINS: Was there a possibility of -- I can't remember where we flushed out on August the 12th for half a day.

MS. ROBESON: Mr. Cobb had family in surgery.

MR. CHEN: Son is in the hospital.

MR. ROBINS: Oh.

MS. ROBESON: So with that, I'm going to go off the record and see if I can find a room somewhere. Well, before I do that, let me just get one more back-up date on the week following --

MR. CHEN: The 6th?

MS. ROBESON: Yes.

MR. CHEN: I'm good Wednesday the 11th, Thursday the 12th and Friday the 13th.

MS. ROBESON: I can't do -- I have another case Friday the 13th.

MR. CHEN: How about the 11th and the 12th?

MS. ROBESON: The 11th and the 12th. Mr. Kline?

MR. KLINE: Those are both open on my -- or I can move things around.

MR. ROBINS: I can't remember, what did you say about the week of August 5th there? Are you gone that week?

MS. ROBESON: Yes.

MR. ROBINS: Okay.

MS. ROBESON: And the week of -- I've got September 11th and 12th as possibilities.

MR. ROBINS: The September 11th, I think, would be okay. September 12th is a date that Mr. Unterberg has another case at the Planning Board. I do too, but I'm not as important here as he is.

MS. ROBESON: Okay.

MR. ROBINS: So I think the 12th will be, will be tough because we don't even know what the Planning Board's schedule is right now. September 11th would work.

MS. ROBESON: Okay. I think that's enough. So I just need to, really all I have to do today is get, check on August 14th to make sure I can get a room.

MR. ROBINS: That would be great if we could get a room.

MS. ROBESON: And then we can firm up the second day. If I can firm it all up today, that's good, okay? All right.

MR. CHEN: Are the dates, again, you're working with is August 14th, September 4, September 11 and possibly September 6, or --

MS. ROBESON: No, September 6th, before September 4th --

MR. CHEN: Oh, yes, you're right.

MS. ROBESON: -- because I thought that --

MR. CHEN: Yes, ma'am.

MS. ROBESON: Okay.

(Discussion off the record.)

MS. ROBESON: Wait. Oh, you, we have a very efficient staff.

MR. ROBINS: Well, she's listening.

MS. ROBESON: -- who has already booked the 7th floor for August 14th.

MR. ROBINS: Great. Good.

MS. ROBESON: So, Sarah, I was going to have her check the other date. Let me go off the record for 5 minutes and then we'll come back on and we'll just announce the dates, all right?

MR. ROBINS: Thank you very much.

(Recess)

MS. ROBESON: Record. Are we -- okay.

MR. ROBINS: We talked amongst ourselves while you were out of the --

MS. ROBESON: Yes?

MR. ROBINS: -- out of the chambers and if we could also see on August 12th, that half day, if we could do it in the morning, that would work.

MS. ROBESON: Okay. I don't -- let me do this. I have the 7th floor reserved. Oh, the 12th?

MR. ROBINS: Yes, so the 14th is good. The --

MS. ROBESON: Okay. I just have to make sure we have a hearing room --
MR. ROBINS: Okay.
MS. ROBESON: -- because --
MR. ROBINS: Sarah is probably listening and we'll probably hear in one second.
MS. ROBESON: She is good. Let me just see what our schedule says. I'm sorry, that was August 12th?
MR. ROBINS: August the 12th in the morning and then the 14th all day.
MS. ROBESON: All right. Thank you. Okay. We can do the morning of the 12th in this room. So what I have is the morning of Monday, August 12th -- when is your deposition, Mr. Chen?
MR. CHEN: My deposition is all day on Tuesday. My, it was the client that had the issue on the 12th.
MS. ROBESON: Oh, okay. That's right.
MR. CHEN: And he's agreed to forgo the morning.
MS. ROBESON: Okay. So what we can do is the morning of August 12th and a full day on August 14th. And then I am going to ask people just in case because, as I said, we sort of got a monster case going on that's usurping all the hearing dates. So what I'd like to do, I have the 7th floor on Friday, September 6th --
MR. ROBINS: Okay.

MS. ROBESON: -- because the Council doesn't come back from recess until the 9th. So I'd like the parties to reserve that date as well and that will be at 9:30. And that -- so --
MR. CHEN: That would be all day too?
MS. ROBESON: What?
MR. CHEN: That would be all day too?
MR. ROBINS: Assuming that we finish?
MS. ROBESON: Yes. So I'm going to -- okay. So we have those three dates. Now, Mr. Kline --
MR. KLINE: Yes, ma'am.
MS. ROBESON: -- how long is it going to take you to get an expert, because what I'd like --
MR. KLINE: Sure.
MS. ROBESON: -- Mr. Harris's, to give him the full 10 days.
MR. KLINE: Oh, yes, sure.
MS. ROBESON: Are you going to make the 12th? Can you make the 12th is my question?
MR. KLINE: Good point. Good point. That probably would be difficult to get the person lined up and have it in timely so somebody could prepare. But if it's only half day, I don't believe the applicant is going to be finished.
MS. ROBESON: Right. How about the 14th?

