

Community Members Opposing
The Application

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Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

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I. EXECUTIVE SUMMARY

Applicant:	Adventist Healthcare, Inc. and Cabin Branch Commons, LLC
DPA No. & Date of Filing:	DPA 13-02, filed March 7, 2013
Location:	283.5 acres located east of Clarksburg Road (Md. 121), West of I-270, and North of West Old Baltimore Road in Clarksburg, Maryland
Zone:	Mixed Use Planned Development (MXPD) Zone
Existing Development Plan:	G-806, approved September 9, 2003, for 1,139 dwelling units, 120,000 square feet of retail, and 2.3 million square feet of office, 75,000 square feet of public uses, and 500 senior units on 283.5 acres
Development Plan Amendment:	Increasing the retail permitted to 484,000 square feet and reducing the office to 1,936,000 square feet and various other amendments to permit development of a retail outlet center; residential units and public use space remain the same
Applicable Master Plan:	<i>June 1994 Clarksburg Master Plan & Hyattstown Special Study Area, 2011 Limited Amendment to the 1994 Clarksburg Master Plan and Hyattstown Special Study Area</i>
Gross Tract Area:	283.5 acres
Neighborhood Response:	Strong community support and community opposition
Support:	Supported by the Gaithersburg/Germantown Chamber of Commerce and many individuals
Opposition:	Opposed by Mr. Paul Whit Cobb, the owner of a commercial property within the Clarksburg Historic District, several individuals, and The Peterson Companies, potential developer of a retail outlet center within Clarksburg's Town Center District, as well as individuals
Major Issues:	Compliance with the Master Plan; compliance with environmental requirements for special protection areas
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval, subject to the following condition: The Applicants must submit a revised Preliminary Water Quality Plan (PWQP) in accordance with Chapter 19 of the

Montgomery County Code that reflects the development plan approved in this case. If the revised PWQP necessitates any changes to the development plan amendment that are inconsistent with the approved plans, the Applicants must seek a further development plan amendment to effectuate those changes.

II. STATEMENT OF THE CASE

Unlike a rose, the parties here argue whether employment is employment is employment.¹ That argument is a by-product of two underlying questions: does the application breathe life into a Master Plan whose implementation has been dysfunctional or does it subvert one of the core purposes of a Master Plan that remains viable? The heart of the controversy surrounds whether a retail outlet center in Cabin Branch will delay development within Clarksburg's Town Center District, and in particular, it's Historic District.

For the reasons that follow, the Hearing Examiner recommends approval of the application, subject to the following condition:

The Applicants must submit a revised Preliminary Water Quality Plan (PWQP) in accordance with Chapter 19 of the Montgomery County Code that reflects the development plan approved in this case. If the revised PWQP necessitates any changes to the development plan amendment that are inconsistent with the approved plan (Exhibit 132(c)), the Applicants must seek a further development plan amendment to effectuate those changes.

Applicants, Adventist Health Care, Inc. and Cabin Branch Commons, LLC, filed the Development Plan Amendment (DPA) on March 7, 2013, seeking to amend the development plan approved by the Council on September 9, 2003. The original development plan (Exhibit 21(f)) permitted a maximum of 2,300,000 square feet of office, 120,000 square feet of retail, 75,000 square feet of public uses, 1,139 dwelling units, and 500 senior dwelling units on 283.5 acres in the MXPD Zone. The Applicants here seek to increase the amount of retail to 484,000 square feet and reduce the amount of office to 1,936,000 square feet in order to develop a retail outlet center on the northeastern portion of the property. No changes are proposed to the amount of residential and public uses.

The hearing in this case proceeded as scheduled on July 29, 2013 (Exhibit 18), and was continued to August 12th and 14th, September 4th, 6th, and 12th, and October 10th and 15th, 2013.

¹ In *Sacred Emily* (1913), Gertrude Stein wrote, "A rose is a rose is a rose." In *McKemy v. Baltimore County*, 39 Md. App. 257, 258 (1978), the Court wrote, "Gertrude Stein once said that a rose is a rose is a rose, and no one appealed. Here, the Circuit Court for Baltimore County has held that a parking lot is a parking lot is a parking lot, and both sides have appealed."

The Applicant amended the proposed development plan on October 10, 2013, and Hearing Examiner kept the record open until October 25, 2013, to permit those opposing the application to respond to the revised plan.

During the course of the hearing, the Hearing Examiner referred several issues to Technical Staff of the Montgomery County Planning Department (Technical Staff) and the Montgomery County Department of Permitting Services (DPS). She referred the question of whether a binding element recommended by the Planning Board limiting the size of stores to 50,000 square feet, was enforceable to DPS and Technical Staff on September 10, 2013. Exhibit 105. On September 17 and 19, 2013, she referred the question as to whether the Applicants had complied with requirements of the Zoning Ordinance and Chapter 19 of the County Code relating to stormwater management in special protection areas. Exhibit 116. Technical Staff responded to the both queries on October 8, 2013. Exhibits 122, 126. DPS responded to the first request on October 10, 2013, and the second via a series of e-mails, the last submitted on October 14, 2013. Exhibits 122, 125, 129.

Because those in opposition to the application testified that a competing potential outlet center (to be located in the Town Center District) better furthered the public interest, the Hearing Examiner permitted testimony and evidence on the status of that project in order to understand their testimony. This included testimony and evidence on the then-pending Staff Draft of the *10-Mile Creek Limited Amendment to the 1994 Clarksburg Master Plan & Hyattstown Special Study Area*, October 2013 (10-Mile Creek Limited Amendment). The Hearing Examiner re-opened the record on November 7, 2013, to notify the parties that she would take official notice of the Planning Board draft of the 10-Mile Creek Limited Amendment, issued in October, 2013, and to permit comment on the draft amendment so that the Council could consider it in their decision.² Those in opposition submitted relatively extensive comments on November 18, 2013 (Exhibits

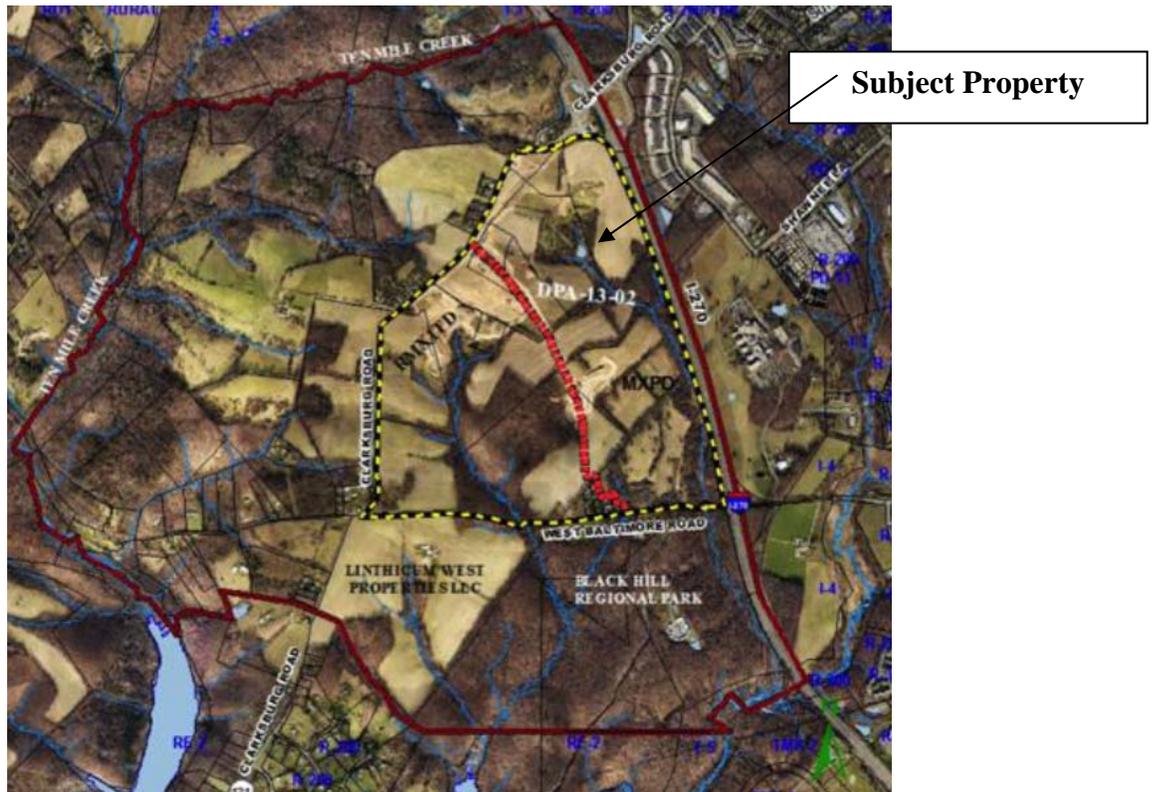
² OZAH's Rules of Procedure require that parties be notified when the Hearing Examiner intends to take official notice of a public document and be afforded an opportunity to comment. OZAH Rules of Procedure, Rule 4.8.

139, 140) and the Applicant requested the record to be re-opened so that it could respond. The Hearing Examiner re-opened the record again to receive these comments and, after receiving the Applicants' comments, the record closed on November 22, 2013. Exhibits 143, 144.

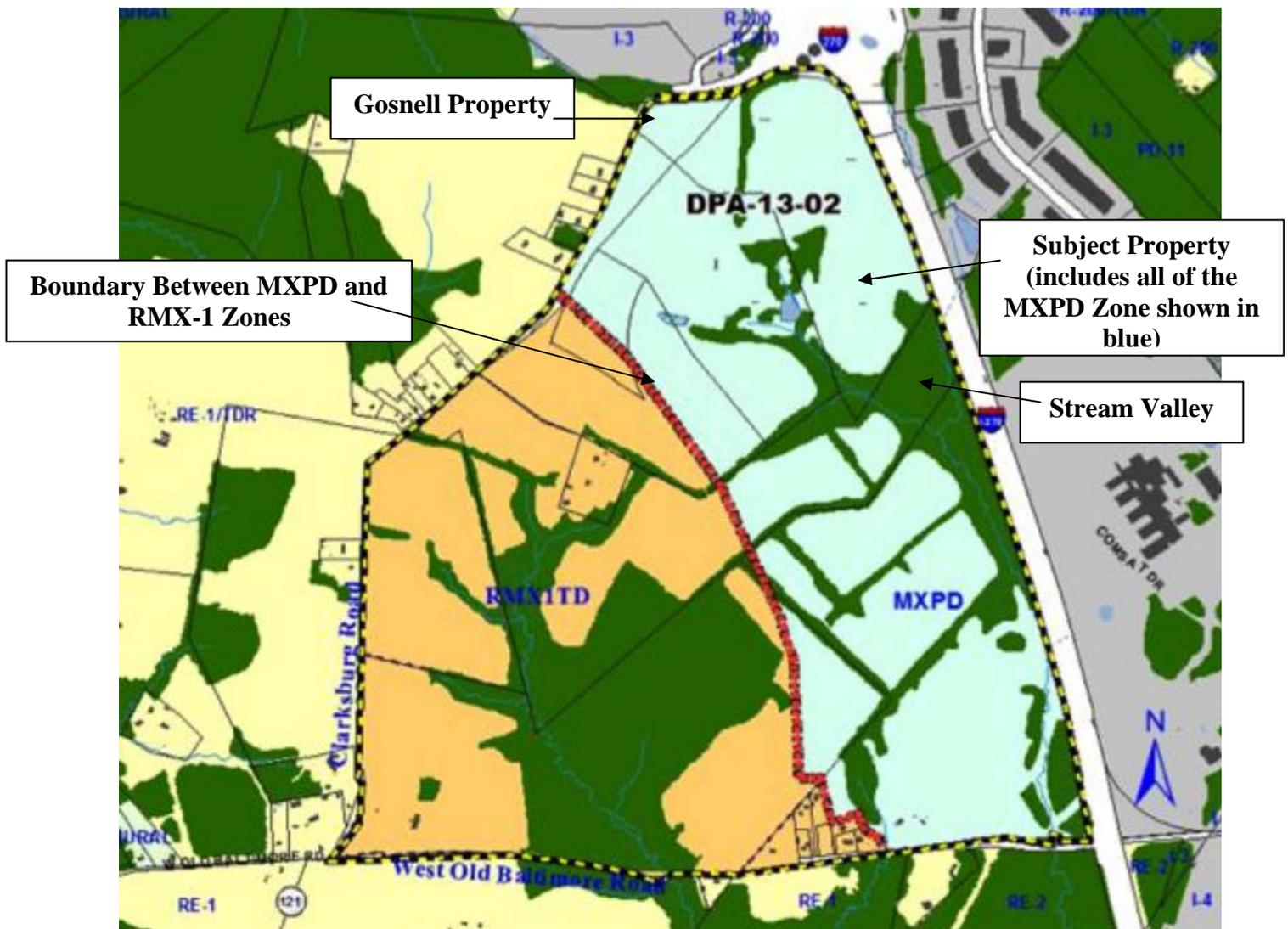
III. FACTUAL BACKGROUND

A. The Subject Property and Development History

The subject property consists of 238.5 acres within the Mixed-Use Planned Development (MXPD) Zone. It is part of a larger 535-acre tract designated as the "Cabin Branch Neighborhood" in the *1994 Clarksburg Master Plan and Hyattstown Special Study Area* (Master Plan or Plan) located southwest of the I-270/Clarksburg Road (Md. 121) interchange. The larger Cabin Branch tract is bounded by I-270 to the east, Md. Route 121 to the north and west, and Old Baltimore Road to the south. The subject property comprises roughly the eastern half of the neighborhood. The balance of the neighborhood is zoned RMX-1/TDR, portions of which have approved residential site plans, although no houses have yet been developed. 7/29/13 T. 96-97. It is identified on the vicinity map included in the Technical Staff Report (Exhibit 50), below:



The boundaries of the development plan amendment generally are I-270 to the east, Md. Route 121 to the north, a planned roadway labeled “Broadway Avenue,” shown on the development plan amendment, Old Baltimore Road to the south, and a small portion is located north of the old Clarksburg Road. The parties refer to the latter as the “Gosnell Property,” which has an approved site plan for a small “highway commercial” development, including a bank, hotel, gas station, car wash and convenience store. 8/12/13 T. 86; 8/14/13 T. 227. A map included in the Technical Staff Report shows the boundaries of the property and its relationship with the remainder of the Cabin Branch neighborhood (Exhibit 50, p. 6):³



³ While the DPA shows the entire 535-acre Cabin Branch neighborhood for illustrative purposes, the DPA is limited to the 283.5 acre portion in the MXPD Zone. Exhibit 132(c).

The Staff advises that the property is within the Clarksburg Special Protection Area and the Little Seneca Creek watershed. There are two stream valleys within the Cabin Branch neighborhood. One runs parallel to I-270 and falls within the subject property. The property is currently being farmed, although some clearing activities are occurring on properties that have received site plan approval. *Id.* at 5-6.

Since the approval of the original development plan in 2003, several development approvals have been obtained for all or part of the 535-acre tract, summarized in a chart provided by Technical Staff (Exhibit 122(a), on the following page). According to the Applicants' Justification Statement (Exhibits 20, 55) the major property owners of the larger 535-acre tract agreed to work together to develop the larger area. Development approvals received include a Natural Resources Inventory and Forest Stand Delineation (2001), a 2002 pre-application for preliminary plan approval to clarify the overall "concept and acreage" to be rezoned MXPDP and the 2003 MXPDP re-zoning. As part of the 2003 development plan for the subject property, the Council approved a Preliminary Water Quality Plan (PWQP). Exhibits 55, 119(c). In 2004 and 2008, preliminary plans were approved. The 2008 preliminary plan approved up to 1,886 trips for the entire Cabin Branch development for a period of 12 years provided the Applicants met road phasing requirements. In 2013, the Council granted an APFO extension of 6 years for plans approved before 2009, applicable to the subject property. Exhibit 55, pp. 3-4.

With the preliminary plan, according to the Applicant, the Council imposed a requirement for an Infrastructure Site Plan for the entire neighborhood to be submitted before the first residential or employment site plan. The purpose of this requirement was to address road phasing. In 2007-2008, the Planning Board approved the site plan for infrastructure, which included a school, local park, roads, and stormwater facilities, along with a Final Water Quality Plan (FWQP) for the infrastructure. The Applicants state that the administrative practice for Cabin Branch has been to update this overall FWQP as site plans for smaller areas are

approved. Exhibit 120. Specific approvals are listed in a Supplemental Memorandum from Technical Staff (Exhibit 122(b), below) and discussed later in this Report.

Case No.	Opinion	Type	Use Approved	Status
G-806	9/9/2003	Local Map Amendment with a Preliminary Water Quality Plan	Rezoned 283.5 acres to MXPDP on the eastern portion of the tract. Development Plan for 535 acres to allow 1,886 dwelling units, 2,240,000 sf commercial and 500 senior housing units.	approved
120031100 12003110A	6/22/2004	Preliminary Plan with a Preliminary Water Quality Plan	1,600 DU, 500 Sr. units, 2,420,000 sf commercial, transportation improvements, LATR review, road construction phasing.	approved
12003110B	10/6/2008	Preliminary Plan Amendment with a Water Quality Plan Based on Previous Approvals*	1,886 DU plus MPDUs, 2,420,000 sf commercial, 500 senior units.	approved
820050150	6/9/2008	Infrastructure Site Plan with a Final Water Quality Plan	Roads only. Density per 12003110B , maximum 635 TDRs, 236 MPDUs, 28.32 acres green space, public water and sewer (W-3), Master Plan Unit Mix, 2,436,000 sf retail and employment.	approved
820060290	10/6/2008	Winchester I Site Plan with a Final Water Quality Plan	428 DU, including Multi-family, attached and detached one-family homes, 64 MPDUs, 128 TDRs, 62.55 green space.	approved, amendment filed
820060240	9/29/2010	Gosnell Site Plan with a with a Final Water Quality Plan	Hotel, banks (employment) 87,500 sf and 8,600 auto-related uses, parking waiver.	approved
16-35 17-04	4/1/2009 4/1/2011	Subd. Regulation Subd. Regulation	Extension of validity period Extension of validity per	approved
820060290A 820110080	7/11/2012 7/11/2012	Winchester I and II Site Plan Amendment with a Final Water Quality Plan	400 DUs in the MXPDP and RMX-1/TDR Zones (232 DUs in the MXPDP Zone, and 208 DUs in the RMX-1/TDR Zone) 341 DUs in the MXPDP and RMX-1/TDR Zones (234 DUs in the MXPDP Zone, and 107 DUs in the RMX-1/TDR Zone)	approved
820120150	4/4/2013	Winchester III Site Plan Amendment with a Final Water Quality Plan	RMX-1/TDR Zone with 185 DUs, including 10 MPDUs consisting of 128 one-family detached and 57 one-family attached units using 56 TDRs	approved
820070140 820100030	5/2/2013 5/2/2013	Toll Brothers I and II Site Plan Amendment with a Final Water Quality Plan	MXPDP and RMX-1/TDR Zone with 435 DUs, including 239 single family detached, 68 single family attached and 128 multi-family units RMX-TDR Zone with 168 DUs, including 128 single family-detached and 40 single family attached units	approved
13-02	Pending	Development Plan Amendment with a Water Quality Plan Based on Previous Approvals*	Rezoned 283.5 acres to MXPDP on the eastern portion of the tract. Development Plan for 535 acres to allow 1,886 dwelling units, 2,240,000 sf commercial and 500 senior housing units.	pending

B. Surrounding Area and Adjacent Development

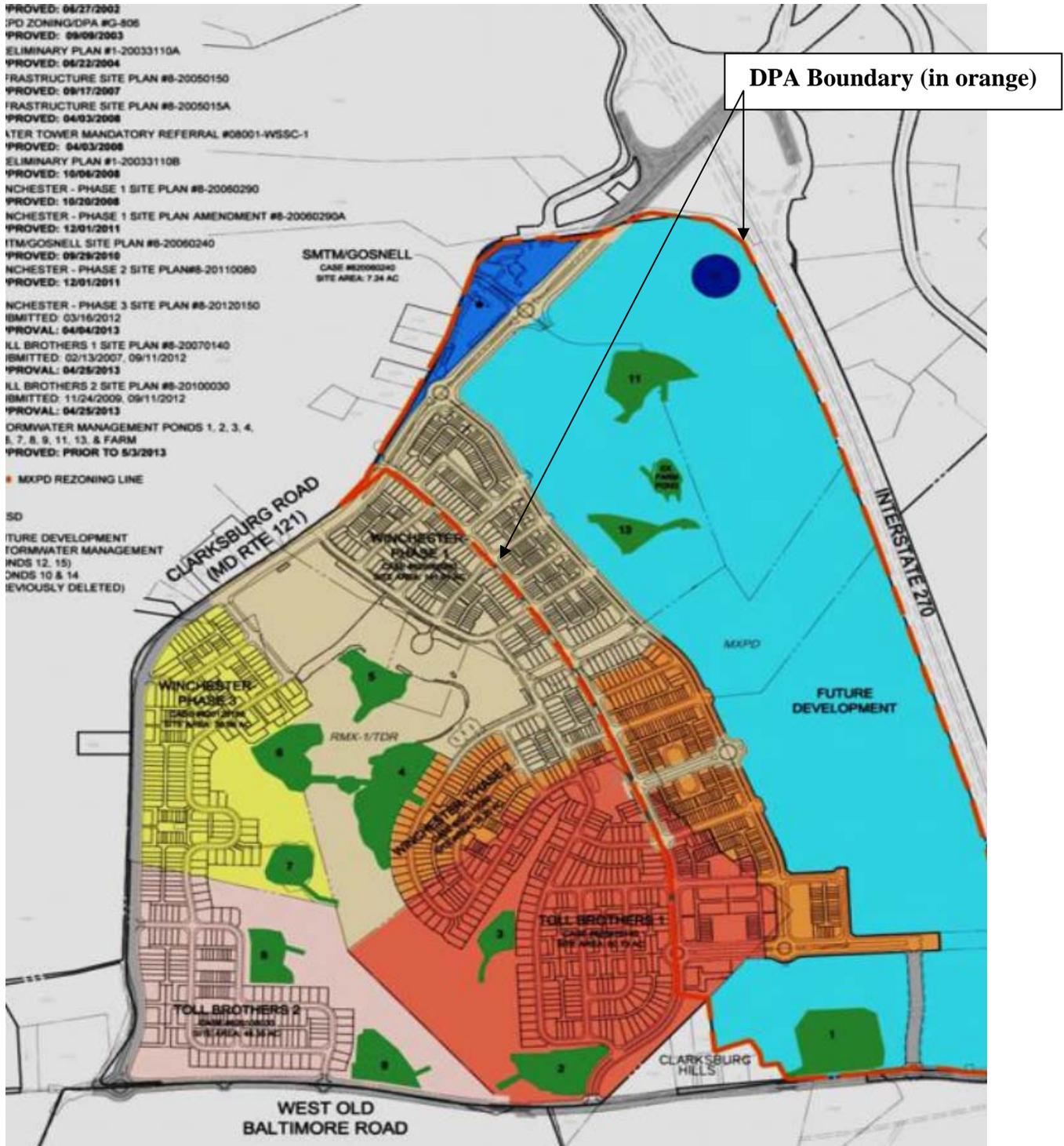
The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

Technical Staff defined the surrounding area by using the boundaries applied in the original re-zoning (i.e, LMA G-806). These were I-270 to the east, an undeveloped I-3 zoned parcel adjacent to the Clarksburg Detention Center to the north, Ten Mile Creek to the west, and Black Hill Regional Park and the Linthicum West property to the south. Exhibits 50, p. 6. None of the parties dispute this delineation.

Staff advises that much of this area has not yet developed. The properties located along Old Baltimore Road and Clarksburg Road are single-family detached homes and farms. Black Hill Regional Park is located immediately south of Old Baltimore Road. Although not within the defined neighborhood, Comsat and the Gateway I-270 Business Center are directly across from I-270. Exhibit 50, p. 6. While not yet developed, portions of the property (primarily to the west) have already received site plan approval for construction of single-family detached homes and townhouses. The graphic shown on the following page, prepared by the Applicants and included in the Staff Report, shows the relationship of these approved site plans to the subject property. Exhibits 50, p. 41, Exhibit 109.

Staff did not characterize of the neighborhood. Given that several site plans have been approved for properties to the west of the subject property, the Hearing Examiner concludes that it is more appropriate to characterize the neighborhood by these approved uses rather than the existing farming activity. Thus, the neighborhood is characterized by a mix of residential uses,

primarily on the western portion of the site, older single-family homes, limited farming activity along Clarksburg and Old Baltimore Roads, and employment along I-270.



Approved Site Plans in Cabin Branch Neighborhood

C. Proposed Development Plan Amendment

Pursuant to Code § 59-D-1.11, development in the MXPB Zone is permitted only in accordance with a development plan that is approved by the District Council, pursuant to Code §59-D-1.7. In the present case, we are examining a proposed amendment to the development plan, rather than a rezoning application. The standards for review are similar where, as here, a public hearing is required, because Zoning Ordinance §59-D-1.7(d)(2) directs OZAH to compile the record “in the same manner as the record is compiled for a local map amendment application.”

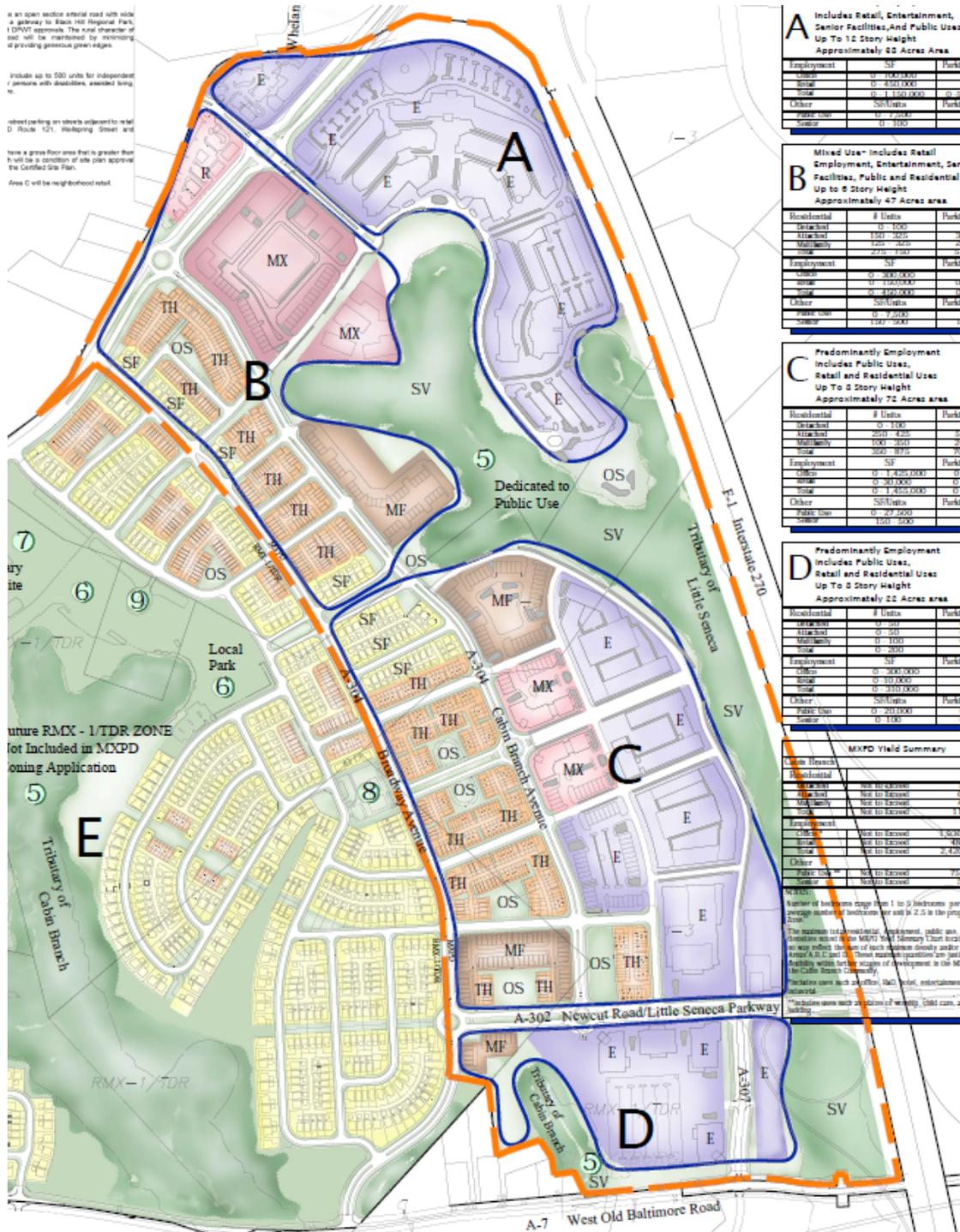
1. The Applicants’ Vision

The Applicants view the proposed outlet center as the lynchpin for a “world-class 21st century mixed-use employment community.” Exhibit 20, p. 7. Referred to by various terms, the Applicants assert that the outlet center is necessary to fulfill the Master Plan’s goal for office development along the I-270 corridor.⁴ According to them, the older “office-only” campuses are a thing of the past and, to be successful, office users now demand “place-making” characteristics, which, they assert, include “[a] great public realm,” excellent venues for retail, arts and culture, physical attractiveness and aesthetic appeal, plentiful shaded parks, conservation areas and recreational opportunities, and connections to housing resources. Exhibit 20, p. 7. In support of this, the Applicants point to several retail and office developments, such as Rock Spring Centre, the Washingtonian and Park Potomac. Exhibit 55, p. 12.

According to the Applicants, the entire Cabin Branch neighborhood has been designed using four “neighborhood planning principles espoused by M-NCPPC Technical Staff.” *Id.* at 8. These principles include: (1) Neighborhood Location and Place-making, (2) Linkage and Pedestrian Orientation, (3) Compatibility and Energy Conservation, and (4) Environmental Protection and Conservation. *Id.* With regard to place-making, the Applicants see the outlet

⁴ Both the Applicants and Technical Staff use different and somewhat unfamiliar terms for the outlet center, including “destination employment retail,” “retail employment center,” and “specialty retail,” although this list may not be comprehensive. *See, e.g.*, Exhibit 50, pp. 7, 10, 13, 19. For simplicity’s sake, the Hearing Examiner will refer to the retail proposed as an “outlet center,” but intends no comment on the quality of the development.

center as establishing “a regional place [that] is holistically created,” that will place Clarksburg “on the map.” *Id.* at 9. The DPA (Exhibit 132(c)) is shown below:



The DPA includes 2.4 million square feet of commercial development, broken down into 484,000 square feet of retail, and 1.936 million square feet of office. It also calls for 75,000

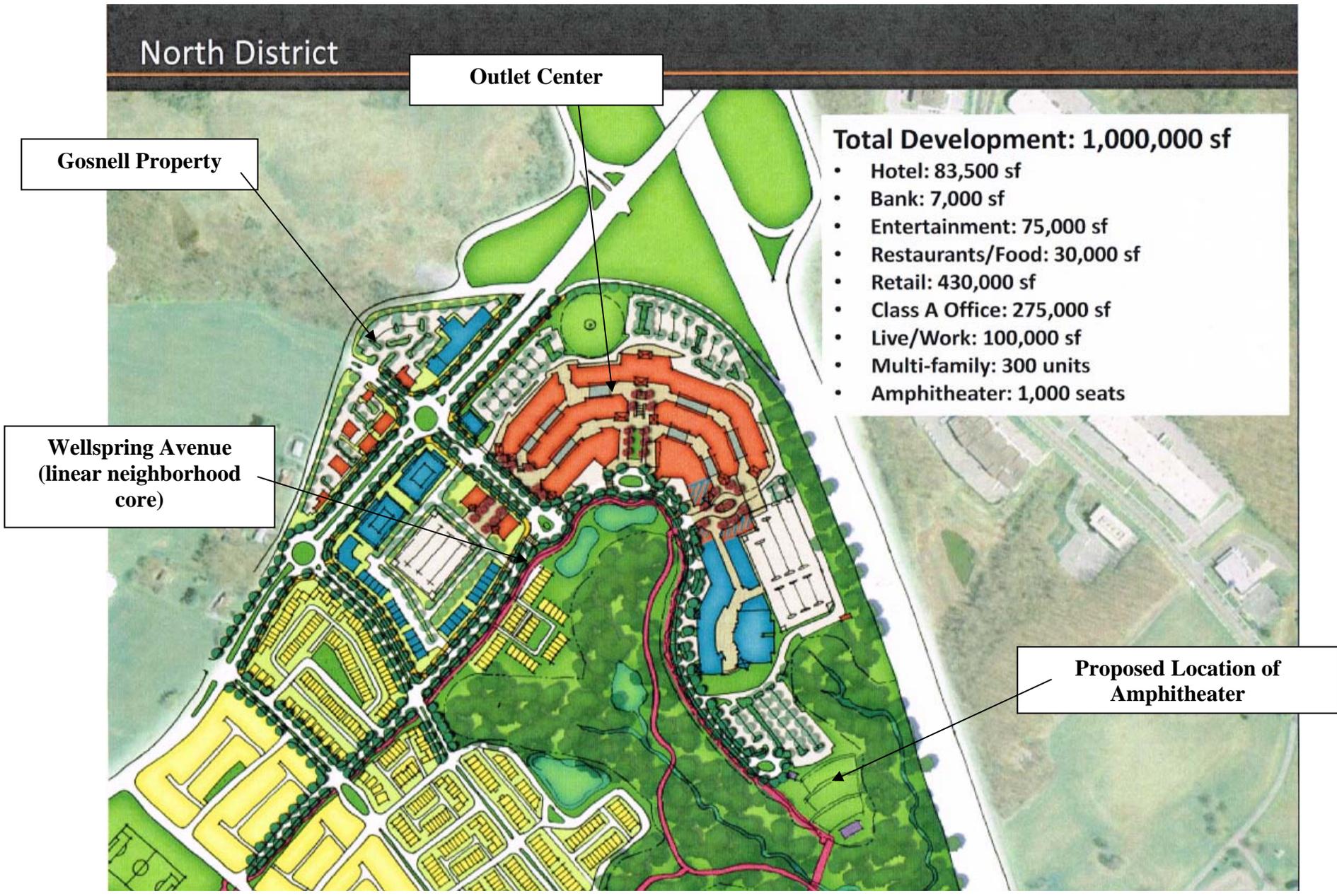
square feet of public uses, and 1,139 dwelling units that are a mix of townhouse, single-family detached, and multi-family units, as well as 500 age-restricted units.

Mr. Ron Kaplan testified that the DPA is divided into four areas, labeled Areas A through D, each of which has a prescribed mix of uses as well as maximum amounts of density permitted.⁵ The DPA does not have any minimum required densities. The North District, the location of the outlet center, will have 1 million square feet of development that will include the outlet center, a hotel, banks, entertainment uses, restaurants, and may include live/work and multi-family units, including retail on the Gosnell property. 7/29/13 T. 114-115. A conceptual layout of the North District, prepared by the Applicants, is reproduced on the following page. Exhibit 45. The outlet center is shown in red on the concept drawing.

After receiving input from the community, the developers also incorporated a large amphitheater in the North District upon hearing that there is no other location that could accommodate this use. Mr. Kaplan spoke with representatives of Strathmore Hall to see how this could be accomplished. 7/29/13 T. 117-118. A potential concept for the amphitheater is shown on a graphic submitted by the Applicant (Exhibit 45):



⁵ Mr. Kaplan is employed by Streetscape Partners, a member of the development team. Mr. Kaplan testified the quality of the development team attracted him to the project. The team includes New England Development, which has developed retail in Montgomery County at Wisconsin Place, Simon Property Group the largest real estate company in the world. He believes that Simon's participation in this project is significant because of their relationships with potential tenants and the high-quality outlet center produced. 7/29/13 T. 102-104.



North District

Outlet Center

Gosnell Property

Wellspring Avenue
(linear neighborhood core)

Proposed Location of Amphitheater

- Total Development: 1,000,000 sf**
- Hotel: 83,500 sf
 - Bank: 7,000 sf
 - Entertainment: 75,000 sf
 - Restaurants/Food: 30,000 sf
 - Retail: 430,000 sf
 - Class A Office: 275,000 sf
 - Live/Work: 100,000 sf
 - Multi-family: 300 units
 - Amphitheater: 1,000 seats

**Exhibit 45: North District
(Outlet Center shown in red)**

The DPA incorporates the topography and natural features of the site and coordinates these with public spaces, Mr. Kaplan believes. The plan provides non-auto connections, including a jogging path that runs through the North District and a bike network. The gathering places incorporated into the DPA are critical to activate the development and make it an attractive destination, according to Mr. Kaplan. When public uses are incorporated, in his opinion, office development generates more income through lower vacancies and higher rental rates. 7/29/13 T. 120-122. Conceptual examples of “place-making” that may occur are shown below (Exhibit 45):



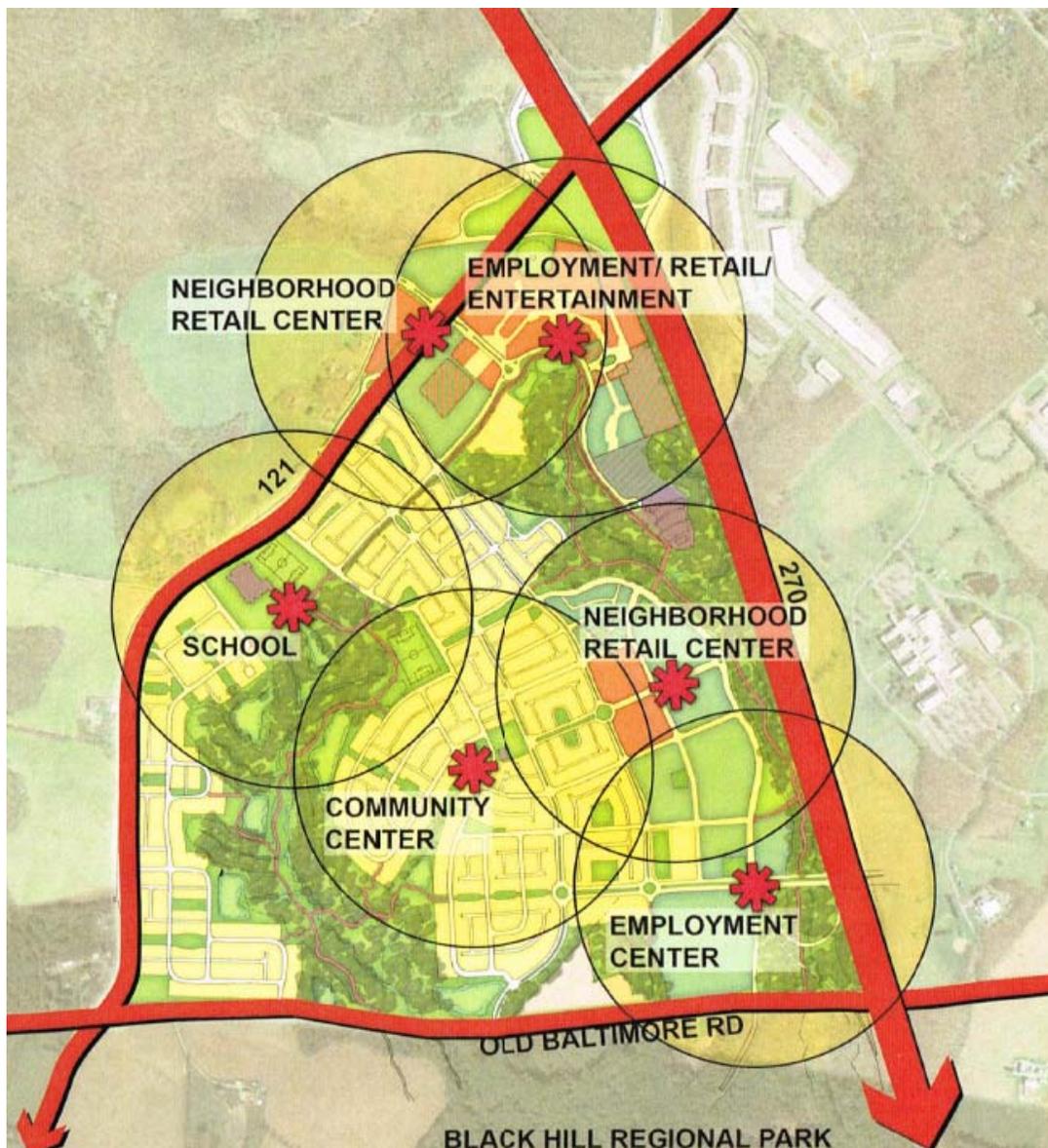
Mr. Kaplan testified that this property is uniquely situated to achieve its positive benefits in a timely manner because it has already received many of its zoning, subdivision, and environmental approvals. In addition, funding for much of the infrastructure is in place and does not require further government approvals. 7/29/13 T. 126.

The Applicants' vision for the "neighborhood core" for Cabin Branch is somewhat contradictory. Its Justification Statement states that the "central square at the food court will serve as the neighborhood square and will be easily accessible by area residents." Exhibit 20, p. 1. The DPA also envisions a "central node" for neighborhood-serving retail in Area C, which originally permitted a maximum of 50,000 square feet of retail and office uses, although this has been decreased. The Statement explained, "[t]he central location of these neighborhood retail services is meant to build on the location of the community center west of Cabin Branch Avenue and will serve the adjacent office neighborhood as well as residents of Cabin Branch." *Id.* at 2.

Despite this assertion, the Applicants' expert land planner, Mr. Gary Unterberg, testified that the neighborhood "core" will not be located in Area C, but will consist of a "linear core" following Well Spring Avenue in the North District. He testified that this "linear greenway" will connect the western residential uses with the retail outlet center and stream valley by linking the local park and elementary school to the stream valley on the eastern side of the site. Along the greenway are a series of nodes, particularly in the mixed-use area. These nodes will include the amphitheater, stream valley, and the plaza within the retail outlet center, and continue through the retail in Area B. The Master Plan recommends that civic uses should be located within the core; these will include the linear greenway, walking trails, and the plaza. The other civic uses include the amphitheater or outdoor greenspace. Churches and daycare centers may also be included in Area B. 9/4/13 T. 82-84.

Mr. Unterberg testified "neighborhood-serving retail" would be located within 3 areas. The first would be the Gosnell property. 8/14/13 T. 227. The second area of neighborhood retail will be the "linear core" between Areas B and A, described above. Types of "neighborhood retail" in these areas include freestanding chain restaurants, and restaurants and a food court within the outlet center. In addition, some retail could serve both as neighborhood retail and outlet center retail; these include coffee shops, furniture stores, and apparel shops. 8/14/13 T. 230.

According to Mr. Unterberg, the development is large enough that they wanted to provide a second, minor neighborhood retail use in Area C that is integrated with the “green links” on the development plan. 9/4/13 T. 88. He acknowledged that the majority of the neighborhood retail core will operate in conjunction with the outlet center. 9/4/13 T. 90-91. The proposed locations for neighborhood retail and its relationship to other uses are shown in a graphic prepared by the Applicant (Exhibit 45), below:



Subsequent amendments to the DPA have paired down the size of the retail in Area C to a maximum of 30,000 square feet that will be reserved for neighborhood-serving retail. Exhibit 132(c). Because none of the areas, including Area C, have mandatory minimum levels of development, neighborhood retail development in Area C is not assured. Mr. Unterberg acknowledged that the amount of retail available for Area C could dip lower than 30,000 square feet if the maximum amount of retail in Areas A and B are developed. The DPA permits a maximum of 450,000 square feet and 150,000 square feet of retail in Areas A and B, respectively, for a total of 600,000 square feet. As the maximum amount of retail permitted in Areas A and B can exceed the overall cap of 484,000 square feet, there is no guarantee that any retail will be developed in Area C. The fact that little neighborhood retail (other than restaurants or retail associated with the outlet center) may be located in the Cabin Branch neighborhood is a source of controversy among the parties, detailed in Part III.D of this Report on compliance with the Master Plan.

Mr. Kaplan testified that the Applicant has committed not to build a grocery store “of any size” on the property, although other witnesses later testified that the commitment is not to build a “full-service” grocery store. 8/14/13 T. 224-225. Instead, they suggest the possibility of a Trader Joe’s or a Mom’s within the development, although the Hearing Examiner finds that evidence speculative. 8/14/13 T. 110-111, 224-225. The purpose of this restriction prohibiting a full-service grocery store is to protect the viability of the neighborhood retail center within the Town Center District (Town Center neighborhood center).⁶ 8/12/13 T. 22-29; 8/14/13 T. 104.

Mr. Jonathan Sachs, Director of Public Policy and Community Engagement for Adventist Healthcare (Adventist), explained Adventist’s role in the project. Adventist is a non-profit, faith-

⁶ Mr. Bogorad testified that the industry term for a neighborhood retail center (the phrase used in the Master Plan) is “neighborhood center”. 8/14/13 T. 91-94. Because of the many confusing references to the “Town Center”, which included at times the entire District as well as the portion of the District that will house the neighborhood retail, the Hearing Examiner will adopt this nomenclature for the Town Center neighborhood center.

based healthcare hospital system that has been in the community for over 100 years. It is the largest private employer in Montgomery County. 7/29/13 T. 38.

In the late 1990's, Adventist anticipated the need for a full hospital between its Shady Grove hospital and Frederick. Seeing that possible development sites were being purchased quickly, Adventist bought 170 acres within Cabin Branch to develop a hospital, medical office building, outpatient centers, nursing and senior housing. Adventist had to delay obtaining the Certificate of Need until there was sufficient population in the area to justify another hospital center. 7/29/13 T. 39.

In 2000, Adventist along with the other owners of the Cabin Branch property began a very lengthy approval process for a mixed-use neighborhood. It has spent seven years and hundreds of thousands of dollars getting water and sewer category changes, a development plan, a preliminary plan, infrastructure site plan, water quality and forest conservation plans and other related approvals. Adventist also committed to fund a portion of the required infrastructure that will cost (in total) approximately \$100 million. 7/29/13 T. 39-40.

While Adventist had the land use approvals needed to apply for the Certificate of Need, the State ultimately awarded the Certificate of Need to a competing site in Germantown. As it is not a developer, Adventist wishes to devote its assets to providing health care. It is also facing paying its pro-rata share of the infrastructure costs, which, as a non-profit, does not further its core mission. 7/29/13 T. 40.

Mr. Sachs testified that they sought a purchaser for their property in Clarksburg. Adventist received four expressions of interest for retail on the property, including Peterson and the Tanger Outlets. After carefully reviewing these and obtaining input from the community, Adventist selected Streetscape New England Development and Simon Properties because it felt that they offered the best produce and had the best track record for delivering on their

commitments to the community. 7/29/13 T. 41. Adventist’s community outreach received an overwhelmingly positive response. *Id.*

2. The Development Plan

The DPA limits the maximum density of different uses by area. The amount and mix of uses for the “North District,” (Areas A and B) are shown below (Exhibit 132(c)):

A	Predominantly Employment Includes Retail, Entertainment, Senior Facilities, And Public Uses Up To 12 Story Height Approximately 38 Acres Area	
	Employment	SF
	Office	0 - 700,000
	Retail	0 - 450,000
	Total	0 - 1,150,000
	Other	SF/Units
	Public Use	0 - 7,500
	Senior	0 - 100
		Parking Spaces
		0 - 5,050

B	Mixed Use- Includes Retail Employment, Entertainment, Senior Facilities, Public and Residential Uses Up to 6 Story Height Approximately 47 Acres area	
	Residential	# Units
	Detached	0 - 100
	Attached	150 - 325
	Multifamily	125 - 325
	Total	275 - 750
	Employment	SF
	Office	0 - 300,000
	Retail	0 - 150,000
	Total	0 - 450,000
	Other	SF/Units
	Public Use	0 - 7,500
	Senior	150 - 500
		Parking Spaces
		0 - 1,200
		300 - 650
		250 - 650
		550 - 1500
		0 - 1,950
		0 - 50
		150 - 1,000

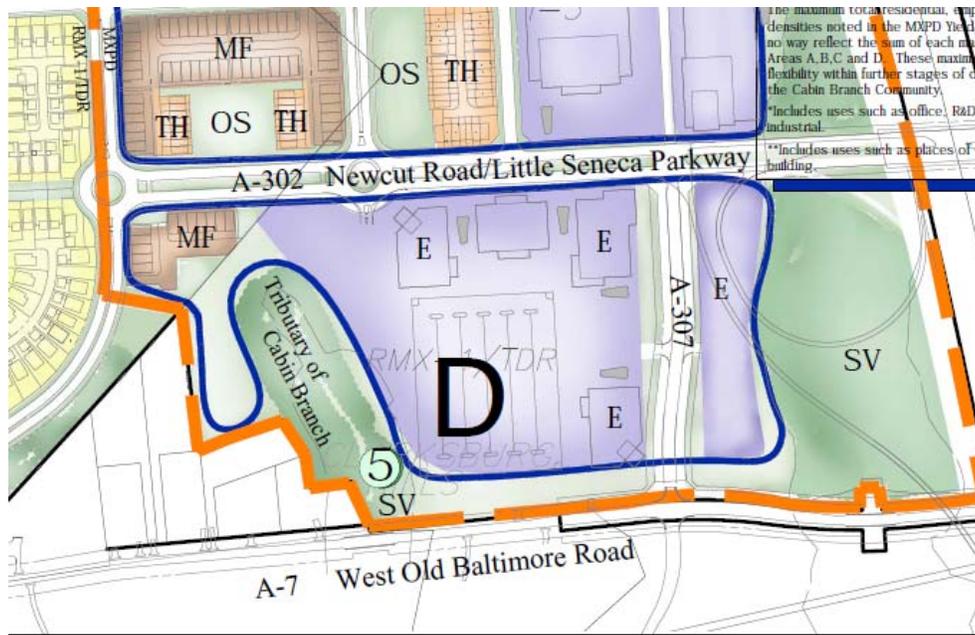
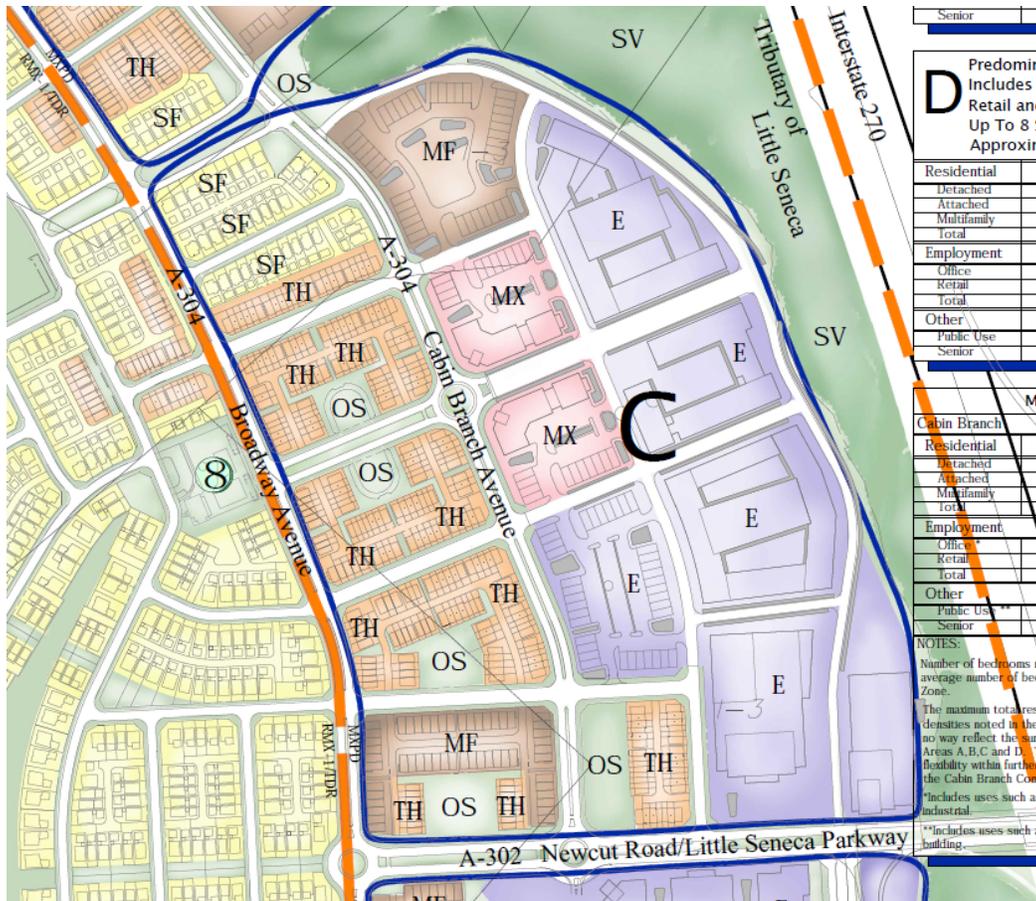
According to Mr. Unterberg, Areas B and C may include residential units, although Area C will be predominantly office uses. A binding element restricts any retail developed in Area C to neighborhood retail. Maximum residential densities in areas designated for mixed use (portions of Areas B and C) are 75 dwelling units per acre. Maximum residential densities in other areas

are 44 dwelling units per acre. Exhibit 132(c). Staff reports that the residential density for the entire neighborhood is 4 dwelling units per acre. Exhibit 51. The mix of uses and maximum densities permitted in Areas C and D are shown below (Exhibit 132(c)):

C Predominantly Employment Includes Public Uses, Retail and Residential Uses Up To 8 Story Height Approximately 72 Acres area		
Residential	# Units	Parking Spaces
Detached	0 - 100	0 - 200
Attached	250 - 425	500 - 850
Multifamily	100 - 350	200 - 700
Total	350 - 875	700 - 1,750
Employment	SF	Parking Spaces
Office	0 - 1,425,000	0 - 5,700
Retail	0 - 30,000	0 - 150
Total	0 - 1,455,000	0 - 5,850
Other	SF/Units	Parking Spaces
Public Use	0 - 27,500	0-85
Senior	150 - 500	150- 1,000

D Predominantly Employment Includes Public Uses, Retail and Residential Uses Up To 8 Story Height Approximately 22 Acres area		
Residential	# Units	Parking Spaces
Detached	0 - 50	0- 100
Attached	0 - 50	0- 100
Multifamily	0 - 100	0 - 200
Total	0 - 200	0 - 400
Employment	SF	Parking Spaces
Office	0 - 300,000	0 - 1,200
Retail	0 - 10,000	0 - 50
Total	0 - 310,000	0 - 1,250
Other	SF/Units	Parking Spaces
Public Use	0 - 20,000	0 - 60
Senior	0 - 100	0 - 200

The general location of land uses in Area C and D, and the maximum yield for all uses within the DPA are reproduced on the following page (Exhibit 132(c)).



NOTES CONTINUED:

MXPD Yield Summary		
Cabin Branch		
Residential		
Detached	Not to Exceed	100 Units
Attached	Not to Exceed	600 Units
Multifamily	Not to Exceed	439 Units
Total	Not to Exceed	1 139 Units
Employment		
Office *	Not to Exceed	1,936,000 SF
Retail	Not to Exceed	484,000 SF
Total	Not to Exceed	2,420,000 SF
Other		
Public Use **	Not to Exceed	75,000 SF
Senior	Not to Exceed	500 Units

The development plan includes 11 binding elements, all but two of which are those originally approved in LMA G-806. These are set forth in full in Appendix A. In response to a recommendation from the Planning Board, the Applicants have added a binding element limiting the size of individual stores to 50,000 square feet of gross floor area. Exhibits 52, 132(a). The Planning Board recommended this binding element to reduce the possibility that big box users, which may compete with the Town Center neighborhood center, could develop on the site if the regional outlet center does not go forward.⁷ Exhibit 52. In response to concerns raised about compliance with the Master Plan during the public hearing, the Applicants added a binding element capping retail in Area C at 30,000 square feet but reserving it for neighborhood-serving retail. Exhibit 132.

The first phase of construction will be the retail and employment uses in Areas A and B, followed by construction of parks and open space areas in Areas B and C, then by employment and retail in Area C. The General Notes included in the DPA state that development of the

⁷ The Peterson Companies argue that there is no mechanism to enforce this binding element because DPS does not review binding elements when it issues building permits. Exhibit 73. The Hearing Examiner referred this question to both DPS and Technical Staff, who responded that the binding elements would become a condition of approval on the site plan, which would then be enforceable at building permit. Exhibits 122 and 126. The Hearing Examiner finds that the binding element recommended by the Planning Board and included on the DPA is capable of enforcement.

MXPB area will be coordinated with development of the RMX-zoned western portion of the site. Exhibit 132(c).

The Peterson Companies, L.C. (Peterson Companies) challenge the ability of the County to include binding elements on a development plan, asserting that there is no authority in the Zoning Ordinance to include binding elements on a development plan (as opposed to a schematic development plan). Exhibit 73. The Hearing Examiner disagrees. Section 59-D-1.63 of the Zoning Ordinance requires an applicant to show any “textual stipulations” on the approved development plan. The long-standing administrative interpretation of this has been to include what is referred to as “binding elements” or “textual” or “written” binding elements on the development plan. See, e.g., LMA G-813, 814, LMA G-832, LMA G-909, LMA G-881.⁸ Because this administrative interpretation is consistent with the language in the Zoning Ordinance, it is entitled to great weight in interpreting the law.