MR. KLINE: The 14th, I, yes. I'll make it work.
MS. ROBESON: Okay. Well, wait a minute. You have to submit your statement --
MR. KLINE: Right, 10 days in advance.
MS. ROBESON: Right. Okay. And that way the 6th will be good. Then we may have to go to the 6th to give him the benefit of the full 10 days.
MR. KLINE: I will use my best efforts to have somebody lined up and submit whatever I can early enough so Mr. Harris could be adequately prepared for the 14th.
MS. ROBESON: Okay. Thank you.
MR. KLINE: I'll do my best.
MR. ROBINS: I appreciate that.
MS. ROBESON: Okay. Thank you. All right. With that, is there anything else before -- I'm going to continue this case to Monday, August 12th at 9:30. Does anyone -- I'm going to, I don't have to announce the other dates yet, so is there anything else anybody wants to say? Yes, Mr. Robins?
MR. ROBINS: I mean just I would like to just point out I do want to run these dates, obviously, by Mr. Harris and I will get in touch with -- assuming it's Mr. Harris can't get in touch with Mr. Kline and Mr. Chen immediately, I will take the responsibility to get in touch with them to --

MS. ROBESON: Okay.
MR. ROBINS: And, obviously, with you too to make sure that these dates --
MS. ROBESON: The only problem is I have to announce the date on the record today or --
MR. ROBINS: Right.
MS. ROBESON: -- you will have to re-advertise.
MR. ROBINS: Okay.
MS. ROBESON: So if you don't feel comfortable --
MR. ROBINS: Can we go off the record for five minutes?
MS. ROBESON: And confer?
MR. ROBINS: I just, well, I don't need to confer with anyone.
MS. ROBESON: Yes.
MR. ROBINS: I just need to make a phone call.
MS. ROBESON: Call him? Sure.
MR. ROBINS: Okay.
MS. ROBESON: We're off the record.
(Recess)
MS. ROBESON: Well, let's -- can we go --
(Discussion off the record.)
MS. ROBESON: We're back on the record. Thank you. I also got a cancellation just as I walked back in there of, no, it's September 13th. So that date is

available too.
MR. CHEN: Actually --
MS. ROBESON: What?
MR. CHEN: That's Yom Kippur.
(Discussion off the record.)
MR. ROBINS: We can --
(Discussion off the record.)
MR. ROBINS: We could check -- are we on the record?
MS. ROBESON: Well, we don't -- yes.
MR. ROBINS: Okay. We can check that date.
MS. ROBESON: Yes. I don't have to set that today, I just need the next date.
MR. ROBINS: I had one -- I checked with, I tried to check schedules --
MS. ROBESON: Yes, I know.
MR. ROBINS: -- as best I could. And I think let's go with the 12th and the 14th. Can you announce both dates so that if the 12th, for example, is a problem, that we have the 14th without re-advertising? I mean I think that would work if we say --
MS. ROBESON: Well, the question is -- I mean if worst comes to worst, I can convene it and continue to the 14th --
MR. ROBINS: Right.

MS. ROBESON: -- that's just --
MR. ROBINS: That's true.
MS. ROBESON: -- that's just expensive for us to call in a court reporter just to, you know, convene a case.
MR. ROBINS: Right.
MS. ROBESON: But I can do that.
MR. ROBINS: I've had that done before too, so --
MS. ROBESON: You know, I can do that. So --
MR. ROBINS: Okay. So we'll --
MS. ROBESON: We'll continue to August 12th, Monday, August 12th at 9:30.
MR. CHEN: Half a day?
MS. ROBESON: Yes. I don't need to announce the end, I just need to announce the beginning, so that's all I'm doing. But, yes, contemplated a half day and then we have in reserve August, Wednesday, August 14th at 9:30; Friday, September 6th. Now Monday I will do -- I forgot to do this. Monday the 12th will be in this room.
MR. ROBINS: Okay.
MS. ROBESON: In the second floor. And then we, so we have also Friday, September 6th in reserve.
MR. ROBINS: So the 6th is reserved and you want us to check on -- and then the 13th is a back-up possibly?
MS. ROBESON: Well, we haven't checked on it, but I would prefer if you could coordinate and --

MR. ROBINS: Okay. We'll coordinate.
MS. ROBESON: -- Mr. Kline, you will try to get something in time for the 14th?
MR. KLINE: Yes, ma'am.
MS. ROBESON: Okay. All right. That being said, this case is continued. Thank you very much.
MR. ROBINS: Thank you.
(Whereupon, at 2:30 p.m., the hearing was concluded.)

C E R T I F I C A T E

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

Petition of Adventist Healthcare and Cabin Branch Commons
DPA 13-02

By:

_____

Tracy Hahn, Transcriber

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