3. Agency Recommendations

Detailed analysis of Technical Staff’s review of master plan compliance and environmental issues are included in Parts III.D and III.E of this Report. This section will summarize Staff’s overall recommendation. Generally, Staff found that the DPA furthered the Master Plan’s goal for employment within the Cabin Branch neighborhood, although it did not analyze its potential impact on the Town Center. The Hearing Examiner gleans that Staff determined that development of a successful office development now requires a broader mix of uses than solely the office and retail contained in the original development plan, although the Report is somewhat confusing due to some inconsistencies and confusing nomenclature. The Hearing Examiner finds that Staff’s essential recommendation is as follows: the Master Plan’s

⁸ OZAH’s has consistently interpreted these textual elements as binding. In LMA G-832 (p. 20), the Hearing Examiner wrote: “The Development Plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual. The Development Plan is subject to site plan review by the Planning Board, and changes in details may be made at that time. The principal specifications on the Development Plan – those that the District Council considers in evaluating compatibility and compliance with the zone, for example – may not be changed without further application to the Council to amend the Development Plan.”

vision was “to establish a highly desirable employment area in Clarksburg as part of the I-270 Technology Corridor without limiting specific employment uses or the nature of uses in addition to office use...” Exhibit 50, p. 4.⁹

The unfamiliar nomenclature Staff uses to describe the mix of uses proposed by the DPA creates some confusion. Both the original development plan and the DPA list the commercial uses under the broad label of “Employment,” which is then broken down into two categories, “retail” and “office.” Exhibits 21(f), 132(c). Despite this relatively simple and clear cut division, the Staff Report refers to other uses, such as “entertainment” uses, which are not clearly associated with either category but appear to come under an overall umbrella of “employment uses”. The report continually refers to the total amount of “employment” uses by various names (e.g., “retail destination employment,” “non-residential,” “commercial”) that appear to include any use that may employ people, such as office, retail, and entertainment uses, although it does appear to differentiate public uses. See, e.g., Exhibit 50, pp. 1, 3, 4 and 7. Only in the conclusion does the Staff Report identify the exact amount of office requested (i.e., 1.936 million square feet). Thus, according to Technical Staff, “employment uses” total 4.2 million square feet.¹⁰ Exhibit 50. The reason for this is not entirely clear, although it may relate to compliance with the Master Plan, which calls for end-state development of 4.2 million square feet of “retail and employment” development in Cabin Branch. Exhibit 60(a), pp. 40, 67. Staff also advises

⁹ It is also important to clarify that both the original development plan (approved in LMA-806) covered only the subject property in this case. Staff considered the original development plan (approved with LMA G-806) as consisting of the entire Cabin Branch community of 535 acres; instead, the development plan approved in G-806 consisted of the subject property here, or 283.5 acres.⁹ The balance of the neighborhood is shown on the development plan amendment to illustrate the coordinated development between the two areas. Exhibit 21(f), 132(c). Thus, the term “development plan” is used to refer to the entire neighborhood as well as the original development plan. As a result, Staff states that the original “development plan” permits up to 1,886 units dwelling units (Exhibit 50, p.15); a review of the original development plan indicates that only 1,139 dwelling units (plus 500 senior units) were approved, for a total of 1,639 units. Exhibit 21(f). Based on other language in the report, the Hearing Examiner believes that the larger number refers to the number of units permitted by the 2008 preliminary plan approval for the entire Cabin Branch neighborhood rather than the number of units permitted by the development plan. Exhibit 50, p. 14.

¹⁰ At different times, Staff refers to a mix of uses considered “employment,” but does not state whether they are retail or office uses. Staff refers to retail, hotel, and entertainment uses as “employment opportunities,” “non-residential,” “mix of employment use.” At one point, Staff states that the application “broadens the employment base” by adding retail, entertainment, and public uses” to the mix. Exhibit 50, pp. 14-15.

that the DPA broadens the public uses permitted by including daycare, places of worship and community buildings. *Id.* at 10.

Staff based its recommendation of approval on the assumption that 50,000 to 120,000 square feet of neighborhood-serving retail would be located in Area C (Exhibit 50, p. 10):

Instead of spreading the neighborhood retail along the internal roads, the DPA proposes to concentrate neighborhood retail of approximately 50,000 to 120,000 square feet in the southern area (Area C) adjacent to the community center and public green near the middle portion of the residential development in Cabin Branch Community. The neighborhood retail will be [sic] connect and serve the residential portions of the Cabin Branch Community. The specialty retail will serve Clarksburg and the surrounding areas as a catalyst for future employment uses.

Later in the Report, Staff concludes that the development plan amendment will create “a strong neighborhood focal point” (Exhibit 50, p. 16):

The neighborhood center with retail, office and housing forms a neighborhood focal point located adjacent to the town green and community center [in Area C]. In addition, the public gathering spaces along the natural areas along the tributary of Little Seneca Creek form another focal point a central organizing feature *for the employment area*. (Emphasis supplied).

Subsequent testimony and evidence demonstrate that Staff’s initial understanding no longer applies to the DPA. The most recent development plan now limits neighborhood retail in Area C to a maximum of 30,000 square feet, which, while reserved for neighborhood uses, may not be developed.¹¹ Testimony from Mr. Leonard Bogorad, the Applicants’ expert in fiscal impact and market analyses, indicates that development of neighborhood retail in Area C is further in the future and may not occur, although this may have the benefit of assuring the viability of the Town Center neighborhood center. 10/10/13 T. 122-123, 127-128, 156, 160.

Staff supported the development plan amendment because it “establishes a set of land uses appropriate for a “world class,’ comprehensively planned and designed employment area to serve the needs of Montgomery County in the 21st Century.” Exhibit 50, p. 4. Staff found that

¹¹ The Hearing Examiner referred the revised binding element incorporating this change to Technical Staff, who replied, “We concur with binding element 11 concerning neighborhood retail in Area C as already proposed.” Exhibit 133(a).

the DPA conformed to the Master Plan’s goal to establish office at Cabin Branch because a wider variety of uses are now necessary to create successful employment centers, discussed in more detail in Part III.E. of this Report. In support of this, Staff compares the mix of uses for Rock Spring Centre (MXPDP), Park Potomac (MXPDP), Washingtonian (Rio) Phase 1 & 2, and Cabin Branch in a table shown below (Exhibit 50):

Development Standard	Required/ Allowed	Rock Spring Centre	Park Potomac	Washingtonian (Rio) Phase 1 & 2	Cabin Branch MXPDP Area
Zone	MXPDP	MXPDP	**I-3 Optional	MXPDP	MXPDP
Tract Area	20.0 Acres	53.4 Acres	59.84 Acres	212.6 Acres	283.5 Acres
Non-residential Land Uses:					
▪ Retail/restaurant					
- Percent retail	20%	20%	20%	20%	20%
- Total square feet	NA	150,000-220,000	145,000	400,000	*484,000
▪ Office, R&D, Industrial	NA	830,000-900,000	735,000	NA	1,782,500-1,936,000
▪ Entertainment	NA	454,000-490,000	NA	NA	66,000
▪ Hotel	NA	200,000	156 rooms	NA	79,775
▪ Banks	NA	80,000-185,000	NA	1,825,000	7,725
▪ Total Non-residential	NA	1,050,000	850,000	2,225,000	2,420,000
▪ Additional Public Uses	NA	NA	NA	NA	75,000
Residential Land Uses:					
▪ Dwelling Units	40%	1,249	600	1,400	***1,186
▪ Dwelling Units/Acre	75	23.4	10.0	6.6	6.7
FAR (non-residential)	0.75 FAR	0.45	0.32	0.30	0.20
Minimum Green Area (percent of Tract Area):					
▪ Residential	50%	50%	50%	50%	50%
▪ Non-residential	35-40%	40%	35%	40%	40%

Notes: *Total retail area includes 50,000 to 120,000 square feet neighborhood retail

**I-3 Optional, but in accordance with the MXPDP Standards

***500 Senior Housing units are included

<p>Staff Comparison of Mixed-Use Projects (Exhibit 50)</p>

Staff also supported the development plan amendment because it implements the four planning principles for sustainable neighborhoods, referred to earlier. A summary of why the DPA complies with these principles is included on page 12 of the Staff Report. Exhibit 50, p. 12.

Finally, Staff appears to acknowledge that its conclusions may not strictly comply with the recommendations of the Master Plan, noting the “considerable effort” expended to stay within its vision and suggesting that its interpretation is driven by the “current needs and demands of the

area.” Exhibit 50, p. 19. Noting in its Report that Master Plans should be interpreted flexibly,

Staff states:

Given the fast pace of development in the past decade and the evolution of present day employment centers with increasing diversity in scale, character and mix of uses, one has 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 the current needs and demands of the area. But with considerable effort to 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 a development of successful employment center.

Exhibit 50, p. 19. Staff does not elaborate what is meant by the “present needs of the Cabin Branch neighborhood.” As no houses have yet been developed within the neighborhood, the Hearing Examiner presumes Staff refers to residents of the larger Clarksburg community.

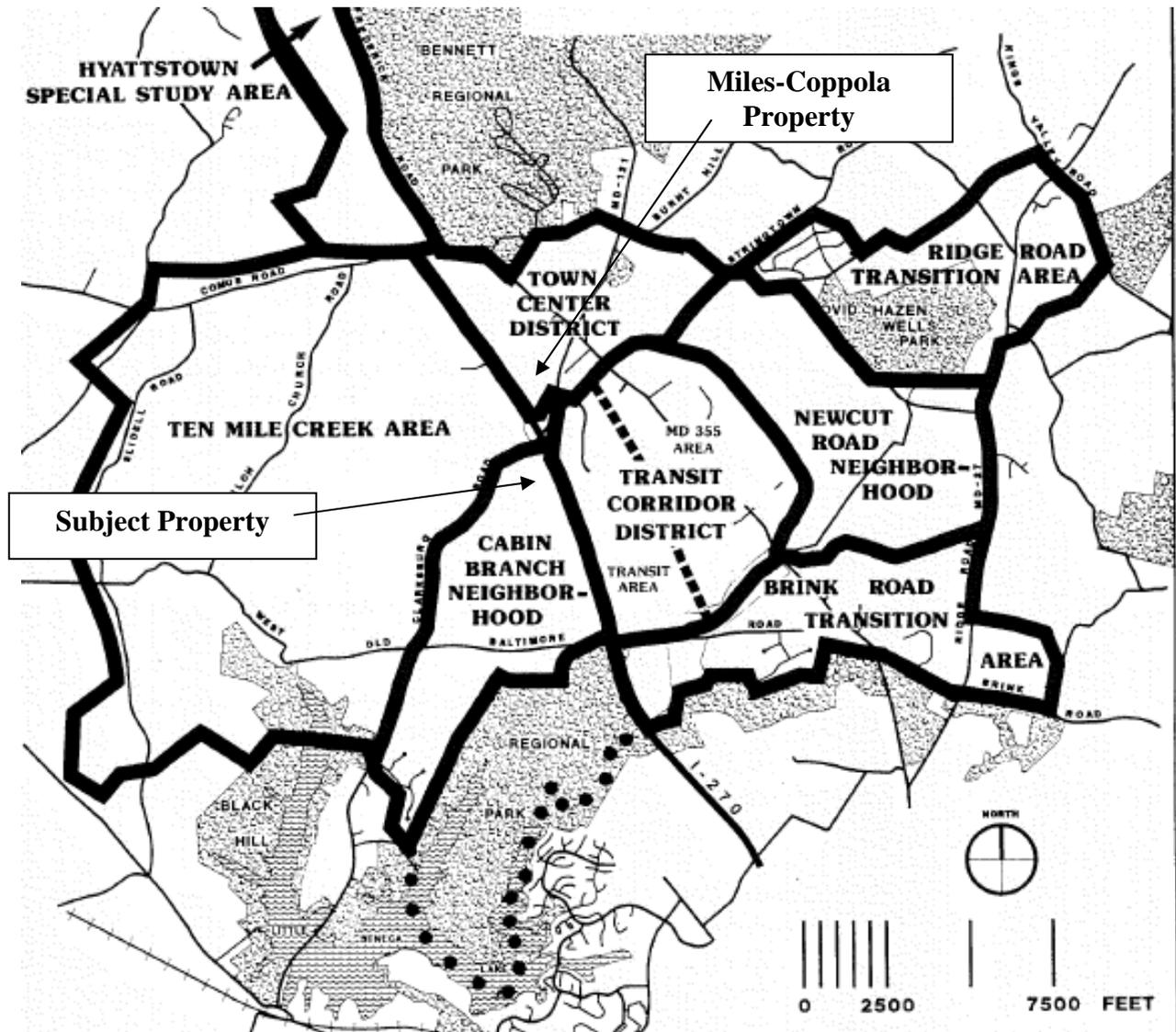
The Planning Board unanimously adopted Staff’s recommendation, finding that the amendment did not represent a “significant change in terms of density of development” because the combined non-residential uses remained at 2.42 million square feet. They also found that the DPA will fulfill the Master Plan’s goal to foster the creation of a mixed-use employment community along the west side of I-270. The Applicants have incorporated the Board’s recommended condition limiting the gross floor area of individual stores into the DPA. Exhibit 132(c).

D. Status of Clarksburg Development Approvals

Because much of the testimony and evidence presented by individual members of the community focused on the impact of the retail outlet center on development of the Town Center and because several expressed a preference for a competing outlet center proposed within the Town Center District, the Hearing Examiner accepted testimony from Mr. James Soltesz, a civil engineer who appeared as a factual witness, regarding the status of development in the Town Center District and the Miles-Coppola property within the District.¹² He pointed out that the Town

¹² Mr. Soltesz’s engineering firm has been retained to work on development of the Miles-Coppola property, 9/4/13 T. 173.

Center District is larger than the Town Center neighborhood center, which is sometimes also referred to as the “Town Center”. According to Mr. Soltesz, the Peterson Companies, in conjunction with Tanger Outlets, are proposing to develop an outlet center on the Miles-Coppola property. A map of the Clarksburg study area, included in the Master Plan, shows the relationship between the Town Center Districts and other neighborhoods, as well as the approximately relationship between the subject property and the Miles-Coppola property (Exhibit 60(a), page 41):



Mr. Soltesz testified that the Town Center neighborhood center is located on the eastern side of the District east of the Historic District and consists of approximately 14 acres. The Master Plan designates this site for development of a grocery store and supporting retail. Civic uses will be included in the center of the District, although he is unsure exactly what these uses will be. 9/4/13 T. 178. The Historic District, located west of the neighborhood center, adjoins planned road Observation Drive. A transit way is proposed within the median along Observation Drive; the transit stop is to be located on the Miles-Coppola property. The Miles-Coppola property consists of approximately 100 acres located in the northwest quadrant of the I-270/Md. Route 121 interchange and is geographically proximate to the Historic District. 9/4/13 T. 177-179. Currently zoned R-200 and PD-4, it falls within Stage IV of the Master Plan phasing schedule because it drains into 10-Mile Creek. 9/4/13 T. 179-182.

According to Mr. Soltesz, the Master Plan included several triggers that had to be implemented before proceeding with Stage 4. The first was a baseline environmental study, which has been completed. The second was to bring water and sewer into to the area. That was completed approximately 7-8 years ago. The next trigger was to have 2,000 building permits issued either in the Town Center District or the Newcut Road (Clarksburg Village) neighborhood. According to Mr. Soltesz, the intent of the Master Plan was to create a synergy of the community to be formed on the east side of I-270. After the 2,000 permits had been issued, the last trigger was a plan outlining how water quality would be preserved in the 10-Mile Creek watershed. The Council requested the Planning Board to prepare a limited master plan amendment in order to address environmental issues regarding Stage IV development. The Council expanded the scope of the study to include land uses. He believes the limited master plan amendment should be completed by the end of the 2013.¹³ 9/4/13 T. 179-182.

¹³ The Council's public hearing on the Planning Board Draft of the 10-Mile Creek Limited Amendment was held on December 3, 2013.

The Miles-Coppola family and the Peterson Companies propose a mixed-use project including a Tanger specialty outlet, hotel, office and residential uses. He testified that the proposed use has already been designed, including the design for sanitary sewers, even though no zoning application has been filed. The owners have undertaken many environmental studies, including forest stand delineations, wetlands delineations, steep slopes, and stormwater management plans. They have also laid out Observation Drive through the property and studied how they would extend sewer to the Historic District. They have not filed for rezoning to the MXPD Zone yet because they must await adoption of the 10-Mile Creek Limited Master Plan Amendment. 9/4/13 T. 185.

Mr. Soltesz testified that the Miles-Coppola development would provide sanitary sewer lines to some, but not all, of the properties within the Historic District because many properties have failing septic systems. Those that drain into 10-Mile Creek will be served by sewer, although individuals will have to pay to connect their properties to the main line. The facility study required by the Washington Suburban Sanitary Commission (WSSC), demonstrates that development of the Miles-Coppola property will be able to provide a gravity surface sanitary sewer trunk line to the Historic District properties, rather than requiring pumping systems on individual properties. The line will also run by the proposed fire station. 9/4/13 T. 186-189.

In addition, the Peterson Companies and Tanger Outlets have offered to build Observation Drive (also known as the 355 By-Pass), although Mr. Soltesz was unsure whether this included the portion between Stringtown Road and Md. Route 121. He was also unsure exactly how construction would be funded, but felt confident that the money would not come from public funds. In addition to Observation Drive, Mr. Soltesz testified that the Miles-Coppola family proposes to reserve land for the transit station recommended in the Master Plan. 9/4/13 T. 191-192, 228-229.

Mr. Soltesz described the timing of the Peterson/Tanger Outlet. He stated that the 10-Mile Creek limited master plan amendment has been scheduled for Council approval in early

2014. He anticipates the rezoning would be adopted in May, 2014. Peterson and other Stage 4 developers have requested that the water and sewer category changes be approved simultaneously with the zoning. He acknowledged that a forest conservation plan and water quality plan will be required, but didn't know their exact status. He could not say whether it normally took 2 years to complete a water quality plan or not, although his firm has worked on the engineering for approximately 1 year. 9/4/13 T. 240. He agreed that he could not file a preliminary plan of subdivision until the water quality plan has been approved. A preliminary plan may take approximately 6-12 months. If the site plan is reviewed simultaneously with the preliminary plan, it does not add more time to the process, but if not, it adds an additional 6-12 months. Record plat approvals take approximately 4 months. During this time, engineered construction drawings for construction of Observation Drive would also have to be developed. He did not agree that the project could begin construction in the summer of 2014, but felt that they could begin grading by the end of 2014. 9/4/13 T. 241-247.

Mr. Soltesz explained the status of the Staff Draft of the 10-Mile Creek Limited Amendment pending at the time of the public hearings. It contained two alternative recommendations for the Miles-Coppola property. One provides for a significant amount of retail that would accommodate the Tanger outlet. The alternative calls for predominantly residential use. 9/4/13 T. 248. Subsequent to the public hearing in this case, the Planning Board issued its draft of the 10-Mile Creek Limited Amendment. The Planning Board's Draft calls for a mix of retail, residential and office for the Miles-Coppola property, which is discussed in more detail in the next section.

E. The Master Plan

Because all parties have parsed the recommendations of the Master Plan so finely, the Hearing Examiner provides an overview of its basic structure and recommendations pertinent to this case.

1. Overview of the 1994 Plan

The Plan envisions Clarksburg as a transit- and pedestrian-oriented town surrounded by a natural setting. Exhibit 60(a), p. 16. It attempts to balance the residential and employment densities necessary to support transit against the desire to maintain a “town-scale” of development. The scale desired is described by comparing the planned end-state population of Clarksburg with larger corridor cities in a table shown below (*Id.*):

	1968 Clarksburg Master Plan	1989 Germantown Master Plan	1994 Clarksburg Master Plan
Population	41,900	92,000	43,000

Ten key planning policies are set forth early in the Plan to guide in achieving this balance. Policy 1 (entitled “Town Scale of Development”) directs 80% of residential densities to the Town Center District and “a series of transit-oriented neighborhoods.” *Id.* According to the Plan, important to the “town scale” concept is to create an identity for Clarksburg “separate from Germantown or Damascus.” *Id.* The Plan’s strategy incorporates the Historic District as part of an expanded Town Center and seeks to maintain the Town Center’s historic function as the center of community life for the larger Clarksburg area. The Plan also reaffirms the role of I-270 as a high-technology employment corridor. *Id.*

The Plan recognized a major challenge to achieving its vision--how to make future residents “feel part of a larger community.” The tool (or “building-block”) used to meet that challenge was to organize development into “neighborhoods”, characteristics of which are described in Policy 7, entitled “Transit- and Pedestrian-Oriented Neighborhoods.” *Id.* at 28. This policy calls for a mix of uses in each neighborhood to encourage pedestrian travel and reduce dependency on the automobile. Core uses necessary for a successful neighborhood, according to the Plan, include retail, employment, open spaces, schools and housing. Retail and employment uses are to be at “a pedestrian scale and oriented to the needs of the residents.” *Id.*

Central to the Plan's vision to create a "community identity" for Clarksburg is the Town Center District. One of the ten overall policies of the Plan (Policy 6, "Town Center") calls for the Town Center District to continue its "historic function" as the center of community life. *Id.* at 26. The Plan envisions an expanded "transit-oriented, multi-use Town Center that is compatible in scale with the existing Historic District." *Id.* Desired goals for the Town Center are to provide a "concentration of civic uses (library, post office, elementary school, etc.) to help define the Town Center as the focal point of public activities." The recommendations for the Town Center are similar to those applicable to all neighborhoods (listed in Policy 7). Specific to the Town Center District, the Plan also proposes (1) a transit stop to connect the Town Center with other neighborhoods and (2) a development pattern similar to "traditional town squares." *Id.* Important here, the Plan recommends the Miles-Coppola property for "high-technology employment" because of its visibility from I-270. *Id.* The base zone recommended for the Miles-Coppola property is R-200; however, similar to the subject property, the Plan recommends the MXPDP floating zone to foster comprehensively planned development.

Aside from creating a community identity "different from Germantown," Policy 8, entitled "Employment", reaffirms the importance of I-270 as a regional "high-technology corridor". *Id.* at 30. While acknowledging that the Comsat and Gateway 270 campuses are likely to meet the County's employment needs for "years to come," the Plan recommended an additional 470,000 square feet of employment in the Town Center District and 2.3 million square feet of employment within the Cabin Branch neighborhood. *Id.*

When it adopted the Master Plan, the District Council also legislatively adopted a Technical Appendix to the Plan that included background for the Plan's recommendations. At issue here is the following language relating to retail in the area (Exhibit 60(b), p. 12) reproduced on the following page. The parties dispute whether this limits retail to 120,000 square feet or whether it limits *only neighborhood* retail to 120,000 square feet.

Retail Uses

The 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.

Neighborhood Retail Centers

Neighborhood retail centers, 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, beer and wine stores, delis, sandwich and pizza restaurants, sit-down restaurants, dry cleaners, banks, and greeting card stores.

This Plan's neighborhood retail recommendations reflect the following findings:

Amount of Square Foot of Neighborhood Shopping Centers Supportable in Three Clarksburg Market Areas

Table 6

	Captured Market Area*			Square Feet of Center Supported by Household & Employment
	Households	Population	Employment	
Town Center	6,000	13,800	3,400	130,000
East of I-270 (outside of Town Center)	5,400	13,200	1,000	112,000
West of I-270	3,500	8,400	1,800	75,000

* Market area for each Clarksburg site comprises a primary and secondary market.
Source: M-NCPPC, Montgomery County Planning Department, Research Division

The Master Plan includes the overall “end-state” development potential for the different Clarksburg neighborhoods, broken down categories of “Employment and Retail” and “Dwelling Units” (*Id.* at 40), shown below:

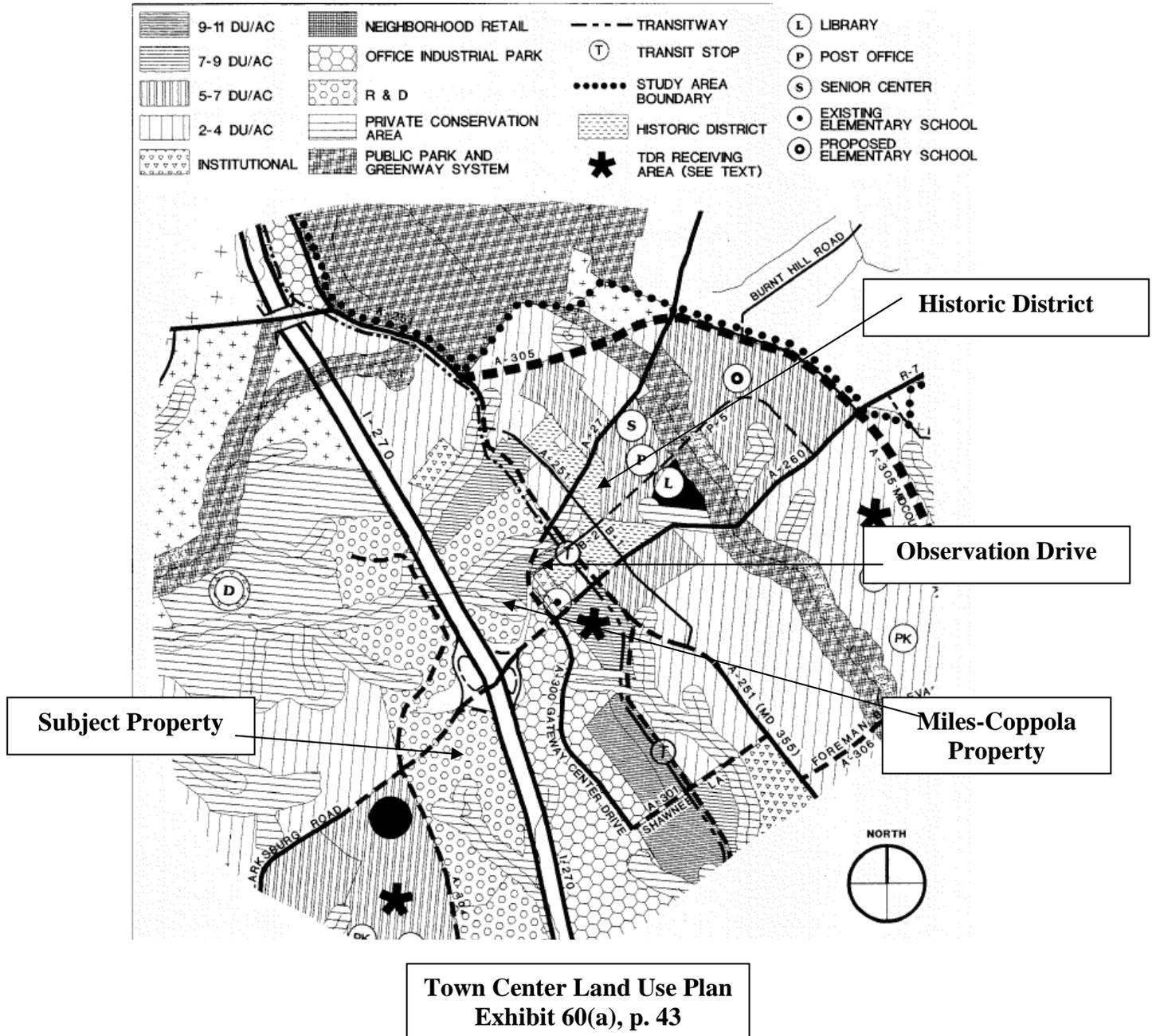
Summary of Maximum End-State Development Potential by Geographic Area*

Planning Subarea	Acres	Dwelling Units*	Employment and Retail (Square Feet)
Town Center District	635	2,600	770,000
Transit Corridor District	990	2,790	3,300,000 – 5,000,000**
Newcut Road Neighborhood	1,060	4,660	109,000
Cabin Branch Neighborhood	950	1,950	2,420,000
Ridge Road Transition Area	900	540	26,000
Brink Road Transition Area	860	1,000	871,000
Hyattstown Special Study Area	687	150	155,000
Ten Mile Creek Area	3,588	1,240	960,000
Totals	9,670 ***	14,930 ***	8,611,000 – 10,311,000 ***

a. Town Center

Aside from the ten guiding principals, the Plan outlines specific recommendations for each of the neighborhoods. For the Town Center District, the Plan re-emphasizes that the Historic District should be the focal point for a “community center” for the larger area. Exhibit 60(a), p. 42. Better to incorporate the Historic District with new development, the Plan desires a “strong interrelationship” between the Historic District and surrounding new office, retail and residential opportunities. Deemed of “equal importance” to these private uses, the Plan also recommended that civic and public uses be centralized in the Town Center as well. *Id.* at 42. The Plan calls for a transit stop along new Observation Drive that would connect via streets and

circulators to a neighborhood retail center on the eastern edge. The Land Use Plan for the Town Center District (Figure 19, p. 43) is shown below:



other retail users. *Id.* In addition to the neighborhood center, the Plan includes the following language regarding retail use, which is interpreted differently by the parties to this case:

In terms of commercial uses, up to 300,000 square feet are proposed. This recommendation exceeds the findings of the Planning Board retail studies (see Technical Appendix) that up to 153,000 square feet of neighborhood retail uses can be supported in the Town Center. Additional square footage would be desirable and would be consistent with the Plan if provided at a pedestrian scale and developed in accord with Plan policies regarding a mix of uses at the neighborhood level (see Policy 7: Transit- and Pedestrian-Oriented Neighborhoods). *Id.* at 47.

To address concerns about recommending a traditionally auto-oriented use in its desired transit and pedestrian oriented neighborhood, the Plan limited the square footage of the neighborhood center to a maximum of 150,000 square feet and incorporated design guidelines for the center. *Id.* Of controversy here, the Plan also refers to additional retail to be located within the Historic District (Exhibit 60(a), p. 47):

The balance of proposed retail and office uses (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).

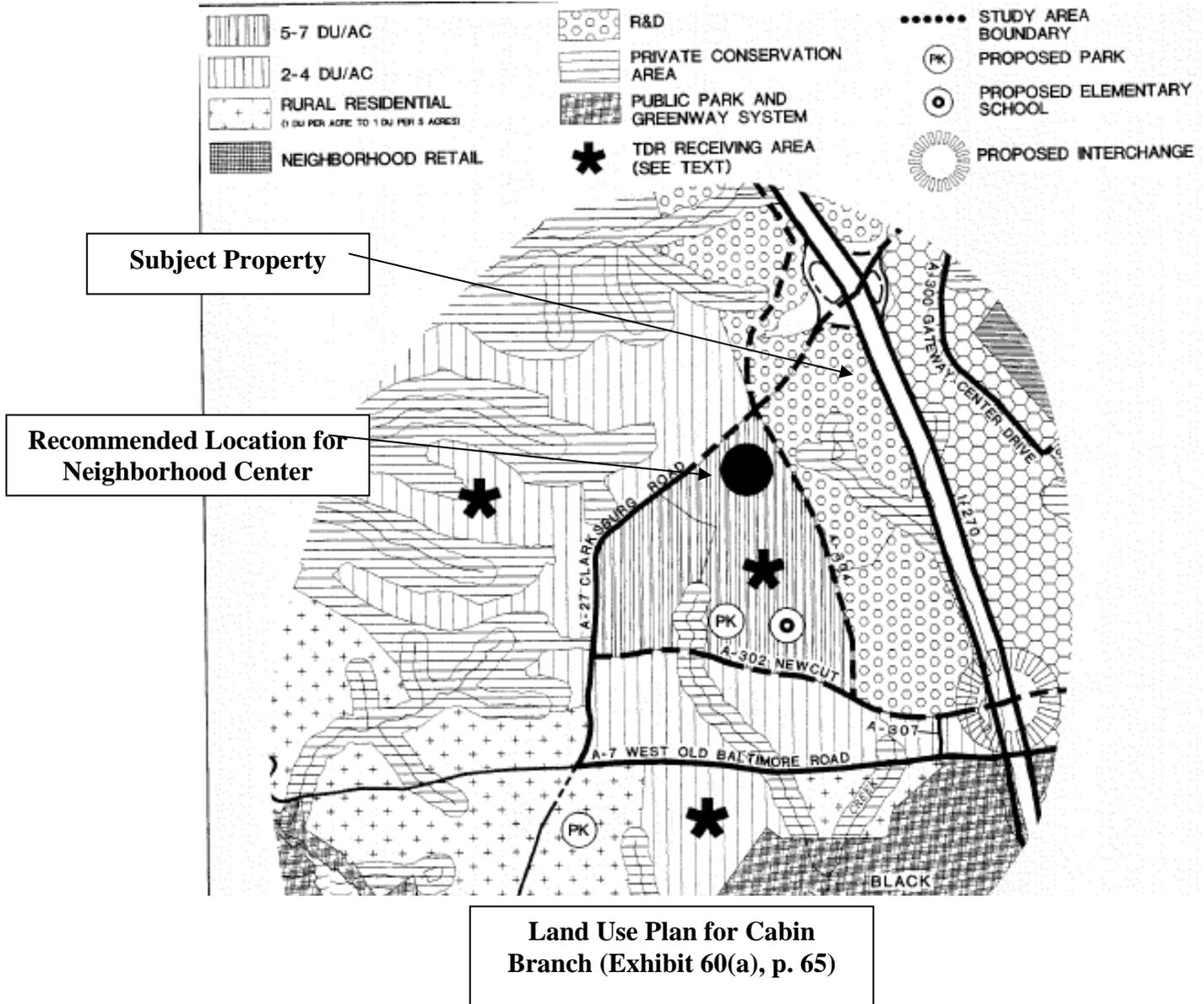
Another significant goal is to make the Town Center a “focal point for community services (such as libraries and postal services) as well as informal community activities.” *Id.* at 49. The Plan explains:

The Clarksburg Town Center should function as the “civic” center of the Study Area. To achieve this end, community and government related services should be located there. This Plan recommends that a high degree of public interaction be provided in the Town Center, in close proximity to the retail center, to encourage a post office, library, and community center. At the time of development, Planning Staff will identify the amenity required under the RMX Zone. A civic use may be an appropriate amenity for this area. Public functions that serve the community but which do not require day-to-day public access (such as fire stations and maintenance depots) should be located outside of the Town Center. *Id.*

b. Cabin Branch Neighborhood

Chosen as the only area west of I-270 for significant residential development, the Plan targeted the Cabin Branch Neighborhood for residential and office development because of its location along I-270, access to Md. 121, and proximity to the commuter rail station in Boyds. *Id.* at 64. The chief public policy objectives for Cabin Branch were to develop a mixed-use

residential neighborhood and to reinforce I-270 as a high-tech corridor. *Id.* The Land Use Plan for the Cabin Branch neighborhood (Figure 26, p. 65) is shown below:¹⁴



To implement these recommendations, the Plan calls for a specific mix of land uses for Cabin Branch, below (*Id.* at 67):

Residential - 1,950 dwelling units

¹⁴ There is no legend for the large black dot in the northern portion of the site. Testimony at the public hearing indicates that the dot is supposed to designate the approximate location of the neighborhood retail center. 8/14/13 T. 269.

Employment	-	2,000,000-2,300,000 square feet
Retail	-	120,000 square feet
Public Uses		Places of worship, child care, community building, park and elementary school.

The Plan recommended base zones of RMX-1/TDR and I-3. *Id.* at 97. Like the Miles-Coppola property, the Plan recommends the MXPDP floating zone for the subject property to “allow more intensive office uses on the north portion of the site than permitted under the RMX base zone.” *Id.* at 67. The MXPDP recommendation furthered the goal to provide “strong interrelationships” between residential, employment, retail, and public facility uses. *Id.* Critical to this case is the language relating to the neighborhood “core”:

The design concept proposes a neighborhood core to be located so that bus service will link the area to the transit way to the east, and the MARC station to the southwest. The core should consist of a cluster of higher density residential uses, retail services, office uses, and civic uses. The design of the neighborhood should adhere to the following guidelines for transit and pedestrian serviceability:

- Locate the core within one-quarter mile of as many residential units as possible, i.e., near the center of the higher density residential area.
- In the core, located a vertical mix of uses in three- to four-story buildings facing a town square or commons.
- Provide an interconnected system of streets.
- A mix of housing types is encouraged within each block. A hierarchy of density is proposed such that the highest densities should be located closest to the core and lowest densities along stream valleys, Md. 121, and West Old Baltimore Road.
- Street-oriented buildings are encouraged throughout the neighborhood. Retail and office uses in the core should face streets with parking behind.
Id.

The zoning proposed by the Plan suggests that the subject property was an important site for achieving the Plan’s goal for continuation of the I-270 hi-tech corridor:

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 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 this site and I-3 Zone for the southern portion with an MXPDP option over the entire area to allow for comprehensive planning of these mixed uses. *Id.*

A similar zoning approach is recommended for the Miles-Coppola property, fronting in the Town Center to encourage joint development of employment and residential uses near a proposed transit stop.

Another neighborhood envisioned by the Plan on the east side of I-270 and outside the high-tech corridor is structured in a similar manner. Called the Newcut Road Neighborhood (now known as Clarksburg Village), the Plan calls for a mixed use neighborhood that is primarily residential with a neighborhood core (*Id.* at 62):

Residential	-	4,660 dwelling units
Retail	-	109,000 square feet
Office	-	Some office uses are envisioned as part of the retail center development
Civic/Public Uses	-	Local Park, schools, greenway, places of worship, day care, community center.

The Plan then goes on to state, “[H]igher density residential uses, retail services, office and civic uses are clustered in the neighborhood center.” The Plan recommended the RMX-2/R-200 Zones for this neighborhood.

c. Staging

Due to the sensitive environmental features within the planning area and the fact that infrastructure necessary to support the development recommended was not in place, the Plan recommended staging new development in four phases. The Technical Appendix to the Plan, adopted with the Plan itself, reveals that the Planning Board considered seven different staging scenarios. These scenarios included prioritizing employment, prioritizing the Town Center and Transit Corridor, prioritizing development on the east side of I-270, and prioritizing development that had necessary infrastructure financing. Exhibit 60(b), pp. 139-183.

Ultimately, the Plan based its staging recommendations on 7 principles. Principle #4, pertinent here, states: “The timing and sequence of development is critical to helping Clarksburg achieve its vision as a transit- and pedestrian-oriented town...” Exhibit 60(a), p. 189. Key to implementing this, according to the Plan, is early development of the Town Center to “create a

strong sense of community and to provide a model for later development in other areas.” *Id.* The Plan labeled retail uses “critical” to the “vitality of a community” and envisioned these playing a significant role in “reinforcing the Town Center as a central focus for the entire Clarksburg area.” *Id.* Thus, the Plan prohibited retail development elsewhere in Clarksburg until 90,000 square feet in the Town Center had been developed (*Id.* at p. 190):

This Plan recognizes that retail uses are critical to the vitality of a community and can play a significant role in reinforcing the Town Center as a central focus for the entire Clarksburg area. Once a sufficient critical mass of housing units are in place to support a retail center...this Plan recommends that early retail development priority be given to the Town Center. Retail development in the Newcut Road and Cabin Branch neighborhoods should follow the development of approximately 90,000 square feet of retail uses in the Town Center.

The Technical Appendix reveals the Council chose to prioritize development of the Town Center over prioritizing employment because the then-existing market demand was for single-family homes. In addition, the Planning Board concluded that development of the employment sites did not support the desired goal to provide sufficient retail to make Town Center retail viable, thus impairing the goal to create community identity. Instead, the Planning Board concluded that the I-270 employment sites should develop as market demand arose. Exhibit 60(b). Ultimately, the Plan’s four phases called for development with existing sewer authorizations to proceed immediately (Stage 1). Stage 2 prioritized development within the Town Center for properties that did not drain to 10-Mile Creek. Stage III included the balance of the planning area, except those properties that drained into 10-Mile Creek, including the Cabin Branch neighborhood. Stage 4 permitted development within the study area on properties that drain to 10-Mile Creek.

Development of the Town Center’s neighborhood center did not occur early as planned, leading the Council to adopt the 2011 Limited Amendment to the Master Plan (2011 Limited Amendment). The Limited Amendment altered the phasing prescribed by the 1994 Plan to permit a grocery store to proceed in Clarksburg Village. In doing so, the Limited Amendment

reaffirmed the County's adherence to the ten policies guiding development in Clarksburg and the seven staging principles in the Plan (Exhibit 86, p. 11):

The Amendment retains the Plan's overall land use policies and objectives (1994 Plan, pages 16-34). It also retains the overall staging recommendations (1994 Plan, pages 186-193). The seven Staging Principles in the Plan provide a general framework and guidance for future staging and timing of private development and public facilities.

2. 10-Mile Creek Limited Amendment to the Master Plan

At the time of the public hearing, the Staff Draft of the 10-Mile Creek Limited Amendment included two alternatives for the Miles-Coppola property: (1) a mixed use project that commercial office/retail use that would, according to the Peterson Companies, permit development of a Tanger outlet center, or (2) a primarily residential development.

After the record initially closed in this case, the Planning Board issued its draft of the *10-Mile Creek Limited Amendment*. The Planning Board's draft alters the land uses recommended for the Miles-Coppola property and the Historic District. Recognizing the "weakened" regional office market and "more attractive and available locations elsewhere" for office development, the Planning Board found that retaining the employment recommendation for the Miles-Coppola properties would cause a significant delay in development of the property. The Board expressed a desire for early development of this property to "support commercial activity in the Town Center, "provided it is complementary." *10-Mile Creek Limited Amendment*, p. 33. As a result, the Plan recommends a mix of commercial, retail and office for the property (*Id.* at 33-34):

- Commercial uses that complement, but do not compete with or encroach on the core Town Center. Retail development that requires a broader market, and amenities like restaurants and entertainment venues, could help create a separate attraction on these properties for Clarksburg residents to enjoy.

* * *

- The Commercial Residential Zones offer an opportunity to balance a mix of uses for each development area, while providing significant amounts of housing and commercial uses that would help implement the 1994 Plan's vision for a complete corridor town. Development on the properties should nonetheless employ Environmental Site Design techniques and preserve undeveloped open space to reduce imperviousness. Should optional method development occur, construction of the MD 355 Bypass should be considered a priority as a major public benefit.

- This Plan Amendment recommends CR 0.75, C 0.5, R 0.5 H 85 for these properties. Maximum building heights of 85 feet are appropriate in the portion of the properties nearer I-270, and in areas along Md. 121 closest to the I-270 interchange, where buildings will be less visible from the Historic District and Town Center. Development closest to the Historic District should be compatible with building heights in the Historic District, but not exceed 45 feet. There should also be a transition in heights on the Miles/Coppola properties, from the areas designated for lower building heights to those where taller buildings are envisioned.

The Plan recommends the CRN 0.25, C 0.25, R 0.25 H35 for the portions of the Historic District within the boundaries of the Limited Amendment to provide owners a wider variety of uses, thus encouraging rehabilitation of historic buildings. *Id.* at 35. It also concluded that development on the Miles-Coppola property should function independently of the remainder of the Town Center District because natural topography and the future roadway and transit network will make it difficult to walk to the eastern portion of the District.

3. The Applicant's Position

The Applicants' argument focuses primarily on the Plan's goal to continue the "hi-tech" corridor along I-270 at Cabin Branch, although the Applicants' acknowledge that full office build-out may not occur for 20 years. Painting a relatively discouraging picture for development of the hi-tech corridor so confidently called for in the Plan, the Applicants argue that the outlet center is critical to achieve office employment in Cabin Branch, and thus view the retail outlet as a glass that is entirely full.

Mr. Bogorad opined that the current office market is "challenged", caused in part by the amount of office planned for Germantown, the Life Sciences Center, and Gaithersburg, and because employers are reducing demand by using less space per employee. In his opinion, this "challenged market" will not resolve quickly, although he believes there still remains long-term demand. 8/12/13 T. 46-48. According to him, absorption of office space in the I-270 corridor between Clarksburg and Gaithersburg has been approximately 74,000 square feet for the last five years and has declined every year since 2010 despite the economic recovery. 8/12/13 T. 49-51. He explained that there are different segments of the I-270 corridor, sometimes defined

as far south as Bethesda/Chevy Chase, which the industry analyzes separately. These different sections include Rockville, Gaithersburg, Germantown and Clarksburg. The market in Bethesda is less challenged than in areas further north, in part due to the desire of office tenants to be near retail. 8/12/14 T. 114. He thinks higher popularity of the southern segments of the I-270 corridor is partially due also to a desire to be closer to downtown, to the Beltway, and to agencies, such as the NIH, which drive work demands. The data supports this assumption, and indicates that the combined areas of Germantown, Gaithersburg, and Clarksburg have had very high vacancy rates and slightly declining rents over the last five years. He agreed that the further north one proceeds along the corridor, the more difficult it is to attract an office user. 8/14/13 T. 114-117.

For these reasons, he believes that office absorption along the I-270 corridor near Clarksburg will be more limited than desired. Even with the amount of retail proposed in the development plan amendment, there remains a tremendous amount of office space permitted that will not be developed for many years, in his opinion. Competition for office space is not only within Montgomery County, it also extends to northern Virginia and Frederick County. 8/12/13 T. 49-51.

Mr. Bogorad opined that development of the outlet at Cabin Branch will act as a catalyst to attract employers to Clarksburg because office-only campuses are a thing of the past and no longer desirable to employers. Based upon his experience preparing market analyses, employers and tenants now prefer mixed-use developments that include retail because it brings activity to the area and provides amenities and services for workers. He acknowledged that the ability of *outlet* retail to attract employment is somewhat “untested” in areas like Bethesda and Reston, but felt that retailers from those areas would not locate in Clarksburg. Because the modern type of outlet center is relatively new, according to Mr. Bogorad, there are a limited number of examples where outlets have catalyzed development of office. He cited to the Round Rock Premium Outlets (also developed by Simon Properties) that opened northeast of Austin, Texas in 2006, which he characterized as an “outer suburban” location. It opened at

approximately the same time as a hospital, and was followed by more retail, another hospital, and a 135,000 square foot office building that opened in 2009. According to him, the outlet center is credited with attracting much of this development. 8/14/13 T. 122-124.

Another example cited by Mr. Bogorad is the Citadel in downtown Los Angeles, developed in 1990. He acknowledged that it was hard to identify the timing of the retail versus the office because all of the uses were developed at once. Despite this, listings for vacant office space label the outlet center as one of the key amenities. In his opinion, it is clear that the outlet center and office development there have a complementary relationship. 8/14/13 T. 123-124. A more recent example is Traverse Mountain near Salt Lake City. While employment uses already existed in the area, in his opinion the outlet center is synergizing the development of additional speculative office space. 8/14/13 T. 124.

Mr. Bogorad opined that, without the retail outlet center, full build-out of the office component at Cabin Branch will probably not occur within 20 years. He testified that at the end of 20 years (which is the typical market analysis period), the current Master Plan scenario might yield 500,000 square feet of office and 120,000 square feet of retail. If the development plan amendment is approved, the County will have approximately 400,000 square feet of retail within a shorter time frame (i.e., 5 years) and a minimum of 500,000 square feet of office at the end of 20 years.

Mr. Bogorad distinguished between the proposed DPA and the lack of office surrounding Hagerstown and Queenstown outlets. He testified that those retail outlet centers did not generate office development there because employers will only locate where there is an inherent demand for office. When those outlets were built, these centers were typically located in outlying areas where this demand does not exist.

In his opinion, it would be an "aberration" in today's office market if a single, government-type use to decide to locate in a stand-alone facility "in the middle of nowhere." 8/14/13 T. 116. While he believes that the entire I-270 corridor offers a reasonable possibility for office

development, the northern areas are at a competitive disadvantage. Retail development offers an amenity for employees that may offset this disadvantage, which has been the case in Loudoun County, Virginia. Employers may be attracted to the more distant locations by lower rents; the proximity of retail may be an amenity that makes the location more palatable to employees. 8/14/13 T. 116-117.

Mr. Bogorad opined that all of the office recommended in the Sector Plan might not be absorbed for 20-30 years, even if the amount of office space is reduced by the square footage of the outlet center. 8/14/13 T. 118. Nevertheless, while his fiscal analysis assumed 500,000 square feet of office at the end of ten years, the actual amount of office doesn't affect his analysis because the catalyzation of the office market is beneficial regardless of the exact amount of office generated. 8/14/13 T. 120. In his opinion, there will be more office development in Cabin Branch with the outlet center than without it. 8/12/13 T. 53-55.

Development of the outlet center will also generate more revenues for the County. Most likely, in his opinion, the outlet center will generate a larger amount of office development at the end of the 20-year analysis period than implementing the current Master Plan. Thus, the development plan amendment will yield higher revenues from retail and more office development in a shorter period of time. 8/14/13 T. 85-88.

Mr. Bogorad assured the parties that a regional outlet center in Cabin Branch would not inhibit development of the Town Center neighborhood center because the type of retail at the two locations will be different. Neighborhood centers will be neighborhood and community oriented, rather than regionally oriented. A full-service grocery store, which accounts for 60% of the sales in a typical neighborhood center, will be critical to successful development of the center. Once the grocery is in place, other tenants follow. These tenants typically include non-chain restaurants, drugstores, and personal services such as hair and nail salons, yoga studios and fitness centers, and doctor's and dentist's offices. Only approximately 4% of the neighborhood center sales are apparel. 8/14/13 T. 91-94.

Mr. Bogorad believes that the regional retail proposed would not compete the additional retail recommended by the Plan within the Historic District. In his opinion, the kind of retailer seeking to locate in an outlet center would “never consider” an infill kind of situation in a small concentration of retail in a historic district. It would be critical to them to draw people from an interstate highway. Even without the access, the small amount of retail in the town center historic district would not have the same potential store sizes, visibility, regional access or critical mass of square footage to be an effective comparative shopping situation. In his opinion, the likely retail within the Historic District will be smaller neighborhood-related stores and interesting restaurants that will not compete directly with the chain restaurants at the outlet center. Many of these types of restaurants tend to be ethnic restaurants, and these can survive together with and complement the chain restaurants located in the outlet center. 10/10/13 T. 129-136.

In contrast, the primary retail category offered by outlet centers is designer fashions and sportswear. The second largest category is woman’s clothing. Shoe stores and children’s clothing are other large categories. Additional retail may include fine leather and luggage, which typically are not located at neighborhood centers. 8/14/13 T. 95-96.

The development plan amendment benefits the Town Center neighborhood center, according to Mr. Bogorad, for several reasons. First, it removes the potential for another full-service grocery store in Cabin Branch. He expressed concern that demand usurped by Wegman’s and Wal-Mart-type supermarkets in the Germantown and Gaithersburg areas leave little appetite for another supermarket in Cabin Branch. In fact, Mr. Bogorad raised the specter that even the *possibility* of a full-service market in Cabin Branch could further delay development of the Town Center neighborhood center. In his opinion, actual construction of a supermarket in Cabin Branch would be the death knell for the Town Center. 8/14/13 T. 98-99.

The outlet center will also benefit the Town Center neighborhood center, in his opinion, because it will generate economic activity in the area. He explained that employees of the retail center (and potentially office users) would use the supermarket and perhaps one of the more

unique restaurants in the Town Center neighborhood center. 8/14/13 T. 99-100. He anticipates that the retail outlets will employ approximately 1,659 people, thus generating additional demand for local retail. 10/10/13 T. 138-139. Examples of places where larger retail development has generated activity outside of the retail site include Potomac Yard, Old Town Alexandria, Washingtonian Center, and King Farm. 10/10/13 T. 137-138. Other examples include the downtown Rehoboth shopping area and the Route 1 outlet centers in Rehoboth, Bethesda Triangle and Bethesda Row, and Leesburg Premium Outlets in Leesburg. 10/10/13 T. 138.

Finally, the outlet center will place Clarksburg “on the map” as a place to be, according to Mr. Bogorad. He testified that Clarksburg has developed a bad reputation in the development community as a place where it’s been really difficult to “get things done.” 8/14/13 T. 100. No major tenant of the Town Center has been able to accomplish its development at that location. Approval of this application, in his opinion, would change the perception of development in the Town Center and encourage additional development at that location. 8/14/13 T. 100.

Despite the benefits described, Mr. Bogorad acknowledged that some of the “place-making” retail in the outlet center would overlap with the retail in the Town Center, and that some of the neighborhood-serving retail envisioned for Cabin Branch would not occur for a significant time. In his opinion, this deviation from the Master Plan’s goal to have neighborhood retail in Cabin Branch is a better option because removes competition with Town Center neighborhood center. 8/14/13 T. 107.

Mr. Unterberg theorized that the Master Plan recommended 120,000 square feet of retail only because the property might develop under the base RMX-1/TDR Zone. That zone, according to Mr. Unterberg, requires that retail be designated in the applicable master plan. Because the MXPD Zone permits 20% of the total square footage to be retail without a master plan designation, the theory expands, the Plan’s limit on retail does not apply to comparison retail. The Technical Appendix supports this, the argument continues, because it differentiates

between comparison and neighborhood retail, but does not include specific limits on comparison retail. 9/4/13 T. 32.

The Applicants interpret the Plan's recommendations for retail in the Town Center District to mean that the Historic District and neighborhood center there should function as the center of the Town Center District neighborhood rather than the larger Clarksburg area. The Plan's goal is to expand the Town Center to include a variety of civic, retail, and housing types that are compatible in scale with the Historic District. According to Mr. Unterberg, this means that the Town Center (and the Historic District) is intended to serve the neighborhood in a manner compatible with the Historic District, but regional uses are reserved for the much larger developments in Cabin Branch and the Comsat properties. None of the Plan's descriptions for the Town Center lends itself to a regional outlet center. 10/10/13 T. 182-183.

Mr. Bogorad testified that the Plan intended the neighborhood center in Town Center to be the "heart of Clarksburg"; not the Historic District. He has worked in Clarksburg for many years, and the main commentary has been to achieve a grocery store-anchored neighborhood center, rather than a focus on the Historic District. The critical item for the neighborhood center to achieve is a grocery store. Without this, the focal point of a neighborhood center will not happen. 10/10/13 T. 137-138.

In Mr. Unterberg's opinion, the "town scale" of development recommended by the Master Plan refers to the scale of buildings: it talks about a main street with neighborhood services, retail services, a post office, and public services such as a firehouse, post office, library, and a community center. In addition, the Plan calls for a transit stop. As a result, he opined, these neighborhood uses define the smaller, "town-scale" envisioned by the Master Plan. 10/10/13 T. 177-178. In comparison, he believes that Cabin Branch is a more appropriate location for a regional use such as an outlet center because the Plan anticipated a regional use (i.e., an employment center) that permitted up to 484,000 square feet of retail. To the contrary, the

Cabin Branch neighborhood retail is a hybrid that serves both the Cabin Branch neighborhood and a regional retail or shopping opportunity. 10/10/13 T. 182.

He further commented that the Master Plan does not preclude the regional outlet. The Plan makes only three specific retail recommendations; these are for the three neighborhood retail centers in the Town Center District and the Cabin Branch and Clarksville Village neighborhoods. While the Technical Appendix to the Plan contemplates the existence of comparison retail, they made no recommendations for that use. He opined again that he believed the neighborhood centers were specifically recommended in the Master Plan because it was a requirement for the recommended zoning. 10/10/13 T. 186-189. In further support of this, he observed that the District Council's Resolution in G-806, the original development plan, recognized that 10% of the 2.42 million square feet approved could be retail. This, in his opinion, confirms that the Plan anticipated more than 120,000 square feet. 10/10/13 T. 188-206.

In Mr. Unterberg's opinion, the development plan amendment will produce the type of mixed use environment envisioned by the MXPDP Zone, which will include residential, office, neighborhood retail, the outlet center and community uses. He believes it is a realistic means implementing the goals of the Plan given changes in the economy, development of office parks, and the needs of the community. 9/4/13 T. 56.

Mr. Bogorad disagreed with Mr. Ferguson's testimony that retail is not an employment use. The numbers of retail employees are similar to those of hotels, more than industrial office uses and somewhat fewer than office uses. The outlet center proposed would employ 1,659 permanent employees. 10/10/13 T. 138-139.

4. The Opposition's Argument

Those in opposition view the development's potential for "place-making" and "putting Clarksburg on the map" as a glass half empty. Rather than a benefit to the larger area, they see the development as a threat to the integrity of the Plan because it would usurp the central role of the Town Center District, further delaying its development. Rather than litigating this issue in a

Local Map Amendment application, they believe the proposed development should be the subject of an amendment to the Master Plan.

Mr. James Noonan, an expert in land use planning, opined that Policy No. 1, which encourages development at a town scale compatible with the Historic District, indicates that the Town Center is to be the center of the larger Clarksburg study area. According to him, the Plan strives to maintain an identity from Clarksburg separate from Germantown or Damascus and recognizes the importance of civic space and public uses to the development of the town concept. 9/6/13 T. 201.

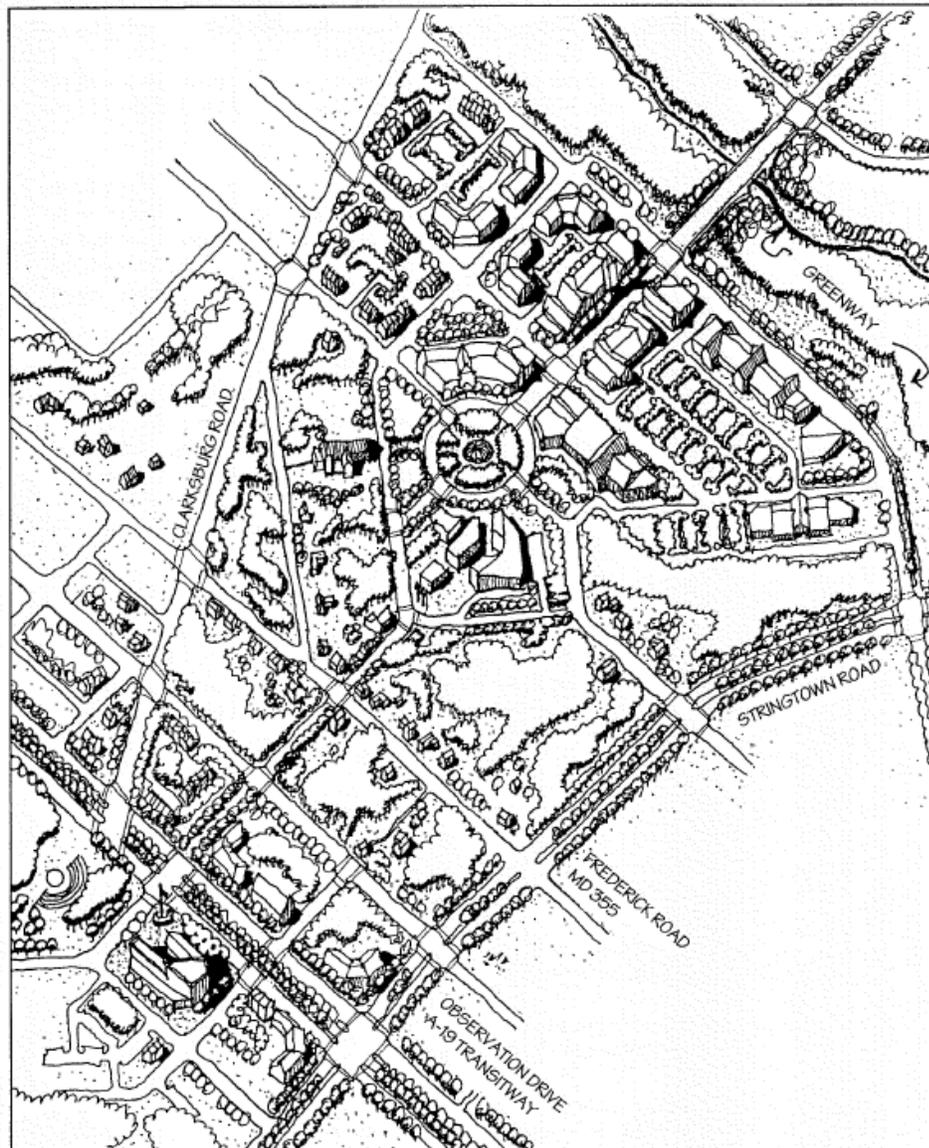
In his opinion, the Plan's specific recommendations for the different neighborhoods support the central focus on the Town Center. The first element for implementing the "town scale" of Clarksburg focuses on what's going to happen at the Town Center. 9/6/13 T. 202. Because Clarksburg had virtually no development except for the Historic District at the time it was adopted, it lays out a very long-term future for a totally new development, similar to Columbia. Like Columbia, it had a defined town center surrounded by defined neighborhoods. While not completely comparable, in his opinion, the two are similar because they set up a hierarchy of places, focusing on the Town Center as the strong, central focus larger area supported by a number of satellite residential neighborhoods. The Clarksburg Plan also added a transit station serving the Town Center and recognized I-270 as a major transportation hub. Thus, it altered the traditional "look" of a town center because of the need to include locations of high density that vary from a perfect circle surrounding the town center. Nevertheless, in his opinion, the Town Center was envisioned to be the strong, central focus of the area. 9/6/13 T. 202-203.

The Plan also encouraged a mixed-use pattern of development in the Town Center to create a lively and diverse place, according to Mr. Noonan. This differs from the Plan's recommendations for neighborhood centers in other neighborhoods because it envisioned the Town Center as the center of activity for the whole planning area with a mix of uses to draw

people in to the center, and in particular, the Historic District, with sufficient density to support transit. This concept is illustrated in the sketch for the Town Center District included in the Master Plan (Exhibit 60(a), shown below). The sketch shows an amphitheater, a fairly large, residential neighborhood with a neighborhood center, surrounded on one side by the Historic District and the other side by enough density, employment and retail services to support a transit center. He testified that the four major conceptual illustrations appearing in the Plan show many

Town Center Illustrative Sketch

Figure 20



activities occurring in the Town Center. According to him, the civic uses included within the illustrative sketches also indicate that will have enough activities to make it a viable center for the Clarksburg area. 9/6/13 T. 203-206.

In contrast to the Plan's recommendations for the Town Center, he believes that many of the activities that one would associate with a "town center" are included within the DPA. This includes nighttime activities, such as restaurants and entertainment uses, employment uses, and civic uses like the amphitheater, which are shown on the Applicants' sketch of the North District. Because of these overlapping uses, the development plan amendment competes with the Town Center District as the central focus point for the area. 9/6/13 T. 208.

In comparison, the Plan's targets the Cabin Branch neighborhood to preserve opportunities for high-tech employment in the I-270 corridor. The transit pattern described in the Plan orients the neighborhood to the MARC station at Boyds and the future transit way in the Town Center. Therefore, according to Mr. Noonan, the Plan pictures Cabin Branch as having a strong neighborhood focal point created by concentrating public and retail uses in the same general area, and the Town Center as the focal point for the entire Clarksburg area. 9/6/13 T. 208-209.

Other recommendations in the Plan support an interpretation that Cabin Branch is intended to be an employment center that operates as a satellite neighborhood to the central Town Center. In his opinion, the Plan's overall vision is to take advantage of I-270 and its visibility to attract the high-technology employment that existed prior to the dot-com crash of 2000. The scale of employment recommended for Cabin Branch (i.e., 2.3 million square feet) is much larger than that recommended in the Town Center, not because the Plan wanted Cabin Branch to compete with the Town Center, but to take advantage of I-270. The original development plan, with a hospital and medical offices, fit much better with that vision. 9/6/13 T. 209-211.

The language in the Technical Appendix supports this, he believes. Everywhere the Appendix refers to retail, it refers to neighborhood retail uses, such as shopping centers with grocery stores and ancillary uses like dry cleaners, pharmacies, etc. Only the recommendations for the Town Center District refer to 300,000 square feet commercial uses that are not specifically neighborhood retail uses. While it may be silent on the possibility, the Town Center District was the only area where the Plan took the opportunity to encourage additional retail uses.

In his opinion, the DPA fragments the Plan's overall vision for two reasons. First, the activities proposed compete with the Town Center in terms of scale, intensity and uses. In addition, the DPA fragments the neighborhood-oriented scale intended for the Cabin Branch community. If approved, in his opinion, Cabin Branch will have the same scale of residential development as Clarksburg Village, but significantly less neighborhood-oriented services that the other neighborhoods will have. At the same time, it will have the advantage of being walkable to much more upscale retail services in the northern part of the development plan. This will require residents of Cabin Branch to get into the car and drive over to the Town Center or Clarksburg Village, where the residents will have that neighborhood services in place. 9/6/13 T. 212-214.

Mr. Noonan testified that the Plan's staging recommendations also reflect the scale and focus of its recommendations. The Plan wanted early development of the Town Center District and properties located on the east side of I-270. In his opinion, the Plan took great care to recommend a land use pattern that fosters a mix of housing, retail, employment, community uses, and transit that best support a strong town center identity early in the process. The Plan also intended to create a strong sense of community identity in the Town Center to serve as a model for later development in the surrounding neighborhoods. These recommendations reflect that the planners were working with an empty stage, other than the Historic District, rather than a well-established town center with an existing identity. Thus, the focus was to prioritize early

development of the Town Center, with much less intensive retail uses in the surrounding neighborhoods. 9/6/13 T. 215-216.

The 2011 Limited Amendment to the Clarksburg Master Plan restated that the Council did not intend to change these overall policies stated in the Plan; rather, it was a very narrow amendment to permit existing residents access to some neighborhood services. 9/6/13 T. 217.

According to Mr. Noonan, the Applicant's justification statement illustrates why the amendment contravenes the Master Plan. The statement pronounces that the amendment will establish a "true identity" for Clarksburg that is "unique" to the County. It also states that the development will "put Clarksburg on the map" as a one-of-a-kind and highly desirable community. 9/6/13 T. 219. In his opinion, the Plan wanted that to be the role of the Town Center rather than the Cabin Branch neighborhood. The amendment proposes a significant amount of highly desirable public use space, including the outdoor amphitheater, gathering places and other community activities. The Plan envisioned the level of activity associated with this development to be located at the Town Center. 9/6/13 T. 220.

If the Plan's key goal for Cabin Branch is to take advantage of I-270 does not occur, the Plan's core goal should be retained. That goal is to create a viable Town Center with sufficient neighborhood development around to ensure that it will be the center of activity for the area, (i.e., where people will go on weekends and see concerts, go to restaurants, and participate in other community activities.) 9/6/13 T. 221. He pointed out that, even with this development, the Applicants' expert anticipates that office development might not occur for 10 to 20 years. In his opinion, this is not the type of catalyst that will bring employment immediately after construction. Rather than satisfying the Plan's goal for Cabin Branch to preserve employment opportunities along I-270, in the short term there will be a large retail center without a significant amount of neighborhood services. He believes the DPA would delay and undercut the kind of development the Plan envisions for Town Center, and its transit-oriented policies. Whatever happens in

Clarksburg, it will need the densities envisioned in the Plan to move forward and development should be staged in the method prescribed by the Plan. 9/6/13 T. 222.

Mr. Noonan believes that the Master Plan already has sufficient flexibility in its recommendations because it does not prescribe precisely where the mix of units should go or internal densities, although it does specify the staging of development. The Council, in its 2011 Limited Amendment, did not find that the Plan had failed because it recommitted to the overall policies stated in the Plan. In his opinion, if it has failed, the correct approach is not to make it more difficult to implement the existing Plan, as this amendment would do, but look at the issue comprehensively under the master plan amendment process. 9/6/13 T. 224.

The Cabin Branch neighborhood contains the largest amount of new employment recommended in the Plan. Residential, retail and civic uses are about the same as other neighborhoods. In his opinion, to the extent these are not supported with the type of retail uses that make a good place to live undercuts the neighborhood community aspect envisioned by the Plan by fragmenting the uses and replacing them with more regional types of public spaces. 9/6/13 T. 226.

Mr. Noonan disagreed with Staff's analysis of Master Plan compliance because it focused very narrowly on one aspect of the Master Plan. The Staff's rationale for compliance states only that the development proposes the same amount of square footage recommended in the Plan and that the buildings step down in height and density from I-270 to the RMX-1 neighborhood to the west. In his opinion, Staff analyzed only whether the building height and density are the same as recommended in the Master Plan, which in his opinion, is a very narrow interpretation. The "town scale" policy in the Master Plan is much more than one single bullet in the Plan. Other aspects include creating an identity separate from Germantown and Damascus, recognizing the importance of civic spaces and public uses, and overall goals of the Plan. 9/6/13 T. 233. Nor does the amendment further the Plan's goal to broaden the employment base for office, research and development, light industrial, hotel, urgent care facilities, etc. The amendment does not

broaden these uses; rather it adds retail, entertainment and public uses that compete with the Town Center. 9/6/13 T. 234.

Nor did he see significance in the Plan's recommendation for MXPDP Zoning for the subject property. Because it is a countywide zone, it may have many uses that are permissible which may or may not be consistent with a master plan. He opined that the Master Plan informs as to what should occur, and is not driven by a generic zoning classification. In his opinion, the Plan encouraged a mixed-use office and residential development, rather than 484,000 square feet of retail. The Plan easily could have said that it encouraged higher amounts of retail under the MXPDP option. 9/6/13 T. 236.

Mr. Mark Ferguson, an expert land planner testifying on behalf of The Peterson Companies, opined that the DPA fails to meet the level of compliance with the Master Plan required by the MXPDP Zone and the requirements for approval of a development plan. According to him, the criteria for approval of a development plan mandate that the application comply with the "land use and density" of the zone applied for. In his opinion, retail and employment are not the same use. Employment uses operate generally during the date and involve bringing large numbers of people to one location on a regular schedule. Conversely, according to Mr. Ferguson, involves having a small number of people employed during the day with large numbers of visitors arriving and leaving at varied times, and particularly at times outside the peak hours. He believes that a hotel is justifiable as an employment use because it's not a retail destination and is sufficiently ancillary to employment concentration. Similarly, a hospital is closer to a purely employment use because there is a concentration of employment activity there.

Typically, Euclidean zones are characterized into three categories: industrial, residential and commercial zones. In some cases, these uses overlap, as industrial zones often include office as well as manufacturing and industrial uses. He opined that this is not true of retail; in his experience as a land planner, he has never heard the term "retail employment" used in a

planning context. In his opinion, the Master Plan conceived of “employment” use as a use similar to the Comsat facility that is solely office or R&D use and used the terms “office” and “retail” in the commonly understood sense of the words. 9/12/13 T. 219-222.

Nor does he find that the projects found comparable by Technical Staff support this development plan amendment. The Park Potomac project is located in the I-3 Zone, which is not a planned unit development zone and does not have the same requirement to conform to the land use and density recommended in the Master Plan. The master plan recommendations for the Rock Spring Park project in North Bethesda specifically called for a substantial amount of retail in conjunction with the office uses there, with a base amount that could be increased if office space were reduced. Thus, the Rock Spring Park project conforms exactly to the use and density of the master plan involved, in his opinion. While planners may wish to repeat that method for this project, the MXPDP Zone does not permit one to substitute current judgment for the recommendations of the Plan. The Washingtonian Center is an MXPDP project within the Shady Grove Sector Plan area. The Sector Plan did not recommend a specific use and density mix for that project—he believes that in that case, the Council had a great deal of latitude to find an appropriate mix of uses. 9/12/13 T. 223-224.

In his opinion, the fact that the MXPDP Zone permits 20% of a project to be retail does not override the recommendations of the Plan because the zone is intended to implement the Plan. If the Master Plan does not recommend that intensity of retail use, the uses permitted are not fixed by the Zoning Ordinance. He believes that the appropriate method for accomplishing this development would be to defer it until the Master Plan is amended to permit it. This method provides a broader ability for the public to participate in the process. This also permits the Council to review the broader ramifications project because an outlet center may vary in terms of operations; some rely heavily on buses that bring people to the project and are, in essence, a captive audience that do not generate activity outside of the site. There are also ramifications to be considered in the design of the project; specifically whether certain aspects of the center will

truly act as “neighborhood” or community uses. Aspects of the design and operations could have a great deal of impact on the viability of retail on the Town Center District. 9/12/13 T. 225-228.

Mr. Ferguson testified that the Master Plan is obsolete in many respects, particularly because absorption of office space has been far less than what the Plan envisioned. Despite this, however, the Master Plan recommendations should be adhered to because the MXPDP Zone is a “plan implementation” zone and is tied specifically to the land use and density of a master plan. This is particularly true, in his opinion, because the 2011 Limited Amendment to the Master Plan could have changed the overall goals, but did not do so. Because the MXPDP Zone is designed to implement the applicable Master Plan, he does not agree that the MXPDP Zone provides a basis for deviating from the Plan’s recommendations. He opined that the mix of uses called for in the Master Plan is a mix of office and residential rather than larger scale retail. 9/12/13 T. 236-240.

He believes that the neighborhood retail approved on the Gosnell property is highway-oriented retail because of its location on Md. Route 121, near I-270. In his opinion, it is too remote to serve as pedestrian-oriented neighborhood retail. For this reason, he does not think that this retail alone will fulfill Policy 7 of the Master Plan, which calls for a mix of uses to reduce dependency on the automobile. 9/12/13 T. 279-283.

5. Agency Recommendations

Technical Staff concluded that the proposed development is “substantially consistent” with the Master Plan, but focused solely on the goals for Cabin Branch rather than any potential impact on the Town Center. When concluding that the application met the Plan’s goal for a “town scale” of development, Staff pointed the fact that the maximum amount of non-residential square footage proposed agreed with the amount recommended for Cabin Branch in the Master Plan. For this reason, and because “the buildings step down in height and density from I-270 to the adjacent areas in the Cabin Branch neighborhood...for compatibility,” Staff concluded that

the development would be at a “town scale.” Exhibit 50, p. 13. Staff also observed that the amendment meets the Plan’s goal to preserve sensitive environmental features, although it superimposes on the Master Plan’s recommendations the four “sustainable neighborhood” planning principles referred to earlier. Staff found that the amendment complies with Policy 7, calling for transit- and pedestrian-oriented neighborhoods, because it had a mix of retail and employment uses, a diversity of building types, and street-oriented buildings.

As to the uses recommended by the Plan, Technical Staff adopted the Applicant’s “silence means permitted” argument--the Plan’s limitation of 120,000 square feet retail applies only to neighborhood retail. It does not limit comparison retail, which, according to the Staff and the Applicants, may be developed to the full amount permitted in the MXP Zone. In support of this, Staff notes that the table listing the end-state amounts of development recommended by the Plan lumps “employment and retail” into the same column:

No qualification is provided for types and nature of Employment [sic] or retail. The approval, by the Planning Board, of Site Plan No. 820060240 for 87,500 square feet of employment uses that includes a hotel, a restaurant and two banks, indicates the Board’s recognition that the term “Employment” covers a wide variety of retail employment generating uses such as banks, hotels and restaurants. The proposed regional type of retail employment use in the form of a fashion center with efficient blending of retail, restaurants and entertainment designed at a neighborhood scale satisfies the plan objective in terms of providing a mix of uses and encouraging an employment pattern which is supportive of I-270 as [sic] high-technology corridor. Exhibit 50, p. 19.

Regardless of whether an outlet center is considered employment or retail or both, it is clear that Staff agrees with the Applicant that an infusion of retail/entertainment users is necessary to produce a “world class,’ comprehensively designed employment center to serve the needs of Montgomery County in the 21st Century,” thus furthering the Plan’s goal for office employment in the I-270 corridor. Exhibit 50, p. 4. The Staff Report also lists other policies of the Master Plan fulfilled by the proposed amendment that are not at issue in this case.

F. Environmental

1. Preliminary Water Quality Plan (PWQP)

The calm stream valleys of Cabin Branch are the headwaters for a cloud of controversy surrounding whether the Applicants have met the requirements for stormwater management in special protection areas. The controversy arises because changes to the stormwater management regulations since approval of the 2003 PWQP (in LMA G-806) make some of the stormwater management facilities shown obsolete.¹⁵ To understand the parties' positions, it is necessary to briefly review the County's stormwater management regulations.

When, as here, a property is located within a special protection area, the Zoning Ordinance requires a development plan application to include "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." *Montgomery County Zoning Ordinance*, §59-D-1.3(i). Amendments to the original development plan must include all "relevant information required by section 59-D-1.3." *Id.*, §59-D-1.74. In order to approve a development plan amendment, the District Council must find that, "[a]ny applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied." *Id.*, §59-D-1.6.

Chapter 19 of the Montgomery County Code governs stormwater management in special protection areas; the Code is further supplemented by Executive Regulations. The Code mandates that a Preliminary Water Quality Plan (PWQP) must be submitted in conjunction with an application for a development plan. *Montgomery County Code*. §19-65(a)(1). After approval of the PWQP with a development plan, the Applicant normally need not submit a Final Water Quality Plan (FWQP) until site plan:

¹⁵ Mr. Frank Bossong, the Applicant's expert civil engineer, correctly points out that the facilities may still possibly be built. However, they may only be built now if the Applicant demonstrates that the modern types of facilities called for in the regulations cannot be utilized. The exact standard is explained shortly.

- (2) If the development proposal requires more than one of the approvals listed ...the applicant must submit a preliminary water quality plan to the Planning Director in conjunction with the first approval and a final water quality plan in conjunction with the last approval. *Id.*, §19-65(b)(2).

This is not necessarily the case, however, when the original development plan is amended. In addition to the Zoning Ordinance's mandate to include all relevant information contained in the original development plan application, Executive Regulations explicitly state that anyone "*seeking approval of an amendment to an approved development plan...*" must file a revised PWQP. COMCOR 19.67.01.03.

In order to understand Hearing Examiner's recommendations on this issue, it is important to know that the Code divides responsibility for approving a PWQP between the Planning Board and the Montgomery County Department of Permitting Services (DPS). The Planning Board reviews the following:

- (i) Conformity with all policies in the Planning Board's Environmental Guidelines which apply to special protection areas;
- (ii) Conformity with any policy or requirement for special protection areas, including limits on impervious area, in a land use plan, watershed plan, or the Comprehensive Water Supply and Sewer System Plan; and
- (iii) Any other element of the plan in which the Planning Board has primary lead agency design, review, and approval responsibility. *Id.*, §19-65(a)(2)(B).

DPS, however, is the lead agency for approving the items below and the Planning Board's approval must conform to DPS' decision on those items:

- (i) Performance goals for the approved best management practices;
- (ii) Stormwater management concept plan;
- (iii) Erosion and sediment control concept plan; and
- (iv) Any other element of the plan for which the Department has primary lead agency design, review, and approval responsibility. *Id.*

The Applicants do not contend that they have modified the 2003 PWQP to reflect the proposed development. Rather, they argue that amendment is unnecessary.

Two of the stormwater management facilities located within the subject property, shown on the 2003 PWQP, cannot be constructed by right under current stormwater management regulations. Both facilities are large dry ponds located, which are no longer either permitted by right or even preferred under current regulations. Current regulations require Environmental Site Design (ESD) to the Maximum Extent Practical (MEP), or very simply, the use of smaller facilities spread throughout the site. In order to build the dry ponds shown on the 2003 PWQP, the Applicants must show that they have attempted to use ESD facilities first. If the Applicants can make this showing to DPS, the dry ponds shown on the DPA may still be constructed. 10/10/13 T. 46-52.

Technical Staff and DPS disagree on whether the DPA requires a revision to its original PWQP and the extent of review afforded by these agencies is factually murky. Because the factual question affects her recommendation, the Hearing Examiner will resolve this first.

The Hearing Examiner referred the issue to Technical Staff and DPS on September 17 and 19, 2013, and requested that they coordinate their response. Exhibit 116. She received Technical Staff's response that the original PWQP remained valid on October 8, 2013, with the reassurance that it had been coordinated with DPS. She received a separate response from Mr. Mark Etheridge, of the Water Resources Section of DPS, on the same date, also indicating that no update to the 2003 PWQP was necessary. Exhibits 122.

In its initial Technical Staff Report, Technical Staff informed the Board that the proposed development "conforms" to the 2003 PWQP. Exhibit 50, p. 22. Despite this assurance, Staff recognized that changes would need to be made to reduce stream buffer encroachments caused by the outdated ponds because of the "strong potential" that neither of the ponds would be built. *Id.* at 31. Staff also states, "[t]he DPA indicates that measures have been taken to reduce forest clearings but there is potential to achieve more as the project goes through detailed site plan process." *Id.* at 28. When those in opposition raised the argument that the Code and Zoning

Ordinance mandate a revised PWQP with the development plan amendment, she turned again Technical Staff to clarify its position.

In a supplemental memorandum, Technical Staff agreed with the Applicants that the 2003 PWQP “remains valid,” citing to the items that the DPA does *not* change. Exhibit 122, p. 1. These include the total site area, the total amount of commercial and residential development, the natural resources inventory, the stream buffers, and forested areas. Staff also found that “the conditions of approval in the original preliminary water quality plan also apply to DPA 13-02 including the sediment control, performance goals, and monitoring elements,” and reassure that the 2003 PQWP was “incorporated” into the review of the DPA. *Id.* at 3.

Staff also supports its arguments based on the number of plans approved for the entire Cabin Branch neighborhood, shown on the following page. In addition to the 2003 PWQP, Staff cites to a water quality plan approved for the entire Cabin Branch neighborhood dated June 22, 2004, and note that the validity of the original approval was confirmed in a Preliminary Plan for infrastructure in the neighborhood in 2008.

Finally, Staff advises that the developable area (i.e., the Limits of Disturbance) has been reduced by 14 acres from that shown on the original development plan. According to them, the “combination of additional green area in the commercial area and the already approved final stormwater management features in the residential area of the MXPDP area demonstrate how additional opportunities to provide water quality protection facilities can be accommodated on the property.” *Id.* at 5. Staff goes on to state, “Staff and DPS recognize that any changes to the regulations and guidelines must be accommodated in the final water quality plans.” *Id.*

DPS initially agreed with Technical Staff that no further update to the 2003 PWQP was necessary, also citing to the administrative practice employed at Cabin Branch. Mark Etheridge of the Water Resources Section of DPS wrote (Exhibit 122):

The purpose of this email is to respond to your email of Friday, October 4. Specifically, I wish to address concerns noted in “Request 2”, with respect to review and approval of Preliminary and Final Water Quality Plans by the Department of Permitting Services.

A Preliminary Water Quality Plan for Cabin Branch (DPS File No. 207133) was submitted and reviewed in accordance with Section 59-D-1.3(i) and Article V of Chapter 19, and a Preliminary Water Quality Plan approval letter was issued for the project by DPS in June, 2003. Subsequent to this approval, each phase of the project was required to submit a Final Water Quality Plan for review and approval by DPS prior to Site Plan approval. These Final Water Quality Plan submissions revised relevant portions of the Preliminary Water Quality Plan to reflect proposed development conditions and ensure that the plans were in compliance with current stormwater management and sediment control requirements, as per by Chapter 19-64 (c). Submission to DPS of a Final Water Quality Plan for the Adventist Health Care portion of the Cabin Branch project would be consistent with DPS requirements in this regard and would meet DPS review requirements. In accordance with 19-23(b) and 19-23(c), DPS will not accept detailed sediment control plans for review until the Final Water Quality Plan has been approved, and DPS will not approved detailed sediment control plans until the Site Plan has been approved. If a determination is made that a revision to the Preliminary Water Quality Plan is necessary at this time, DPS can accommodate that review.

When the Hearing Examiner questioned Mr. Etheridge as to how the Council was to find that stormwater management complied with Chapter 19 of the Code, he replied, "I can only speak to DPS review process." Exhibit 122.

With these communications in hand, Mr. Frank Bossong, the Applicant's expert civil engineer, testified that both agencies had confirmed that stormwater management for the outlet center could be accommodated on the site. When asked the basis for his opinion, he testified (10/10/13 T. 53):

I think the confirmation, whether I shared them or not, was both DPS in, I guess its what you talked about earlier, the e-mails and the letters coming from, the letters coming from—or the letter that came 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 regard—from DPS's standpoint, from the executive branch, also confirmed that the preliminary water quality plan is acceptable and the details would 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.

When asked what had been submitted to each agency for their review, the following exchange occurred (10/10/13 T. 53-54):

MR. KLINE: And that's based on what submission to both agencies?
MR. BOSSONG: The DPA.

MR. KLINE: That's all, right?

MR. BOSSONG: Uh-huh...They already have it.

After Mr. Bossong's testimony, the Hearing Examiner received an e-mail from Mr. Rick Brush, Chief of the Division of Land Development of DPS, stating that DPS had *not* seen the development plan amendment and that revisions to the PWQP *would* be required (Exhibit 129):

You have asked questions of the Department of Permitting Services with respect to the Preliminary Water Quality Plan in the captioned matter. Typically, the Department of Permitting Services does not get involved in reviewing a plan at the development plan stage of the planning process until it is coordinated by the Planning Department with DPS. ***We have not been provided the amended development plan for review or any revisions to the stormwater concept plan. Therefore, we are not in a position to comment on whether stormwater can be adequately managed on-site as you have asked of us.***

In reviewing Section 19-65(a)(2)(B), it is apparent that recent law changes create some confusion in light of past practices. There have been significant stormwater law changes that now require Environmentally Sensitive Design for stormwater management to be included in the design of improvements. In fact, as a result of the Cross-Agency Streamlining efforts, the Department of Environmental Protection, the Department of Permitting Services and others are and will be reviewing current requirements in light of recent law changes. Nonetheless, at some point in the process, the stormwater concept plan will need to be revised to reflect the recent amendments to the stormwater management laws.

We understand that the Planning Department has confirmed that many elements of the existing Preliminary Water Quality Plan do not change. ***That said, and as indicated above, the stormwater concept plan will need to be revised and finalized during the development approval process which will need to be no later than the final water quality plan.*** (emphasis supplied).

Based on this record, the Hearing Examiner finds that DPS did *not* review the development plan amendment because Technical Staff had not provided it to them and because the Applicant had not submitted a revised PWQP reflecting the proposed development.

The Applicants pose several arguments that a revised PWQP is not required. They argue that the original 2003 PWQP (approved with LMA G-806) remains valid because of the "established practice" with regard to development approvals in Cabin Branch that does not require revision to the PWQP approved with the original zoning. Exhibit 120. Because the site has an approved Final Water Quality Plan (done for the road construction), amendments are made to that when each site plan receives approval. In addition, according to the Applicant, the

Code only requires a 2-step process—approval of the PWQP with the first development plan approval and approval of a FWQP at the second, citing Code section 19-65(b)(2). Thus, development changes occurring “mid-stream” (i.e., between the original development plan approval and site plan) do not necessitate updated stormwater management plans. Exhibit 132(a).

Finally, they argue that they have met the submission requirements for an amendment to the development plan because §59-D-1.3(i) because submission of a PWQP is not “relevant” to the Council’s decision. This is because, according to the Applicant, the amendment does not significantly affect the original approval and it is clear that stormwater management may be accommodated on the site. Exhibit 120. When asked why the Applicants do not simply amend the 2003 PWQP and eliminate the controversy, they respond that to do so is “pointless” because the exact location of the facilities are unknown until final design at site plan. 10/15/13 T. 70.

Mr. Bossong addressed both the contention that stormwater from the outlet center could be managed on the site and that the development plan amendment does not significantly affect the original approval. According to him, 81% of the entire 535-acre Cabin Branch neighborhood already has final water quality plan approval. 10/10/13 T. 37. He emphasized that the retail outlet center will not require changes in the Limits of Disturbance (LOD), thus eliminating the need to revisit protection of forest, wetlands, buffers and stream valleys. He stated that there was no change in the imperviousness of the site, and in fact, the imperviousness may be reduced, as this is calculated based on the Limits of Disturbance. At FWQP, he must define the drain sheds and design the ESD features for those drainage areas. He does not consider elimination of the ponds as requiring an amendment to the PWQP because the ESD facilities will be used in the same area. 10/10/13 T. 24-28, 53.

Further to this position, Mr. Bossong opined that a PWQP has two functions: 1) it sets forth the concept for how stormwater management can be accomplished on the site, and 2) it generally designates the areas where the features may be located to treat stormwater. He

testified that the actual stormwater facilities are not designed at the PWQP stage; design is deferred until approval of the FWQP at site plan. Therefore, the term “plan” does not mean specific locations of specific features; rather, it’s the conceptual foundation for the site design. Because it is conceptual, according to him, it need not be revised when the proposed development changes. T. 10/10/13 T. 10-11. Changes necessitated by different designs may be addressed at site plan, when the final design is known, although he agreed with the Hearing Examiner that PWQPs normally accompany other rezoning approvals. As a result, according to Mr. Bossong, the original PWQP remains in effect today. It does not specify any particular stormwater management features. He opined that in his experience, actual stormwater management features have never been shown on the development plan itself. 10/10/13 T. 20.

On cross-examination, Mr. Bossong acknowledged that while the locations of the treatment facilities will not be changed, the types of facilities used will be different. 10/10/13 T. 29. When queried further by the Hearing Examiner, Mr. Bossong stated that some conditions listed in the Planning Board’s approval are no longer relevant and stormwater management will have to be handled differently along the roadways. 10/10/13 T. 66-69.

When asked on cross-examination whether Mr. Bossong had “thought about” how stormwater management would be handled for the outlet center, the following exchange occurred:

The open space area will have stormwater management facilities. I think it’s part of the amphitheater, so it would be accommodated as part of the amphitheater. Environmental site design to the Maximum Extent Practical (MEP) will be infiltrated throughout Area A.

He also testified that he “looked at” the possibility of using parking lot islands, where he can use micro-bio retention facilities and bio-facilities. Pavement may also be used for these items. Micro-bio retention facilities can go between buildings, bio-swales may be located along the roads. According to him, these are “no different” than the types of facilities contemplated in the original PWQP, they will just be shifted around. 10/10/13 T. 24-25.

When asked whether the reconfigured building layout for the outlet center affected the way he would address stormwater management, he responded:

MR. BOSSONG: I'm going to provide water quality measures for the layout at the time of site plan, yes.

MR. KLINE: There are going to be different configurations of what was conceived in the PWQP?

MR. BOSSONG: Yes, that's what you do at site plan.

Mr. Bossong reiterated that the Applicants were not making any changes to the PWQP because they are unnecessary as long as the buildable envelope doesn't change. According to him, the major issues such as sediment controls, steep slopes, and forest conservation are not changing. 10/10/13 T. 63-64.

Those in opposition assert the Applicants must amend their PWQP approval because it is clearly required by the law, the proposed development is not grandfathered under pre-2007 stormwater management regulations, the 2003 PWQP shows facilities that are not longer by-right, the proposed development is not reflected on the current PWQP, and because the law's intent is to take the new stormwater regulations into account early in the design process for a development. Exhibits 135, 136, 137, 140.

According to them, the State's stormwater management manual reiterates that stormwater management and water quality design must be addressed in the early stages of site design. Those in opposition note that current stormwater regulations, or ESD strategies, rely on "integrating site design, natural hydrology, and smaller controls to capture and treat runoff." Exhibit 124, p. 5.1. In order to utilize ESD to the Maximum Extent Practical, an applicant must demonstrate that "all reasonable opportunities for meeting stormwater requirements using ESD have been exhausted by using natural areas and landscape features to manage runoff from impervious surfaces and that structural BMPs [Best Management Practices] have been used only where absolutely necessary." *Id.* Thus, plan review should occur throughout the process, including the conceptual plan stage because, "[w]hen strategies for reducing imperviousness and

protecting natural resources are combined with design options that distribute ESD practices throughout a site, the resulting plans will provide an effective means to address stormwater requirements at the source.” *Id.* at 5.9.

Thus, those in opposition argue, the “PWQP is no longer valid because it was designed for a different use and different configuration of buildings and is not grandfathered.” Exhibit 140, p. 8. Therefore, according to them, the process is the “reverse of what the Stormwater Management Act of 2007 and Chapter 19 of the Code intended.” *Id.* (emphasis in original). Without an approved PWQP reflecting the proposed development, those in opposition believe that the Applicants have not “demonstrated that it is utilizing ESDs to the maximum extent practicable.” *Id.* (emphasis in original).

2. Preliminary Forest Conservation Plan (PFCP)

Those in opposition raised similar concerns regarding the continuing validity of the PFCP for the property, also approved in conjunction with LMA G-806 in 2003.

Mr. Unterberg qualified as an expert in landscape architecture. He opined that the 2003 PFCP remains valid. While the stormwater management ponds are shown on the forest conservation plan, the two plans are for different purposes. According to him, the forest conservation plan shows the area that may be developed, what trees are protected, and then what trees are to be planted. In his opinion, most forest conservation plans do not show the specific development that will occur on the property, but only define developable area. Thus, the requirements are based on the limits of disturbance, what trees must be removed, and what trees will be used to meet afforestation requirements. 9/6/13 T. 74-76.

He testified that a preliminary forest conservation plan was approved with the original development plan in 2003. A final forest conservation plan for the entire Cabin Branch property was approved on May 2, 2013. This application does not vary the limits of disturbance approved in the final forest conservation plan for the Cabin John property. 9/6/13 T. 76-78. He testified that the areas impacted by the amendment will be further updated at site plan approval in order

to determine where forest plantings and tree save areas will be located. 9/6/13 T. 81. These updates will be minor—99% of the work has been completed. As site plans move forward for the different areas, there may be perimeter updates that the Planning Board must approved, but these must comply with the overall plan requirements. As a result, he opined, if you subtracted forest in one location, it would have to be reconciled with the final forest conservation plan. The majority of planting areas have been identified. At site plan, they may identify additional planting areas or may be able to calculate the credit for street trees. The majority of the plantings, however, are within the stream valley. 9/6/13 T. 82-83. He noted that the Final Forest Conservation Plan approved with the infrastructure site plan has been updated several times and that has been the methodology used at Cabin Branch. 9/6/13 T. 84-85.

Technical Staff concluded that the development plan amendment complied with the County's Forest Conservation Law (Chapter 22A of the Montgomery County Code) as well as M-NCPPC's environmental guidelines, although they acknowledge that some changes will be necessary due to the elimination of the dry ponds. Once again, they relied on the procedure used for the overall development of the Cabin Branch neighborhood and deferred any changes to site plan. Exhibit 50, p. 31.

G. Transportation and Public Facilities

Mr. Chris Turnbull, the Applicants' expert transportation engineer, opined that the specialty retail will generate fewer weekday peak hour trips than anticipated in the analysis for the 2008 preliminary plan approval. He advised that current traffic conditions at critical intersections operated well below the maximum of 1,425 CLV. To prepare the analysis, his firm then added pipeline development to the existing traffic counts, netted out the traffic from the previously approved medical facility, and factored in trips attributable to the premium outlets. Based on this analysis, he opined that the specialty retail would generate approximately 10% fewer weekday peak hour trips than the former proposed use. All critical intersections, in his opinion, will operate below the CLV standard. The intersections studied on the eastern side of

the original site will perform better under the development plan amendment than project for the original development plan. This is due to the decrease in trips because of the outlet center's regional draw—more trips will be coming from I-270. 8/12/13 T. 63-65.

Mr. Turnbull testified that his firm performed a supplemental traffic analysis to study the impact of peak hour traffic during a Saturday. While the Saturday p.m. peak hour trips increase from 700 trips (in the 2003 development plan) to 1,900 trips for the proposed development, the total number of trips from the project will decrease by 6% throughout the day on Saturdays, according to him. He advised that the peak hour on Saturday is between 11:00 a.m. and 2:00 p.m. His analysis showed that the typical weekday p.m. peak hour was the most critical time period because office, retail and residential trips all occur at that time. 8/12/13 T. 66.

For the Saturday analysis, Mr. Turnbull opined that the most critical intersection is the I-270 northbound on and off ramp. This had a total CLV of 1,203 in the a.m. and 1,300 CLV in the p.m. The CLV in the intersections further west of that decreased. 8/12/13 T. 67.

In his opinion, traffic generated by the development plan amendment will meet all of the County's transportation standards and will not create an adverse impact on the surrounding road network. The development plan amendment will generate fewer peak hour trips than has been previously approved for the project. 8/12/13 T. 68.

Staff advises that the subject property is currently served by public water and sewer. According to Staff, various plans have been approved by The Washington Suburban Sanitary Commission (WSSC) "as part of the overall development of the Cabin Branch community. The 2005 Facility Plan required by the WSSC include a sewer outfall, water and sewer lines, and a water tower. Exhibit 50, p. 28; Exhibit 55.

H. The Concerns of the Community

Opinions expressed by the community fall into three basic camps. The Hearing Examiner received many letters supporting the project because it will provide shopping and other amenities, such as restaurants, to the Clarksburg area. These letters expressed frustration with

delayed development of Clarksburg. Several noted that this project could deliver these amenities faster than others because the I-270/Clarksburg Road interchange is ready to proceed and would not have an impact on the environmentally sensitive 10-Mile Creek. Exhibits 36, 38(a)-(qqq), 78(a)-(d), 54, 112(a)-(j).

Ms. Kathy Hulley testified that, in her view, people have no reason now to go to Clarksburg because the Town Center is no longer going to be what was promised in the Master Plan. Originally, the Town Center was to have been developed first rather than Clarksburg Village. Thus, the original vision of the master plan has changed significantly. In her opinion, this needs to go forward now because the Germantown master plan has recommended so much commercial. According to her, if this development does not go forward, then Clarksburg will be left in limbo again. In addition, this development is necessary for the I-270 interchange to move forward. 7/29/13 T. 45-46.

Mr. Michael Knapp, former Council member for the area, testified that Clarksburg has “struggled” to achieve the Master Plan’s and the communities’ vision of a mixed-use village where residents can work, shop and play. He stated that infrastructure, housing, and retail development have taken much longer to achieve the critical mass needed to sustain the community. He expressed concern that limiting funding for the city’s transit way to extend only to Watkins Mill will further delay achievement of the goal to create employment centers along I-270. In his opinion, a major retail facility in Clarksburg will stimulate other employment growth and, at the same time, provide services and amenities to the residents. 7/29/13 T. 77-78.

According to Mr. Knapp, approval of the development plan amendment will not detract from retail in the Town Center; rather, he believes that it will serve as a catalyst for other types of development in the Town Center. He expressed concern that development in Gaithersburg, Urbana and Frederick will cause commercial development to “leap frog” over Clarksburg.

Mr. David Flanagan, developer of the Town Center neighborhood center and Clarksburg Village, submitted a letter supporting the DPA provided it did not include a grocery store. Mr.

Flanagan believes that the outlet center will generate economic activity and bring new shoppers to the Clarksburg Area. Exhibit 37.

Others oppose the development because, in their view, its competing uses will negatively impact the Historic District and development of the Town Center in general. Exhibit 46(a)-(e), 47. Many of the latter support the competing outlet center proposed on the Miles-Coppola property because that development will provide infrastructure, such as Observation Drive and public sewer connections, necessary for the Town Center and the Historic District in particular.

Mr. Paul Whit Cobb testified that he owns a small commercial property in the Historic District within the Clarksburg Town Center. He opposes the development plan amendment because it would “effectively move the heart of Clarksburg across Interstate 270.” 8/14/13 T. 168. For this reason, he believes that it will fundamentally alter the Master Plan’s vision for Clarksburg.

According to Mr. Cobb, the Historic District is located along Md. Route 355 and is one of the County’s oldest and most significant early communities. There are a several 19th and early 20th century buildings within the District, including the Gardner House, owned by him and his wife. The Historic District now contains only a few businesses that have struggled due to the lack of activity in the area. 8/14/13 T. 168-169.

He believes that the development plan amendment contravenes the intent of the Master Plan for two reasons. First, it shifts the focal point of Clarksburg from the Town Center (including the Historic District) to the Cabin Branch neighborhood. Second, it quadruples the amount of retail recommended for the Cabin Branch community. 8/14/13 T. 169.

He testified that the central vision of the Master Plan was to create a Town Center that would be a strong, central focus for the entire study area. The Town Center area contains 635 acres that was planned to include the Historic District, a neighborhood retail east of the Historic District, and commercial and residential development west of the Historic District along I-270. The Peterson Companies are proposing their retail development within the latter area. Thus, the

Town Center is much larger than the relatively small neighborhood retail center that will have a grocery store. He does not believe it appropriate to consider the Cabin Branch neighborhood to be part of the Town Center. 8/14/13 T. 170.

Mr. Cobb believes that the Master Plan intended to have a mix of retail, civic and transportation uses within the Town Center. The development plan amendment, however, will establish competing uses across I-270. If approved, he believes that the goal of making the Town Center the focal point of the area will be unlikely, if not impossible. According to him, nothing in the Plan contemplates a large regional retail center on the west side of I-270 that supplants the central focus for the Clarksburg area. 8/14/13 T. 171.

In addition, the outlet proposed for Cabin Branch does not support the Town Center in any way. Amenities within the outlet center will not be within walking distance of the Town Center. He does not think it credible or intuitive that a regional outlet mall on the other side of an interstate, a mile from the Town Center, will draw people into the Town Center. In his opinion, it will instead draw people out of the Town Center and into the Cabin Branch neighborhood, leaving development scattered on the fringes of Clarksburg. People will get off the interstate to shop and then will get right back on. If implemented, he thinks the outlet center will severely limit the amenities available in the Town Center and the Historic District. 8/14/13 T. 172.

Ms. Elizabeth Buffington, who owns a restaurant within the Historic District, testified she supports the plan proposed by Elm Street Development, an owner of land within the Town Center, which would create a walkable development connecting the historic district, a grocery store mall, and the Peterson property, adjacent to the historic district. According to her, the Peterson project will bring sewer to the historic district, which now has many failing septic systems polluting Ten Mile Creek. She believes that if this development is approved, the Peterson project will not go forward and the infrastructure needed by the Historic District will not come to fruition. She also expressed concern that the transit station and by-pass of the Historic District, partially funded by Peterson, will never be developed because there is not sufficient

retail demand for two outlet centers. In her opinion, the Peterson outlet center is preferable to this because it will result in a walkable Town Center, provide needed infrastructure for public water and sewer, and assist with development of the transportation center. She believes that approval of the Cabin Branch outlet center will marginalize the Historic District. 7/29/13 T. 52-54.

The final category consist of letters received from employees of Adventist Health Care, Inc., urging approval of the application so that Adventist may focus its resources on health care rather than funding road improvements it will not use. Exhibits 28, 29, 30(a)-(c), 33, 34(a)-(d), 35, 53.

IV. SUMMARY OF THE HEARING

The Applicant presented five expert witnesses: Mr. Gary Unterberg (land planner), Mr. Leonard Bogorad, a market and fiscal impact analyst, Mr. Chris Turnbull, a transportation engineer, Mr. Kris Hughes, III, a civil engineer, and Mr. Frank Bossong, IV, also a civil engineer. In addition, Ms. Marilyn Balcom testified on behalf of the Gaithersburg/Germantown Chamber of Commerce. Two expert land planners, Mr. James Noonan and Mr. Mark Ferguson, appeared on behalf of Mr. Cobb and The Peterson Companies, respectively. Several individual witnesses testified both in support and opposition to the application. This testimony is set forth in this Report where relevant and summarized in total in Appendix B, attached hereto and incorporated here.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standards for Council Review

Sections 59-D-1.61 and 59-D-1.7 of the Zoning Ordinance require the District Council, before it approves any application for re-zoning to a Planned Development (PD) Zone or an amendment to a previously approved development plan in a PD Zone, to consider whether the application, including the development plan, fulfils the "purposes and requirements" set forth in

Code Section 59-C for the PD zone.¹⁶ In making this determination, the law expressly requires the District Council to make five specific findings, “in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification.” Therefore, these findings are an essential part of the Hearing Examiner’s Report and Recommendation.

The five specific findings required by §59-D-1.61 the Zoning Code are:

(a) [That t]he zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. [The remaining language of this provision addresses height and density issues not at issue in this case; it is therefore not quoted here.]

(b) That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

(c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

(d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings (especially in subsection (b)), a determination that the five findings have been satisfied would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As

¹⁶ The standards for review of a proposed development plan amendment are similar to those for a rezoning application, where, as here, a public hearing is required, because Zoning Ordinance §59-D-1.7(d)(2) directs OZAH to compile the record “in the same manner as the record is compiled for a local map amendment application.”

stated in the State Zoning Enabling Act applicable to the County, all zoning power must be exercised to:

(1) guide and accomplish a coordinated, comprehensive, adjusted, and systematic development of the regional district;

(2) coordinate and adjust the development of the regional district with public and private development of other parts of the State and of the District of Columbia; and

(3) protect and promote the public health, safety, and welfare. Md. Land Use Article Code Ann., § 21-101(a)(4)(i).

In sum, there are six findings required (§59-D-1.61(a) through (e) and the public interest).

B. The Miles-Coppola Property

Before delving into the issues of this case, the Hearing Examiner clarifies what *is not* the issue—this case is not a choice between two competing outlet centers, as suggested by some of the individuals testifying against the application. The sole question before the Council is whether this proposed development plan amendment meets the criteria for approval in §59-D of the Zoning Ordinance and whether it serves the public interest. Whether a competing use on a different property would serve the public better is beyond the scope of a development plan amendment and is more appropriately reserved for an amendment to the Master Plan.¹⁷ While the Peterson Companies assert that the 10-Mile Creek Limited Amendment solidifies this competing use as a real possibility, the Limited Amendment has not been adopted nor is the project's timing certain. Because the relative benefits of the proposed use on this or another property is not properly the subject of a development plan amendment, the Hearing Examiner does not consider it.

C. Substantial Compliance with the Master Plan and Other Plans and Policies

As pointed out by the opposition, Section 59-D-1.3 Zoning Ordinance requires the Applicant to show that it complies with the use and density recommended in the Master Plan,

¹⁷ Because the Hearing Examiner finds that the DPA substantially complies with the Master Plan, she is not recommending that the Council remand the DPA until an amendment to the Master Plan is completed. Should the Council disagree, however, this would be the appropriate avenue for weighing the benefits of the two competing outlet centers.

and that it does not conflict with the general plan, capital improvement program, and other County plans and policies. The MXPZ Zone also requires this. Section 59-C-7.5 of the Zoning Ordinance states:

“it is intended that this zoning category 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 than may be possible under other zoning categories*. The specific purposes of this zone are:

(a) To establish standards and procedures through which the land use objectives and guidelines of approved and adopted master or sector plans can serve as the basis for evaluating an individual multi-use center development proposal. (emphasis supplied).

To be approved, property must be designated for MXPZ Zoning in the Master Plan. Residential and commercial densities must be “compatible with” the densities recommended in the Plan. *Montgomery County Zoning Ordinance*, §§ 59-C-7.53, 59-C-7.54..

The question here is how much flexibility should be read into a Plan that both supporters and opponents believe is partially outdated. In particular, the parties agree that current office market will not support the large amount of office uses recommended for Clarksburg in the 1994 Plan, a fact recognized by the Planning Board in the 10-Mile Creek Limited Amendment. 10-Mile Creek Limited Amendment, p. 3. In Maryland, master plans in zoning cases are treated as flexible guides in zoning cases unless a statute elevates them to the status of a regulatory device, which is not the case here. *The Maryland National Capital Park and Planning Commission v. Greater Baden-Aquasco Citizens Association*, 412 Md. 73, 98 (2009).¹⁸

¹⁸ Precisely what is meant by the term “substantial compliance” or “consistent with” in the context of master plans has been the subject of both litigation and legislation. In *Trail v. Terrapin Run*, 403 Md. 523, 548, 569 and 573-574; 943 A.2d 1192 (2008), the Maryland Court of Appeals held that legislative words such as “conform to” a master plan and “consistent with” a master plan were intended to convey the concept of being generally “in harmony with” the master plan, unless the legislation specified otherwise. Subsequently, the Maryland legislature enacted the *Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009*, effective July 1, 2009. That Act amended Md. Ann. Code Art. 66B, § 1.02, in an attempt to define the term “consistent with” to strengthen master plan impact on land use; however, by its terms, the statute does not apply to development plan amendments because they do not constitute an “action” under the legislation. The Hearing Examiner thus concludes that that 2009 legislation does not apply to the instant rezoning application.

As Technical Staff points out, the Master Plan itself recognizes that “circumstances will change following adoption of a plan and ... the specifics of a master plan may become less relevant over time.” Exhibit 50, p. 19; *Plan*, p. vii. The Hearing Examiner notes that the 2011 Limited Amendment to the Master Plan expressly reaffirmed the 10 key policies in the 1994 Plan for guiding development in Clarksburg, but did not explicitly reaffirm compliance with all of its specific recommendations for the different neighborhoods.

The Hearing Examiner finds that the DPA does further the two primary goals of the Master Plan at issue here—preservation of locations for large office developments, and perhaps more importantly, the core goal of protecting the viability of the Town Center as the community focus for the entire area. She is persuaded by the extensive testimony of Mr. Bogorad that more office development will occur with the outlet center than without it, and the mix of uses in the DPA is needed to ensure that the Plan’s goal for an I-270 office corridor is realized, despite the possibility that this goal may not be completely fulfilled for another 20 years.

The critical question is whether development of the outlet center in Cabin Branch will usurp the function of the Town Center District as the center of the larger Clarksburg community. The Hearing Examiner agrees with Mr. Noonan that the Plan prioritizes development of the Town Center as the center of community activity for the Clarksburg study area and not solely the Town Center District. The central role of the Town Center in the development of Clarksburg is reinforced in many places in the Plan. These include the desire that the Historic District continue its historic function as the center for community life, to concentrate civic uses there, to locate a transit stop there, and to prioritize its development as a model for community identity. When the Planning Board considered staging priorities, it rejected prioritizing employment locations in favor of creating community identity in the Town Center that could be modeled in other neighborhoods. This priority, however, applied to the Historic District and properties to the east. The Plan considers both the Miles-Coppola property and Cabin Branch neighborhood as employment sites, reflected in the fact that they are placed in Stage IV and Stage III, respectively.

The Hearing Examiner finds from the evidence that the regional outlet center will *not* usurp the central function of the Town Center. Perhaps an unexpected victim of its own hyperbole, the Hearing Examiner understands how the “place-making” claims of the Applicants could insight fears of individuals with interests in the Historic District. Yet, the expert testimony in this case weighs in favor of the Applicants. While Mr. Noonan testified that simply having night-time activities such as restaurants, entertainment, and civic uses (such as the amphitheater) usurped the Town Center’s central role, Mr. Bogorad testified that the retail in the outlet center would not compete with the type of retail contained in the Town Center neighborhood center or the “infill” retail in the Historic District. There is no expert evidence that the retail outlet center precludes other civic and community building uses that may create a community identity in the Town Center, such as a library or a farmer’s market. Rather than harming the Town Center District, both Mr. Bogorad and Mr. Flanagan agree that the retail outlet will also generate activity in the Town Center for those looking for a different type of retail experience and from employees of the center. More importantly, she is persuaded by Mr. Bogorad’s testimony that there is insufficient demand for three full-service grocery stores in Clarksburg. Therefore, the DPA benefits the Town Center District by ensuring a viable neighborhood center.

The Hearing Examiner finds that the DPA may not strictly comply with every aspect of the 10 key policies governing the Plan or the specific recommendations for each neighborhood. She finds from the evidence that neighborhood-serving retail, other than uses that overlap with the outlet center, such as chain restaurants, may not occur either in the amounts or at the type of “core” location envisioned by the Plan. Thus, as posited by Mr. Noonan, Cabin Branch residents may have to travel to other Clarksburg neighborhoods to reach these services for the near future. A single core location for neighborhood-serving retail, however, is only one aspect of Policy 7, the “Pedestrian- and Transit-Oriented Neighborhood.” Although reduction of neighborhood retail in Cabin Branch may not strictly comply with this single aspect of Policy 7, the DPA does incorporate other pedestrian- and transit- oriented goals of the neighborhood, such connected

streets, bikeways, and paths to further reduce reliance on the automobile and will include bus routes to connect Cabin Branch to other areas. Further, while the “core” may not include the full array of typical neighborhood retail uses, the “neighborhood core” of the DPA contains activities that also achieve community identity, as described by Mr. Unterberg. The “linear” core along Well Spring Avenue include some neighborhood retail uses as well as civic uses and gathering places, such as the greenway and the amphitheater that may achieve the community building goals of the Plan.

Even more important, however, the Hearing Examiner finds persuasive Mr. Bogorad’s testimony that the reduction of neighborhood retail will protect the viability of the Town Center neighborhood center, which is clearly one of the central goals of the Plan. To protect the viability of the Town Center, some modification of Policy 7 and the specific recommendations for the Cabin Branch neighborhood, furthers this core goal of the Plan.

As to the requirement in 59-D-1.61(a) that the DPA comply with the land uses and densities recommended by the Plan, the Hearing Examiner agrees with Technical Staff and the Planning Board that the DPA meets this standard because the overall density of the project (i.e., 2.42 million square feet) remains the same and the residential uses have not changed. Nor does she find the torturous exercise undertaken by Technical Staff regarding what is considered employment, office and retail, necessary to make this finding. The DPA preserves 1.936 million square feet of office space, an amount that not may be fully developed for 20 years. While difficult to comprehend at first glance because of the large amount of retail proposed, the DPA changes only a minor portion of the total commercial square footage recommended for Cabin Branch because of the sheer size of the development envisioned by the Plan. She agrees with Technical Staff that the Plan did not intend to prohibit additional retail, although the original development plan did do so. It is somewhat speculative that the Plan envisioned 2.4 million square feet of office on 283.5 acres to be served solely by a single neighborhood center, especially considering that the Plan’s recommended zoning permits up to 20% retail and the

Council's Resolution approving the original application referenced 10% of additional retail uses. Rather, the Hearing Examiner interprets the Plan's recommendation for 120,000 square feet of neighborhood retail as the tool used to ensure a viable neighborhood focal point, as that was the "building block" used in the different Clarksburg neighborhoods to create community identity. While this DPA alters the tool somewhat in Cabin Branch, it offers a different building block in the form of gathering places, civic uses and neighborhood retail to achieve the same result. At the same time, the DPA preserves one of the Plan's core goals to protect the neighborhood retail in the Town Center. Given the purpose of the MXPD Zone to encourage comprehensively planned multi-use centers (see, §59-C-7.50(b)), she agrees with Technical Staff and the Planning Board that the Plan's mandate for 120,000 square feet of neighborhood retail does not prohibit other retail.

The Hearing Examiner does not agree with the Applicants that the Master Plan's call for 120,000 square feet of neighborhood retail was a result of the property's RMX-1 base zoning. There is simply no basis in the Plan for such an assumption. Instead, she agrees with Mr. Noonan's testimony that the Cabin Branch neighborhood is structured very similarly to Clarksburg Village, which is not zoned RMX-1. Instead, she finds that this is another illustration that the Plan used neighborhood retail centers as the tool to build community identity in each neighborhood. While this DPA may not use that specific tool, the Applicants' have adequately demonstrated that the combination of some neighborhood retail combined with civic uses provides a different tool to achieve the same result.

Aside from substantial compliance with the relevant master plan, the Applicants must also show that the DPA does not conflict with the General Plan, the Capital Improvements program or the Adequate Public Facilities Ordinance.

Other than Master Plan compliance, none of the parties contend that the DPA conflicts with these other County plans and policies. Evidence demonstrates that road improvements will be privately funded and that the DPA has a valid preliminary plan approval. Mr. Chris Turnbull,

the Applicants' expert traffic engineer, presented a traffic report and supplemental analysis for weekend traffic indicating that traffic generated by the development will not exceed congestion levels for the policy area nor will it exceed the number of trips approved in the preliminary plan. For these reasons, the Hearing Examiner finds that the DPA will not conflict with the General Plan, the Capital Improvements program, or other County policies. Staff advises the 2005 Facility Plan required by WSSC to bring water and sewer to the site is being implemented. Exhibit 25.

E. Purposes and Standards of the MXPB Zone

1. Purposes of the MXPB Zone

The Hearing Examiner finds that the DPA fulfills the purposes of the MXPB Zone, will provide for the maximum safety, convenience, and amenity of the residents of the development and will be compatible with adjacent development. The first purpose of the MXPB Zone is:

(a) To establish standards and procedures through which the land use objectives and guidelines of approved and adopted master or sector plans can serve as the basis for evaluating an individual multi-use center development proposal.

As described above, the Hearing Examiner finds that the DPA substantially complies with the Master Plan.

(b) To encourage orderly, staged development of large-scale, comprehensively planned, multi-use centers by providing procedures for the submission of a concept plan for an entire site and subsequent development plans for each stage of development, as identified on the concept plan.

Staff advises that the Applicants chose not to utilize a concept plan. Nevertheless, they did opt to develop the site cooperatively with other owners in the Cabin Branch neighborhood and have shown the entire neighborhood on the development plan amendment to demonstrate the coordination of development on the subject property with the balance of the neighborhood.

(c) To provide, where appropriate, higher density residential uses integrated into the overall multi-use center.

The DPA locates two multi-family nodes and senior units in Area B in close proximity to the neighborhood retail and civic uses along Well Spring Avenue. Multi-family nodes are also

located in Area C close to open space and potential neighborhood retail in Area C. The Applicants presented testimony that bus routes will link different areas of the neighborhood and provide a link to the Town Center retail. For these reasons, the Hearing Examiner finds that this purpose of the MXPB Zone has been met.

(d) To ensure internal compatibility of residential and nonresidential 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.

(e) To assure compatibility of the proposed land uses with surrounding uses by incorporating higher standards of land planning and site design than could be accomplished under conventional zoning categories.

Technical Staff found that the DPA fulfilled both of the above purposes because it includes a variety of uses that will transform the entire Cabin Branch community “into a place that offers a pleasant and enriching environment for living, working, socializing and relaxing.” Exhibit 50, p. 21. The Hearing Examiner finds that these purposes have been met because the DPA provides automobile and pedestrian connectivity between all of the uses, it incorporates civic amenities such as greenways and an amphitheater into the commercial uses, and transitions from more intense development close to I-270 to residential townhouse and single-family homes toward the western edge of the property along Cabin Branch Avenue.

(f) To encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial/industrial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation, and social activity. It is also intended that open space and amenities be located so as to achieve the physical and aesthetic integration of the uses and activities within each development. In addition, structured parking within mixed-use planned developments is encouraged to help achieve the open space and amenities objectives of the zone. Where surface parking is necessary, the purposes of this zone may be achieved by the provision of additional landscaping.

According to Technical Staff, this purpose has been fulfilled because the DPA takes advantage of its location near Black Hill Regional Park and provides linkages between the park and the office component. Staff also points to the physical and visual connections to the stream valleys throughout the larger neighborhood, which include parks, trails, and open spaces

between buildings. These connections, along with the fact that parking is landscaped and designed in a manner sensitive to topography and natural features, also led Staff to conclude that the DPA is compatible with surrounding uses. Exhibit 60, p. 21. Having no evidence to the contrary, the Hearing Examiner so finds.

(g) To encourage and provide for the development of comprehensive non-vehicular circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and industrial areas and public facilities.

The Hearing Examiner agrees with Technical Staff that the interconnected street system streets designed for pedestrians and the network of bike paths and trails connecting different areas with each other as well as parks, greenways, bike paths, and natural features fulfills this purpose. *Id.*

(h) To encourage and provide for efficient use of energy resources through shared facilities or other economies of scale or technology, including innovative fuels and district heating, etc.

Staff reports that the Applicants are aware of this purpose clause and have agreed to explore measures to satisfy its requirements. No parties have asserted that the DPA fails to meet this requirement. Based on this evidence, the Hearing Examiner finds that this purpose of the MXP Zone has been met.

(i) To preserve and take the greatest possible aesthetic advantage of existing trees and to minimize the amount of grading necessary for construction of a development.

Technical Staff concluded that this requirement had been met because the DPA conforms to all Forest Conservation Plan, Water Quality Plan and Stormwater Management approvals, which were approved for the overall development of the Cabin Branch community. *Id.* at 22. The Hearing Examiner disagrees with this conclusion as to stormwater management for the reasons stated below.

2. Standards of the MXP Zone

No one contends that the DPA fails to meet the development standards of the MXP Zone. Staff concluded that the DPA meets those development standards and sets them out in

detail in the Technical Staff Report and its Supplemental Staff Report. Exhibits 50, 52. The issue of stormwater management is discussed under the requirements for approval of a development plan, below.

F. Safety and Efficiency of Access

The third finding necessary for approval of a development is:

- (c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

Technical Staff reports that the Applicants' traffic study indicates that the approval of the DPA will not adversely affect the surrounding area roadway. The testimony of the Applicants' traffic engineer supports this conclusion. Staff further concluded that the site access, internal circulation and pedestrian facilities shown in the DPA are adequate and safe. Exhibit 50, p. 28. The Hearing Examiner finds that this standard has been met.

G. Environmental Approvals

1. Stormwater Management

In order to approve a development plan amendment, the Council must find:

- (d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

Other than Master Plan compliance, this is the most controversial debate among the parties. Based on the testimony and evidence submitted, the Hearing Examiner finds that a PWQP for the entire site was approved in 2003 and a Final Water Quality Plan associated with the infrastructure site plan was approved in 2008. The administrative practice in Cabin Branch has been to update the FWQP for infrastructure as site plans were approved for the residential development. Apparently under the impression that this administrative practice obviated the need to revise the PWQP for a development plan amendment, the Applicants did not prepare a

revised PWQP reflecting the proposed use nor did Technical Staff forward the DPA for review by DPS. DPS indicates that revisions to the 2003 PWQP will be required.

The Applicants and Technical Staff assert that the administrative practice used for Cabin Branch is a sufficient water quality review for a development plan amendment in a special protection area. First, the argument goes, it is impossible to comply with the requirement because the exact design of the new ESD stormwater treatment facilities are not known until the final design at site plan. Second, the PWQP remains valid because most of what was approved in the 2003 PWQP remains the same, such as the limits of disturbance for the site. They do acknowledge, however, that the 2003 PWPQ does not reflect the buildings or design of the DPA, that some of the conditions of approval need to change, and that some stormwater facilities called for in the original approval are likely to change as well. Despite this, both Technical Staff and the Applicants assert that there is ample room on the site to accommodate ESD facilities, particularly because there will be additional green area. Thus, according to the Applicants, compliance with the requirements is "pointless." 10/15/13 T. 70.

Those in opposition argue that the administrative practice used for Cabin Branch does not satisfy the explicit requirements of the law, nor does it meet the intent of the law. They believe that an administrative practice cannot override the law's requirements and negates the law's intent to incorporate stormwater management into the initial design of new development to ensure that the new stormwater management standards may be met.

The Hearing Examiner agrees with those in opposition that the administrative practice used for Cabin Branch does not satisfy the water quality regulations applicable to the DPA. The opposition correctly points out that Maryland courts instruct that an administrative practice cannot substitute for what is otherwise required by law. *County Council of Prince George's County v. Billings*, 420 Md. 84, 103 (2011) ("when a statutory provision is entirely clear, with no ambiguity whatsoever, 'administrative constructions, no matter how well entrenched, are not given weight.' (quoting, *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 69 (1999),

quoting, *Macke Co. v. Comptroller*, 302 Md. 18, 22-23, 485 A.2d 254, 257 (1984)). Agencies must follow their own rules of procedure. *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 503 (2003) (“[A]n agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances and when it fails to do so, its actions will be vacated and the matter remanded. This [rule] is consistent with Maryland’s body of administrative law, which generally holds that an agency should not violate its own rules and regulations”).

The Zoning Ordinance requires an applicant to submit all “relevant” information required for an original development plan. It also requires the Council to find that all requirements of Chapter 19 of the Code will be met. Executive Regulations implementing Chapter 19 specifically require a revised PWQP for a development plan amendment. Thus, reading the Zoning Ordinance and Chapter 19 together, a revised water quality plan is “relevant” to a development plan amendment, at least where the amendment significantly changes the building layout and design of the original development plan. The Hearing Examiner agrees with the opposition that the intent of the new stormwater regulations is to incorporate stormwater management in the initial design of projects. As the outlet center is designed differently than the hospital and medical offices previously approved, and because the facilities shown on the PWQP are outdated, there should have been some higher level of analysis as to how stormwater for this particular use would be treated other than simply to assert there is sufficient room for ESD facilities. Further, when the concept occurs at the beginning of the process, Council has a development concept before it that incorporates current stormwater management requirements.

While in some circumstances an agency’s interpretation of a statute is entitled to great weight, see, e.g., *Comptroller of the Treasury v. John C. Louis Co.*, 285 Md. 527 (1979), the Hearing Examiner does not find those circumstances present here. First, there is no long-standing agency interpretation applicable to this case. Other areas of the Cabin Branch neighborhood are distinguishable from the DPA here because in the other areas the site plan

approvals are consistent with the initial approval (i.e., either the 2003 DPA or the initial approval for the RMX-1 zone properties), thus meeting the two-step process in the Code. The difference here is that the development proposed is *inconsistent* with the initial approval, triggering the requirements for review of water quality in special protection areas.

Second, the two lead agencies responsible for administration of the statute disagree on whether the 2003 preliminary plan remains valid. Technical Staff asserts that it does; DPS indicates that changes will be required, although it cannot determine the extent of those changes because it has not reviewed the amended development plan. Thus, there is no coordinated agency agreement that would constitute a “long-standing” interpretation.

Reassurances from the Applicants and Technical Staff that there is sufficient room on the site to accommodate ESD facilities could possibly have sufficed as substantial compliance with the requirements had DPS reviewed the DPA. As noted, the Planning Board has jurisdiction over determining the limits of disturbance and protection of natural features. This is the aspect of the PWQP that has not changed, at least at this point. DPS, however, is the lead agency for approving the stormwater management concept plan. That agency indicates that it cannot answer how stormwater management will be handled on the site. As Mr. Bossong cannot answer the question either, other than to say that the Applicants will comply with the stormwater regulations at site plan and that the general locations of the facilities will not change, the Hearing Examiner finds that the Applicants must comply with the plain requirements of the Zoning Ordinance and Chapter 19.

Given that both Technical Staff and Mr. Bossong believe that there is enough room on the site to accommodate stormwater management without significantly changing the development concept shown, and having no expert evidence to the contrary, the Hearing Examiner finds it appropriate to require a revision to the 2003 PWQP as a condition of approval, rather than remanding the application until the 2003 PWQP is actually approved. Taking the

Applicants at their word that revisions to the PWQP are minor, the Hearing Examiner recommends the following condition of approving the development plan amendment:

The Applicants must submit a revised Preliminary Water Quality Plan (PWQP) in accordance with Chapter 19 of the Montgomery County Code that reflects the development plan approved in this case (Exhibit 132(c)). If the revised PWQP necessitates any changes to the development plan amendment that are inconsistent with the approved plans, the Applicants must seek a further development plan amendment to effectuate those changes.¹⁹

2. Preliminary Forest Conservation Plan

Those in opposition raise similar arguments regarding the 2003 Preliminary Forest Conservation Plan (PFCP) because it has not been updated to reflect the proposed development. Mr. Gary Unterberg testified that the Limits of Disturbance will not change. According to him, the updates are minor and typical of those performed at the Final Forest Conservation Plan (FFCP). Moreover, Staff does note changes may be required due to elimination of the stormwater management ponds, however, these increase the amount forested area. As the Planning Board is the lead agency for approving PFCPs and Technical Staff indicates that the DPA conforms with the 2003 PFCP, the Hearing Examiner finds that there is no need to revise the 2003 PFCP.

G. Perpetual Maintenance of Common Areas

The last requirement for approval of a DPA is:

(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

The development plan amendment includes a note carried forward from the original development plan stating that documents assuring perpetual maintenance of common areas would be submitted at site plan. (Exhibit 132(c)). The Applicants correctly point out that the Hearing Examiner in LMA G-806 found this sufficient to meet this finding. 9/6/13 T. 35. The Hearing Examiner finds that this requirement has been met.

¹⁹ While the Zoning Ordinance prohibits placing conditions on rezonings (*see*, §59-H-6.4), there is no such prohibition on approval of development plans. The Council has additional binding elements submitted at the Council's public hearing. *See, e.g.*, DPA 04-3.

H. The Public Interest

When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of affordable housing.

Both the Planning Board and Technical Staff have recommended approval of the DPA. Uncontroverted evidence and testimony indicates that DPA the standards for traffic meet the test for adequate public facilities and that water and sewer will be available to serve the proposed development. Compliance with the Master Plan has been discussed in Part V.C of this Report. Other than the procedural requirement of submitting a revised PWQP reflecting the proposed development, the only expert testimony here supports a finding that stormwater management for the development may be accommodated in accordance with Chapter 19 of the Code. For the reasons stated, the Hearing Examiner finds that the DPA will be in the public interest.

I. Conclusion

As demonstrated above, all of the findings required by statute for the requested development plan amendment are appropriate in this case. Based on the foregoing analysis, and after a thorough review of the entire record, the Hearing Examiner concludes that the proposed DPA would accomplish the goals of the Master Plan.

VI. RECOMMENDATION

I therefore recommend that Development Plan Amendment DPA 13-02, amending the development plan approved by the Council on September 9, 2003, as part of LMA G-806, for the property located southwest of the interchange of I-270 and Md. Route 121, in Clarksburg, Maryland, be **approved** in the manner requested and subject to the specifications and requirements of the Development Plan Amendment, Exhibit 132(c), provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the

Development Plan Amendment approved by the District Council within 10 days of approval, as required under Code §59-D-1.64 and subject to the following condition,

The Applicants must submit a revised Preliminary Water Quality Plan (PWQP) in accordance with Chapter 19 of the Montgomery County Code that reflects the development plan approved in this case. If the revised PWQP necessitates any changes to the development plan amendment that are inconsistent with the approved plan (Exhibit 132(c)), the Applicants must seek a further development plan amendment to effectuate those changes.

Dated: December 9, 2013

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'L' and 'R' followed by a long horizontal line extending to the right.

Lynn A. Robeson
Hearing Examiner

APPENDIX A (Binding Elements)

BINDING ELEMENTS

1. Transferable Development Rights and Moderately Priced Dwelling Unit's

The property that is the subject of this application (283.5 acres) is part of a larger, mixed-use community planned for 535 acres shown on the Development Plan, of which the Applicants are also owners. The portion of the property not being rezoned MXPB, is zoned RMX-1/TDR and will require the purchase of Transferable Development Rights (TDR's) for the development planned by Applicants. Based on calculations developed with M-MCPPC staff, the total Master Plan residential density for the 535-acre community is 1,676 market rate units plus 210 Moderately Priced Dwelling Units. Assuming this density and the mix of unit types called for in the Master Plan for the entire Cabin Branch Neighborhood (including a maximum of 20% multifamily) the 535-acre project will require 635 TDR's. The Preliminary Plan of Subdivision application(s) for the MXPB area and the remaining RMX-1/TDR area shall require the purchase of TDR's in conformance with this calculation.
2. Off-site Amenities and Features

By the time of issuance of building permits for the 100th dwelling unit in the Cabin Branch Community, which consists of the larger, mixed-use community of 535 acres shown on the Development Plan, the Applicants will dedicate the sites shown on the Development Plan for an elementary school, a local park and a recreation facility. The school site will be rough-graded at a time determined at the earliest Preliminary Plan of Subdivision application for the Cabin Branch Community, subject to Montgomery County Public School approval.
3. Trip Reduction Measures

At the time of Preliminary Plan of Subdivision, the Applicants, MNCPPC Transportation Planning staff, and Department of Public Works and Transportation (DPWT) staff will consider mutually acceptable trip reductions measures. The parking ratios for non-residential uses in the Cabin Branch Community will be determined at Site Plan, considering trip reduction goals.
4. Street Network

A network of public streets shall be provided, supplemented by private streets, in a grid pattern that promotes interconnectivity. Public streets will consist of Master Plan streets and additional business and residential streets to form blocks that, with the exception of Area D defined on the Development Plan, are substantially similar to the street system shown in the Road Hierarchy Plan of the Development Plan and that are subject to MNCPPC and DPWT approvals.

5. Area D Street Network

Area D will be designed with a public or private street connecting First Avenue (Route A-304) and Newcut Road (Route A-302) in a grid pattern with a particular emphasis on a building line to frame Newcut Road Extended, with parking in the rear.

6. Street Character

All streets will adhere to a pedestrian-friendly design to the extent practicable, which places particular emphasis on a building line to frame the street, with parking in the rear, excluding retail and entertainment uses. Within the core, pedestrian friendly uses including retail, residential, or office will be located on the first floor. The entire MXPB area will conform to a Cabin Branch Community Streetscape Plan that is designed to integrate the entire community, which will be submitted at Site Plan and is subject to M-NCPPC and DPWT approvals.

7. Special Roads

A-307 will be designed as an open section arterial road with wide green edges to provide a gateway to Black Hill Regional Park, subject to M-NCPPC and DPWT approvals. The rural character of West Old Baltimore Road will be maintained by minimizing environmental impacts and providing generous green edges.

8. Service/Public Uses

Service/Public uses may include up to 500 units for independent living for Senior Adults or persons with disabilities, assisted living, life care, or continuing care.

9. On-street Parking

Applicants will include on-street parking on streets adjacent to retail facilities. (Excluding MD Route 121, Wellspring Street and Goldeneye Avenue.)

10. No single retail store will have a gross floor area that is greater than 50,000 square feet, which will be a condition of site plan approval and will be referenced on the Certified Site Plan.

11. The retail uses located in Area C will be neighborhood retail.

APPENDIX B

Summary of Testimony

July 29, 2013, Public Hearing

1. Jonathan Sachs:

Mr. Sachs testified that he is the Director of Public Policy and Community Engagement for Adventist Healthcare (Adventist). Adventist is a non-profit, faith-based healthcare hospital system that has been in the community for over 100 years. It is the largest private employer in Montgomery County. 7/29/13 T. 38.

He described the history of Adventist's participation in the Cabin Branch development. In the late 1990's, Adventist anticipated the need for a full hospital between its Shady Grove hospital and Frederick. Seeing that possible development sites were being purchased quickly, Adventist bought 170 acres within Cabin Branch to development a hospital, medical office building, outpatient centers, nursing and senior housing. Adventist had to delay obtaining the Certificate of Need until there was sufficient population in the area to justify another hospital center. 7/29/13 T. 39.

In 2000, Adventist along with the other owners of the Cabin Branch property began a very lengthy approval process for a mixed use neighborhood. It has spent seven years and hundreds of thousands of dollars getting water and sewer category changes, a development plan, a preliminary plan, infrastructure site plan, water quality and forest conservation plans and other related approvals. Adventist also committed to fund a portion of the required infrastructure that will cost (in total) approximately \$100 million. 7/29/13 T. 39-40.

While Adventist had the land use approvals needed to apply for the Certificate of Need, the State ultimately awarded the Certificate of Need to a competing site in Germantown. As it is not a developer, Adventist wishes to devote its assets to providing health care. It is also facing paying its pro-rata share of the infrastructure costs, which, as a non-profit, does not further its mission to provide health care. 7/29/13 T. 40.

Mr. Sachs testified that they sought a purchaser for their property in Clarksburg. Adventist received four expressions of interest for retail on the property, including Peterson and the Tanger Outlets. After carefully reviewing these and obtaining input from the community, Adventist selected Streetscape New England Development and Simon Properties because it felt that they offered the best produce and had the best track record for delivering on their commitments to the community. 7/29/13 T. 41. Adventist's community outreach received an overwhelmingly positive response. *Id.*

On cross-examination, Mr. Sachs testified that he thought that the Adventist's application for a Certificate of Need was denied in late 2011, although he was not sure. 7/29/13 T. 42.

2. Ms. Kathy Hulley:

Ms. Hulley testified that she has been a resident of Clarksburg for 33 years and has been involved with the Clarksburg Civic Association since its inception. During adoption of the Master Plan in 1994, residents thought that the Federal Drug Administration would locate in the area and drive the development of the town. They also thought that the hospital would develop there.

She views the regional outlet development as a plus for Clarksburg because it will draw people from out of the town center to that area. People have no reason now to go to Clarksburg because the Town Center is no longer going to be what was promised in the Master Plan. Originally, the Town Center was to have been developed first rather than Clarksburg Village. Thus, the original vision of the master plan has changed significantly. In her opinion, this needs to go forward now because the Germantown master plan has recommended so much commercial. According to her, if this development does not go forward, then Clarksburg will be left in limbo again. In addition, this development is necessary for the I-270 interchange to move forward. 7/29/13 T. 45-46.

On cross-examination, she clarified that she believes this will draw people from a larger area into Clarksburg, including the Town Center, because the Town Center is adjacent to this project. She believes that too much residential development was approved in the Town Center, reducing the amount of commercial and civic uses that can locate there. 7/29/13 T. 46-48.

3. Elizabeth Buffington:

Ms. Buffington testified that she and her husband purchased commercially-zoned land in Clarksburg to develop their real estate office in 2006. It took them over 6 years to develop the office, during which time the community told them that they wanted a restaurant there. As a result, she and her husband built a 14,288 square foot commercial building in the historic district in the center of Clarksburg. They occupied their building approximately one year ago and built a Bennigan's restaurant. She and her husband developed the properties themselves because Clarksburg is known as a difficult place in which to develop property. At the moment, she believes that their business is one of the lone businesses in the historic district that has any viability.

She was very excited to learn that the Peterson Company was going to develop the land adjacent to the Historic District as an outlet center. She opposes development of outlets in Cabin Branch because she believes it will draw things away from the center of Clarksburg, making the Historic District a "fringe" rather than a focal point. She disagrees with Ms. Hulley's statement that the proposed development is adjacent to the Town Center because it is on the opposite side of I-270. In her opinion, this will segregate retail uses and adversely impact the Town Center. 7/29/13 T. 51-52.

Ms. Buffington testified she supports the plan proposed by Elm Street Development, an owner of land within the Town Center, which would create a walkable development connecting the historic district, a grocery store mall, and the Peterson property, adjacent to the historic

district. According to her, the Peterson project will bring sewer to the historic district, which now has many failing septic systems polluting Ten Mile Creek. She believes that if this development is approved, the Peterson project will not go forward and the infrastructure needed by the Historic District will not come to fruition. She also expressed concern that the transportation center and a by-pass of the Historic District, partially funded by Peterson, will never be developed because there is not sufficient retail demand for two outlet centers. In her opinion, the Peterson outlet center is preferable to this because it will result in a walkable Town Center, provide needed infrastructure for public water and sewer, and assist with development of the transportation center. She believes that approval of the Cabin Branch outlet center will marginalize the Historic District. 7/29/13 T. 52-54.

On cross-examination, Ms. Buffington testified her support of the Peterson development is based on the understanding that Peterson will pay for the main sewer to be brought to the Historic District and for the by-pass and that both projects may finish at the same time. 7/29/13 T. 58-59.

She testified that she and her husband purchased their property because the Master Plan called for the Town Center to be developed before either Clarksburg Village or the Cabin Branch neighborhoods. She believes that this development plan amendments detracts from the structure envisioned by the Master Plan because the Town Center will no longer be the focal point of development. 7/29/13 T. 65. According to her, there is insufficient retail demand for both developments because Clarksburg only has a population of approximately 14,000. 7/29/13 T. 59-70.

4. Marilyn Balcom:

Ms. Balcom testified on behalf of the Gaithersburg/Germantown Chamber of Commerce. The Chamber's Board of Directors voted to support the development plan amendment because they believe it will serve as a catalyst for other employment at Cabin Branch, and for restaurants, stores, and entertainment opportunities for residents of Clarksburg and the region. The development's environmental impact has been addressed already. The fact that infrastructure is in place to support the construction was important to their support, especially the timing of the interchange. Because the project can be brought online very quickly without public expense, the Chamber believes that it is important for the project to move forward. 7/29/13 T. 73-76.

5. Michael Knapp:

Mr. Knapp testified as an individual, although he formerly was the County Council member representing the Clarksburg community. He supports the development plan amendment.

According to Mr. Knapp, Clarksburg has "struggled" to achieve the Master Plan's and the communities' vision of a mixed-use village where residents can work, shop and play. He stated that infrastructure, housing, and retail development have taken much longer to achieve the critical mass needed to sustain the community. He expressed concern that limiting funding for the city's transit way to extend only to Watkins Mill will further delay achievement of the goal to create employment centers along I-270. In his opinion, a major retail facility in Clarksburg will stimulate other employment growth and, at the same time, provide services and amenities to the residents. 7/29/13 T. 77-78.

In his opinion, approval of the development plan amendment will not detract from retail in the Town Center; rather, he believes that it will serve as a catalyst for other types of development in the Town Center. He expressed concern that development in Gaithersburg, Urbana and Frederick will cause commercial development to “leap frog” over Clarksburg.

Mr. Knapp testified that retail stores and restaurants must precede commercial office development to create a reasonable destination for employment and, over time, have the office support the retail uses.

He stated that he supports the development plan amendment because the property has already received numerous development approvals, including subdivision, adequate public facilities, and environmental approvals. According to him, this project will provide the “toe hold” that the community has struggled to find to implement the vision of Clarksburg. 7/29/13 T. 79-80.

6. Barry Fantle:

Mr. Fantle testified that he is a resident of the Clarksburg Town Center and president of the Clarksburg Civic Association, although testified as an individual and not on behalf of the Association. 7/29/13 T. 82.

He supports the development plan amendment because Clarksburg has waited a long time for retail development. Residents complain about having to drive to Germantown or further to shop. This development, he believes, will draw people into the region from Germantown, Frederick, and Urbana. Currently, many residents drive to Leesburg, Virginia to shop at the outlet mall there. 7/29/13 T. 83.

He does not agree with those who believe that this project will detract from development of the Town Center. He believed the testimony before the Planning Board that retail will beget more retail. Nor did he agree that walkability in the Town Center is critical because most people who shop at an outlet do not walk with all of the packages around the town. 7/29/13 T. 84.

Mr. Fantle testified that he supported approved plans for the Town Center before the Planning Board. The current developer has redesigned the Town Center and has had community meetings regard the new design. He has done nothing to oppose the new developer or the original developer of the Town Center.

He stated that Town Center is supposed to contain 193,000 square feet of retail. In his opinion, this is plenty of room for an outlet mall and for retail development in the Town Center. The developer of the Town Center has informed him that he anticipates completion of the Town Center by 2018. 7/29/13 T. 84.

7. Ibi Sofillas:

Ms. Sofillas testified that she is a real estate broker and business owner who lives in Clarksburg. According to years, there has been “buzz” among her friends, clients and neighbors about retail development in Clarksburg and she has reviewed the facts about all of the proposals.

In her opinion, the Cabin Branch development is the best proposal for Clarksburg for several reasons. The Center will be able to open by the end of 2015 or early 2016, which will provide more jobs, more investment, and greater benefits for the community sooner. She also believes that the subject property is a better location for this scale of development because it will not impact Ten Mile Creek and the infrastructure is in place. This proposal, she believes, will make Clarksburg more vibrant now and will ultimately make the Town Center and the rest of Clarksburg a more viable neighborhood. 7/29/13 T. 86-88.

8. Ron Kaplan:

Employed by Streetscape Partners, Mr. Kaplan testified that he is part of the development team for development plan amendment. He is a resident of Montgomery County and has been a developer for 20 years, focusing on creating mixed-use, pedestrian-oriented developments. When employed by Federal Realty, he expanded the company from developing solely shopping centers to projects such as Bethesda Row. He co-founded Streetscape Partners, which focuses primarily on residential developments, such as Symphony Park, developed in coordination with Strathmore Music Center. 7/29/13 T. 97-98.

Mr. Kaplan testified that this development appealed to him because several factors assured that it would be successful. One of these was that it already had five years of development approvals, a rare circumstance in Montgomery County, and because he could relieve a non-profit organization of some of its financial commitments. 7/29/13 T. 98-99. They were also attracted to this site because not only did the community desire amenities such as retail, restaurants and gathering places, but there was also market demand for retail. 7/29/13 T. 101.

The other members of the development team also give him assurance that the project will be successful. One of these, New England Development, has developed retail in Montgomery County at Wisconsin Place, which includes a Whole Foods, office, and residential. Another developer is Simon Property Group, which is the largest real estate company in the world. Simon’s Premium Outlet Division is the largest outlet developer in the world. According to Mr. Kaplan, Simon Properties was attracted to the project because of its quality, measured by sales per foot. No other outlet competitors have achieved Simon’s level of productivity. He believes that Simon’s participation in this project is significant because of their relationships with potential tenants and the high-quality outlet center produced. In his opinion, the development will be 95% leased and bring approximately 100 tenants or more to the community. This will assist other businesses such as Ms. Buffington’s, because he believes that retail begets more retail. Simon’s participation also ensures the development’s success of this because Simon Properties has significant assets—there is no need to bring in third-party investors. 7/29/13 T. 102-104.

Mr. Kaplan described some of the background of the development plan amendment. He stated that there are a large number of “pods” in Clarksburg that may be developed with commercial offices. He believes, however, that stand alone office parks are a thing of the past. An example of the older form of office park is Rock Spring, which consists solely of office

buildings. Rock Spring has a 30% vacancy rate despite its proximity to Bethesda. Instead, employers now look for more active areas with a mix of uses.

It's his belief that the Master Plan recommendations exercised a lot of foresight because it offered the opportunity for MXPZ zoning that allows a greater mix of uses. 7/29/13 T. 105-106. The MXPZ Zone requires that 20% of the development be retail; in other developments, this has proven the correct mix. 7/29/13 T. 120.

According to Mr. Kaplan, changes in other master plans have negatively affected the potential for office development in Clarksburg. The Germantown master plan increased the amount of office recommended from 8 million to 24 million. In addition, the amount of office recommended for the Life Sciences Center has been increased from 11 million square feet to 18 million square feet, which he believes are "staggering" numbers. 7/29/13 T. 107. In response to a question from the Hearing Examiner, he stated that there is "little hope" of creating stand alone office centers, even in the long term. Without retail and housing, Clarksburg will be at a competitive disadvantage in attracting commercial office. He believes that this development will avoid such a disadvantage, especially because of the financial soundness and experience of the developer. This will, in his opinion, fulfill the "long term" objective of the Master Plan. 7/29/13 T. 108-109.

He compared this project with Bethesda Row that was developed with a 10-phase development plan. Only have 15 years have they finished the final phase. Despite much opposition stemming from concerns that it would put existing restaurants out of business, it revitalized the Woodmont Triangle. In contrast, this development has a great deal of community support and will generate commercial office development and increase residential property values. 7/29/13 T. 111.

Mr. Kaplan described the development plan. According to him, the Cabin Branch neighborhood consists of 535 acres and includes 2.4 million square feet of commercial development, some public uses, and age-restricted residential units. The northernmost portion of the area is located south of the intersection of Route 121 and I-270, called the "North District". At build-out the North District should have 1 million square feet of development that will include a hotel, banks, entertainment uses, restaurants, and specialty retail outlets. These may also include live/work and multi-family units. 7/29/13 T. 114-115. The latter would be located along Cabin Branch Avenue, shown on the development plan.

The Applicant also plans a large amphitheater in this area, after hearing from the community that there is no other location that could accommodate this use. He spoke with representatives of Strathmore Hall to see how this could be accomplished. The Applicant also listened to concerns from the community that the development could adversely impact the Town Center. The Applicant's representatives met with the Town Center developer, Elm Street Development. Elm Street support this project because its uses complement the development proposed for the Town Center, provided that the Cabin Branch neighborhood does not develop a grocery store. 7/29/13 T. 117-118.

The development team also attempted to incorporate the topography and natural resources of the site into the development as well as public spaces. The plan provides non-auto

connections, including a jogging path and a bike network. They have also incorporated various gathering places into the plan. Incorporating public spaces into the plan is critical. Integration of all of these uses is what activates the development and makes it an attractive destination. Office development generates more income through lower vacancies and higher rental rates. 7/29/13 T. 120-122.

The development plan amendment will still leave a large amount of potential for office development. The original development plan calls for 2,420,000 square feet of non-retail employment; this amendment still permits approximately 1.9 million square feet of office. Nor does the proposed amendment affect the employment potential for the Comsat property located on the east side of I-270. 7/29/13 T. 122-124.

Mr. Kaplan testified that this property is uniquely situated to achieve its positive benefits in a timely manner because it has already received many of its zoning, subdivision, and environmental approvals. In addition, funding for much of the infrastructure is in place and does not require further government approvals. 7/29/13 T. 126.

Mr. Kaplan agreed with a statement made by Elm Street Development in a letter submitted into the record for the proposition that an outlet center on either side of I-270 has an equally positive impact. If the outlet center proposed by the Applicant is successful, it will make it easier for other retail to develop in the area. In his experience throughout the country, when a project is successful, employers will come. T. 135.

On cross-examination, Mr. Kaplan testified that the Leesburg Premium Outlets would be the best analogy to the proposed outlet center here. Simon Properties has also acquired the Hagerstown and Queenstown outlets from another developer. 7/29/13 T. 137.

Mr. Kaplan did not know the exact amount of retail that would be located in the North District, although he anticipates that the outlet center will probably have 450,000 square feet of retail. 7/29/13 T. 140. He does not believe the Master Plan intended to limit retail to 120,000 square feet because of its recommendation for MXPZ zoning. This is because the Master Plan also recommended the RMX Zone for the subject property, thus, according to him, the recommendations in the Master Plan could not be based on the certainty that retail would be developed at that location. As there was a risk that no retail would be developed, he believes the Plan specifically recommended 120,000 square feet of retail to ensure that some retail occurred. 7/29/13 T. 142.

He also stated that he was not an expert in the commercial office market; his testimony was based on speaking with others who know that market better than he does. He does not personally have any studies on this. Nor has he submitted a study stating that the retail proposed here will definitively act as a catalyst for office development, although he has worked with some of the foremost experts in the world. 7/29/13 T. 143.

Mr. Kaplan testified that he anticipates that there will be 50,000 to 100,000 square feet of development left for a neighborhood retail center. The development plan amendment does not contain a binding element that a grocery store be excluded from permitted uses, but the Applicant has committed to that. 7/29/13 T. 150.

August 12, 2013, Public Hearing

This hearing commenced with the continued cross-examination of Mr. Kaplan.

1. Ron Kaplan:

Mr. Kaplan testified that the two smaller reddish blocks in Area B could be restaurants or fashion retail, although this would be determined at site plan. The Applicant anticipates that the food court serving as a “central square” will be at the southern end of the larger retail stores, although the development is conceptual at present. The amount of retail shown on the slide entitled “North District” on Exhibit 45 includes the area north of Md. Route 121, which already has an approved site plan. Although the Applicant’s Statement of Justification (Exhibit 21) states that the food court will serve as the “neighborhood square”, he was unsure of what activities may take place other than the food court. 8/12/13 T. 18. The Applicant may put some entertainment uses in the area shown in blue along I-270. An example of this type of use would be a bowling alley. He is not sure whether these would be classified as retail or office as they will not definitively know who the tenants are until the project is completed. 8/12/13 T. 21.

The square footage of the different uses shown on Exhibit 55 are only conceptual, but total retail development will be capped at 484,000, including the area across Md. Route 121 and the neighborhood serving retail. The neighborhood retail will be located more centrally in the development. They have committed not to build a grocery store “of any size”. 8/12/13 T. 22-29.

He clarified that he believed that the proposed amphitheater would complement the Town Center because it is at a larger scale than what could be achieved in the Town Center. They anticipate that it will be a grassy area, but it could accommodate larger performers with a stage and loudspeakers. 8/12/13 T. 30.

Mr. Kaplan acknowledged that the experiences that he had where retail catalyzed office development did not include outlet centers. He broader experience has been that retail generates development of other uses including commercial office uses. This is also demonstrated by the fact there are large vacancy rates in traditional office parks. 8/12/13 T. 35-36.

On re-direct examination, Mr. Kaplan testified that Hagerstown and Queenstown are very different areas demographically and one would not expect office development to occur there. He did not know whether any office buildings are located near the Leesburg outlet center. 8/12/13 T. 38.

2. Leonard Bogorad:

Mr. Bogorad qualified as an expert in fiscal impact and market analysis. He prepared a fiscal impact analysis of the proposed development on County and State revenues and expenditures over the next 20 years. 8/12/13 T. 46. He opined that the County and the State will net almost \$39 million dollars and \$403 million dollars, respectively, in revenues over this time period. 8/12/13 T. 46. In his opinion, construction of the center will support approximately 2,000

temporary and its operation will support approximately 2,200 permanent jobs, including indirect impacts. He explained that “indirect impacts” measures the “multiplier effect” resulting from jobs created by the income of those directly employed by the retail center and follows it through jobs created by the latter. Revenue generated from these “indirect impacts” is based on models used within the industry. In his opinion, the retail center will result in a major employment concentration that will generate many on-site and off-site jobs ranging from professionals to minimum wage workers. 8/12/13 T. 46-48.

Mr. Bogorad opined that there is a long-term potential for office development at Cabin Branch. He believes that it is distinguishable from the outlets in Hagerstown and Queenstown because there is no market demand for office in those corridors. He testified that there is some demand for office space in the I-270 corridor that will increase over time for many reasons. He has seen a number of studies, however, indicating that the office market is “challenged” between Clarksburg and Gaithersburg due to limited demand, a situation that will not resolve quickly. Costar, an established industry source for office absorption, states that the annual net absorption in this area has been only 74,000 square feet per year in the last 5 years and has been declining every year since 2010 despite the economic recovery. The same area has an office vacancy rate of 16% and average rents are slightly lower than they were five years ago. He attributes this to the fact that government agencies and other employers have reduced their demand for office space by using a lot less space per employee by using open office space and working from home.

In Mr. Bogorad’s opinion, approval of master plans calling for a large amount of office development in Germantown and the Life Sciences Center in Gaithersburg have challenged the Clarksburg market even more. He considers the latter locations to be more desirable for most tenants than Clarksburg. For these reasons, he believes that office absorption along the I-270 corridor near Clarksburg will be more limited than desired. Even with the amount of retail proposed in the development plan amendment, there remains a tremendous amount of office space permitted that will not be developed for many years, in his opinion. Competition for office space is not only in Montgomery County, but also extends to northern Virginia and Frederick County. 8/12/13 T. 49-51.

Mr. Bogorad opined that development of the outlet retail at Cabin Branch will be very important in getting office development in Clarksburg. Based on his experience preparing many market analyses, employers and tenants find mixed use projects more desirable than the older, single use office parks. He opined that retail is typically one of the most desired uses because it brings activity to the area and provides services and options for those working there. Mr. Bogorad acknowledged that outlet retail as the catalyst for office development is somewhat untested in areas such as Reston and Bethesda, but Clarksburg is an area where the type of retail in those locations would not occur. His firm is working with developers along the Dulles access Road in Loudon and Fairfax County, and each project includes retail within the mix of uses. He opined that there will be more office developed at Cabin Branch with the retail rather than without it. 8/12/13 T. 53-55.

In Mr. Bogorad’s opinion, the proposed retail outlet center will not negatively impact the Town Center because each will have different but complementary retail uses. According to Mr. Bogorad, the retail in the Town Center will be much more neighborhood and community oriented. The outlet center will serve a regional, travel oriented market. Critical to this, in his opinion, is

the exclusion of a grocery store from the Cabin Branch community, because that is a key element for the neighborhood retail proposed for the Town Center. He expressed concern that there will not be sufficient demand for another supermarket if one were to be developed in Cabin Branch. Given the commitment not to have a full sized supermarket, he thinks that the Town Center retail will not compete directly with the outlet center retail. He agreed with the letter submitted by Elm Street which states that the outlets will be beneficial to Town Center. 8/12/13 T. 56-58.

3. Chris Turnbull:

Mr. Turnbull qualified as an expert transportation planner. He testified that he as worked on the development since 2001. His firm completed the Local Area Transportation Review analysis in July, 2003, during approval of the preliminary plan for the property. His firm updated this analysis in 2004 for Phase 2 of the project, and updated it again in 2013 for this development plan amendment. 8/12/13 T. 62-63. This latter update looked at the impact of substituting specialty retail development for the medical office which had been previously proposed.

Mr. Turnbull opined that the specialty retail will generate fewer weekday peak hour trips than anticipated in the 2004 analysis. To reach this result, he advised that counted current traffic conditions at critical intersections, all of which operated below the maximum of 1,425 CLV. His firm then added in traffic from pipeline developments. They then netted out the traffic from the prior medical facility and factored in trips attributable to the premium outlets. Based on this analysis, he opined that the specialty retail would generate approximately 10% fewer weekday peak hour trips than the former proposed use. All critical intersections, in his opinion, will operate below the CLV standard of 1,425. The intersections studied on the eastern side of the original site will perform better than the prior projects due to the decrease in trips because of the outlet center's regional draw—more trips will be coming from I-270. 8/12/13 T. 63-65.

Mr. Turnbull testified that his firm performed a supplemental traffic analysis to study the impact of peak hour traffic during a Saturday. While the Saturday p.m. peak hour trips increase from 700 to 1,900 trips, the total number of trips from the project will decrease by 6% throughout the day on Saturdays, according to him. He advised that the peak hour on Saturday is between 11:00 a.m. and 2:00 p.m. His analysis showed that the typical weekday p.m. peak hour was the most critical time period because office, retail and residential trips all occur at that time. 8/12/13 T. 66.

For the Saturday analysis, Mr. Turnbull opined that the most critical intersection is the I-270 northbound on and off ramp. This had a total CLV of 1,203 in the a.m. and 1,300 CLV in the p.m. The CLV in the intersections further west of that decreased. 8/12/13 T. 67.

In his opinion, traffic generated by the development plan amendment will meet all of the County's transportation standards and will not create an adverse impact on the surrounding road network. The development plan amendment will generate fewer peak hour trips than has been previously approved for the project. 8/12/13 T. 68.

On cross-examination, Mr. Turnbull testified that retail outlet centers have a different trip generation rate than commercial office uses. These have a lower trip generation rate because the trips do not generally occur during weekday peak hours. The trip generation rates from the ITE

manual are based on an average of many different studies, so the rate would reflect uses like restaurants. He is unsure whether the entertainment uses would be included within the trip generation for retail outlet centers nor was he certain whether trips attributable to an amphitheater are included in the rate. He does not believe that this would change his analysis, however, as trips attributable to these uses do not typically occur during the peak hour. 8/12/13 T. 71.

He also clarified that the increase from 700 to 1,900 trips in the Saturday peak hour would reflected only that peak hour; the overall Saturday trip generation will decrease by 6 percent. 8/12/13 T. 75.

3. Gary Unterberg:

Mr. Unterberg qualified as an expert in land use planning. 8/12/13 T. 78. He described the Cabin Branch community and the development plan amendment.

According to Mr. Unterberg, the total Cabin Branch development consists of approximately 535 acres. The portion within the MXPDP Zone is 283.5 acres. The Cabin Branch neighborhood is triangular and is bordered on the east by I-270, on the north by existing Md. Route 121, on the south by West Old Baltimore Road and Black Hill Regional Park. The western portion (approximately 251 acres) is zoned RMX-TDR. 8/12/13 T. 83-84.

Mr. Unterberg testified that the MXPDP zoning for the property was approved in 2003. A preliminary plan for the entire Cabin Branch tract was approved in 2004, although only two-thirds of the potential density was approved at that time. In 2008, the preliminary plan was amended to include all of the potential density within the neighborhood, which was up to 1,186 dwelling units, 2,420,000 square feet of employment and retail, and 500 age-restricted dwelling units.

He described the status of development within the 535-acre Cabin Branch neighborhood. The preliminary plan approval required the owners to do an infrastructure site plan for the entire 535-acre tract that included the relocation of Md. Route 121, the widening of the I-270 interchange, a water quality plan and a forest conservation plan. He testified that this site plan has been approved. In addition, approximately two-thirds of the entire neighborhood is subject to approved site plans, primarily for residential development in the western portion of the site. According to Mr. Unterberg, two site plans have been approved within the MXPDP-zoned property: a retail employment area that will be north of the re-aligned Md. Route 121 and a water tower located near the I-270 interchange. Approximately 10 stormwater management plans have been approved. 8/12/13 T. 86.

Construction has commenced within the larger tract. Winchester Homes has begun construction on one of the residential developments, several of the stormwater management ponds have been constructed, and the main north/south interior road, Broadway, has been graded. 8/12/13 T. 87.

Mr. Unterberg compared the development plan amendment with the original development plan. There are several technical changes to the plan. It now shows the residential developments approved in the western portion of the property. The two north/south streets have been renamed to Broadway (on the westernmost edge of the MXPDP portion) and Cabin Branch Avenue. The

development plan amendment also shows the relocation of Md. Route 121. A southern roadway bisecting areas C and D in the plan has been renamed Little Seneca Parkway, which will connect to a planned interchange with I-270 that is not part of the Cabin Branch approvals. 8/12/13 T. 89.

The primary substantive change is to the chart itemizing the amount of square feet devoted to employment and retail. According to Mr. Unterberg, the original development plan approved 2,420,000 square feet of employment that included 120,000 square feet of retail. The site plan approved for the area north of re-located Md. Route 121 includes 8,600 square feet of retail, a hotel and a bank. When approving the site plan, the Planning Board considered the hotel and bank to be employment uses, according to Mr. Unterberg. 8/12/13 T. 90-91.

Mr. Unterberg testified that the proposed amendment met all standards of the MXPDP Zone, adopting the Technical Staff Report as his own testimony.

Mr. Unterberg opined that the amendment complied with the recommendations of the Master Plan. 8/12/13 T. 94. He adopted the findings in the Technical Staff report as his own testimony. *Id.* He observed that the Plan contains a statement that it is to be interpreted flexibly over time and that has been his experience with interpretation of master plans generally. He pointed to the District Council's decision in LMA G-881 as an example of this because the Hearing Examiner's Report and Recommendation stated that plans should be interpreted in light of development standards enacted since adoption to the plan. A second example is the original approval of the Cabin Branch tract in 2003. The Master Plan recommends that Little Seneca Parkway continue all of the way through the tract to connect to Md. Route 121. This did not occur because of the environmental impact to the western stream valley. 8/12/13 T. 97-98.

According to Mr. Unterberg, the Plan emphasized the importance of I-270 as a high technology corridor for Montgomery County and sought to preserve key sites along I-270 for future employment. The development plan amendment complies with this goal because only 20% of the MXPDP portion will be retail; it retains almost 1,936,000 square feet for employment. He believes that the Plan's recommendation for MXPDP Zoning envisions this level of retail because the MXPDP development standards permit 20% of the property to be retail.

Another goal of the Plan is to promote a healthy economy including a broad range of business, service and employment and to encourage land uses that provide opportunities for social interaction and that promote community identity, he testified. In his opinion, the amendment furthers these goals because the Applicant has tried to include the greatest mix of possible uses permitted by the Zone in order to spur office development. 8/12/13 T. 101-103.

Mr. Unterberg stated that the Plan's recommendation of Clarksburg as a smaller scale town is also met by the amendment. The use mix is varied, and includes residential (including age-restricted housing), employment, public, and retail uses. The development plan does not change the scale of the development originally approved, as it remains limited to 2,420,000 square feet of non-residential use. This amendment defines the particular uses that will occur on the property. 8/12/13 T. 103.

The Plan also strived to create an identity for Clarksburg separate from Germantown or Damascus. In Mr. Unterberg's opinion, the amendment accomplishes this because the retail outlet center will be unique to the regional area. 8/12/13 T. 104.

Another goal of the Plan, Mr. Unterberg believes, is to encourage development that protects the environment and create a greenway system utilizing stream valleys. He testified that the natural features on the site have been a key part of the development plan from its inception. These include two stream valleys located on the east (Little Seneca) and west (Cabin Branch) sides of the site. Both of these have been preserved as green space. While only two-thirds of the property is within a special protection area, the Applicant has volunteered to treat the entire tract as a special exception area. 8/12/13 T. 105. The amendment proposes a number of east/west greenway connections such as Tribute Parkway that connects the local park on the subject property with the stream valley park greenway as well as other connections. 8/12/13 T. 106.

August 14, 2013, Public Hearing

1. Tatiana Franklin:

Ms. Franklin testified that she lives directly across Md. Route 121 (Clarksburg Road) from the subject property. She is a business owner and co-president of the Clarksburg Town Center Farmer's Market. 8/14/13 T. 11-12. Her home is located on the west side of Old Clarksburg Road and according to her, is the closest home owner to the property. T. 13.

Ms. Franklin opposes the proposed DPA, primarily because she believes that it will "take the heart away" from the Clarksburg Historic District. 8/14/13 T. 14. According to her, the Historic District is faltering because of failing septic systems; she believes that locating amenities on the west side of I-270 will "literally kill" the center of Clarksburg. She stated that she knows that a number of large companies have left Clarksburg due to the lack of amenities. 8/14/13 T. 15. She also believes that the proposed outlet center will probably eliminate the farmer's market, which now is one of the activities that animate the Town center. 4/13/13 T. 20-21.

In addition to its impact on the Historic District, Ms. Franklin opposes the project because she is concerned about lights from the development shining into her home and the buildings blocking her views. 8/14/13 T. 16. She also thinks that the loss of a grocery store in Cabin Branch will adversely affect the neighborhood because residents will have to drive across I-270. 8/14/13 T. 17-18.

On cross-examination, Ms. Franklin testified that she did not oppose the Gosnell project that will be located north of the new alignment for Clarksburg Road. She has discussed the proposed outlet center with representatives of The Peterson Companies, developer of the competing outlet center, because it sponsors the Farmer's Market and is in regular attendance. Sponsorship includes financial support. She has had more limited conversations with representatives of the Cabin Branch development, calling once to complain about blasting and inviting them, in her capacity as a member of the Clarksburg Business Referral Team (CBRT) to share their vision of Clarksburg. She was unable to attend the meeting at which the Applicant's representatives appeared. 8/14/13 T. 33-36.

According to her, The Peterson Companies is the only developer that has committed to helping the Historic District. 8/14/13 T. 28-30, 38. She is concerned that approval of this project will knock the Peterson project “off kilter” because “we all know there’s not going to be two sets of outlets in Clarksburg.” 8/14/13 T. 39. She supports the Peterson outlets because they are the only developer willing to step “up to the plate” and do something for the Historic District. She stated that Peterson is pledging to fix septic systems in the Historic District and to fund the bypass to alleviate traffic congestion on Md. Route 355. Peterson has also promised to connect the Historic District with their retail center by pathways. 8/14/13 T. 39-40. She thinks that the Peterson project will not be completed until 2016. 8/14/13 T.48-56.

2. Sandra Barrier:

Ms. Barrier is a resident of Clarksburg and supports the proposed development plan amendment because she believes that the competing outlet center will adversely affect 10-Mile Creek. In her opinion, Clarksburg is “ready to flourish” and this development will occur earlier than the Peterson project because the necessary road improvements are currently underway. 8/14/13 T. 53-56. She also supports this development because she finds it attractive and is unsure whether the competing outlet center will be as attractive. 8/14/13 T. 58.

She is unaware that environment regulations govern construction draining into the 10-Mile Creek watershed. She understands that there are master issues with the competing outlet center based on discussions with representatives of the Applicants. 8/14/13 T. 56-57. She hasn’t spoken formally with representatives of the Peterson project. 8/14/13 T. 59. She has not read the Master Plan, but is a member of “Livable Clarksburg,” which opposes the Peterson project. 8/14/13 T. 59-61.

3. Melanie Kinney Hoffman:

Ms. Hoffman testified that she has lived in Clarksburg for 16 years and participated actively in the adoption of the 1994 Clarksburg Master Plan. She moved to Clarksburg with the expectation that the Master Plan’s vision would be fulfilled and has since spent, with others, “way too much time immersing ourselves in the excruciating details relating to the dysfunctional build-out of Clarksburg.” 8/14/13 T. 62-63.

Ms. Hoffman stated that Clarksburg residents have been repeatedly disappointed with the lack of promised amenities. She strongly supports this development because it offers the real chance to get amenities sooner rather than later. In addition, she supports the project because it will be “upscale”, provide basic amenities, and will attract restaurants, businesses and hi-tech jobs. 8/14/13 T. 63-64.

According to Ms. Hoffman, the traffic nightmare scenarios posited by opponents are overstated because the road improvements underway will minimize traffic on Md. Route 121 and Md. Route 355. 8/14/13 T. 64

She also supports this development rather than the Peterson project because she is concerned that the latter will harm 10-Mile Creek. She believes that 10-Mile Creek is critically important it is the County’s last clear stream and supplies the reservoir.

She stated that Clarksburg residents have waited too long for amenities. If this application is denied, residents will have to wait another 5 years or more until the competing outlet center is approved and will not be sure whether that product will be as desirable. 8/14/13 T. 65-66.

On cross-examination, Ms. Hoffman acknowledged that there is a pending Master Plan amendment to address development impacts on 10-Mile Creek. She does not believe, however, that some of the Environmental Site Design (ESD) proposals are credible. 8/14/13 T. 68-69.

4. Leonard Bogorad:

Mr. Bogorad appeared again for cross-examination on his testimony at the August 12, 2013, public hearing.

He opined that the fiscal impact of this proposal will be more beneficial to the County than the development recommended in the Master Plan. Office development in general has a positive fiscal impact; retail development has a greater fiscal benefit. Thus, retail development above the 120,000 square feet recommended will result in higher revenues to the County.

Further, without the retail outlet center, full build-out of the office component will probably not occur within 20 years. He opined that at the end of 20 years (which is the typical analysis period), the Master Plan scenario may yield 500,000 square feet of office and 120,000 square feet of retail. If the development plan amendment is approved, the County will have approximately 400,000 square feet of retail within a shorter time frame (i.e., 5 years) and a minimum of 500,000 square feet of office at the end of 20 years. More likely, in his opinion, is that the retail will generate a larger amount of office development at the end of the 20-year analysis period. Thus, the development plan amendment will yield higher revenues from retail and more office development in a shorter period of time. 8/14/13 T. 85-88.

Mr. Bogorad also testified that the retail center will attract additional types of employment. This will include two different types of jobs related to the retail, those created by direct employment by retailers and those created by retail employees purchasing goods and services.

Office employment outside of the Cabin Branch neighborhood will also be more likely to locate in the area because of the outlet center. 8/14/13 T. 89. According to Mr. Bogorad, there is a lot of competition for office development elsewhere within the County and the region. The proposed development offers a location right on I-270 with retail amenities that are very important in attracting employers, who look for a multi-use environment. 8/14/13 T. 90.

In his opinion, the proposed outlet center will not detract from development of the Town Center neighborhood center because each will have attract different types of retail. Even if there is overlapping retail, any competitive disadvantage may be outweighed by the effect of drawing more customers to the area. The industry term for the retail contemplated in the Town Center is "neighborhood center". Critical to the development of a neighborhood center is a full-service grocery store, which accounts for 66% of the sales in the center. Generally, once a full-service grocery locates in the center, other types of tenants follow. Typical tenants in a neighborhood center include non-chain restaurants (both sit-down and take-out), drugstores, and

personal services such as weight loss centers, yoga studios, hair salons, nail salons, opticians, fitness centers, and doctor's and dentist's office. These centers typically offer few apparel or shoe stores; only 4% of neighborhood center sales are in this category, which is the primary category offered in the outlet center. 8/14/13 T. 91-94.

In comparison, the primary retail category offered by outlet centers is designer fashions and sportswear. The second largest category is woman's clothing. Shoe stores and children's clothing are other large categories. Additional retail may include fine leather and luggage, which typically are not located at neighborhood centers. Restaurants are typically chain restaurants, which do not generally compete with restaurants typically located in neighborhood centers. 8/14/13 T. 95-96.

Mr. Bogorad opined that there are two main reasons the outlet center in Cabin Branch will have a positive impact on the neighborhood retail in the Town Center. First is the commitment not to have a full-size supermarket. He is very concerned that there is not enough demand in the area for another full-service supermarket, especially given that Wegman's will be located in Germantown and Walmart has entered the supermarket arena. 8/14/13 T. 98. According to Mr. Bogorad, entry of these very large stores created a "whole new world" in the supermarket business, one that was not contemplated when the Plan was adopted. *Id.* He opined that a supermarket within Cabin Branch could "be the end of the town center." *Id.* In addition, Mr. Bogorad believes that even the possibility of a supermarket within Cabin Branch could be enough to cause retailers to be nervous about investing in the Town Center, and would further delay its development. *Id.* at 99.

Second in importance for the viability of the Town Center is the economic activity that will be generated by the outlet center. Employees of the retail center and potentially office workers will use the supermarkets and perhaps use the more unique restaurants in the Town Center. 8/14/13 T. 99-100.

The outlet center will also place Clarksburg "on the map" as a place to be, according to Mr. Bogorad. He testified that Clarksburg has developed a bad reputation in the development community as a place where it's been really difficult to "get things done." 8/14/13 T. 100. No major tenant of the Town Center has been able to accomplish its development at that location. Approval of this application, in his opinion, would change the perception of development in the Town Center and encourage additional development at that location. 8/14/13 T. 100.

In response to a question from the Hearing Examiner, Mr. Bogorad testified that the binding element limiting retail stores to 50,000 square feet would prevent a Wegman's or Walmart from locating within Cabin Branch because those stores are typically over 50,000 square feet. 8/14/13 T. 102. Assuming that the Planning Board's intent was to prevent development of a "power center" similar to Milestone, he didn't think the restriction was valid for several reasons. He found it unlikely that these types of stores would desire to locate in Clarksburg given the "huge concentration" of them in Germantown. 8/14/13 T. 103. Even assuming that these "power center" or big box retailers did wish to locate there, these types of retailers are not competitive with the type of retail planned for the Town Center. 8/14/13 T. 103. He did believe the restriction was a valid method of ensuring that desirable "place-making" occurred in the Cabin

Branch neighborhood. T. 103. The modern outlet center is more likely to attract office employment than retail similar to a power center. 8/14/13 T. 104.

Mr. Bogorad explained the difference between a power center and the retail outlet center planned for Cabin Branch. In his opinion, a power center is a conglomeration of very large, “so-called” big box stores that are not susceptible to attractive development. 8/14/13 T. 104. Modern outlet centers have “much more of a nice place” to them, with a better mix of restaurants than the older model of these centers. According to him, this is more appealing to the office user that wants places where people may go during lunch and after work. An outlet center fulfills this desire where a power center doesn’t. 8/14/13 T. 105.

He acknowledged that some of the “place-making” retail in the power center would overlap with the neighborhood retail in the Town Center. There will be neighborhood-serving retail within Cabin Branch, although there is a better chance that they will occur in the Town Center as well due to the commitment to prohibit a full-service grocery store in Cabin Branch. 8/14/13 T. 107. In his opinion, it will be much easier to attract a “depth” of these stores if the only full-service grocery store is located in the Town Center. As a result, of the two alternatives, the proposed development plan amendment offers a better chance for development of the Town Center than the existing development plan. He acknowledged that neighborhood-serving retail may be delayed at Cabin Branch, as a grocery store in the Town Center will get “first dibs” on this type of retail. The neighborhood services in Cabin Branch will tend to be the retailers serving the housing and employment when it gets built. Any reduction in neighborhood services in Cabin Branch will be better for the Town Center. 8/14/13 T. 107.

While Mr. Bogorad did not know the Applicant did not reserve the long-term right to build a grocery store, but did think that it was positive for Clarksburg as a whole to deliver on the Town Center development. He clarified that the Applicant has committed not to build a full-service grocery store, but there may be convenience grocery stores similar to 7-Eleven or High’s. This could include a natural food store, a Mom’s market, or possibly a Trader Joe’s. He did not know the exact plan for those in the area, but does not think they would compete with the full-service grocery store in the Town Center. 8/14/13 T. 109-110.

Mr. Bogorad also clarified his testimony from August 12, 2013, about the status of the I-270 office market. According to him, there are different segments of the I-270 corridor, which is sometimes defined as far south as Bethesda/Chevy Chase. The industry analyzes different sections of the corridor independently. These different sections include Rockville, Gaithersburg, Germantown and Clarksburg. In his opinion, the office market in general is experiencing a “difficult time” in the country and in Montgomery County. The market in Bethesda is less challenged than areas further north, in part due to the desire of office tenants to be near retail amenities where their employees have places to lunch without getting in their cars. T. 114. He thinks higher popularity of the southern segments of the I-270 corridor is partially due also to a desire to be closer to downtown, to the Beltway, and to agencies, such as the NIH, which drive work demands. The data supports this assumption, and indicates that the combined areas of Germantown, Gaithersburg, and Clarksburg have had a very high vacancy rates and slightly declining rents over the last five years. He agreed that the further north one proceeds along the corridor, the more difficult it is to attract an office user. 8/14/13 T. 114-117.

He testified that the retail outlet centers did not generate office development in Queenstown and Hagerstown because employers will only locate where there is an inherent demand for office. When those outlets were built, these centers were typically located in outlying areas where there is no inherent demand for office. In his opinion, it would be an “aberration” in today’s office market were a single, government-type use decide to locate in a stand-alone facility “in the middle of nowhere.” 8/14/13 T. 116. While he believes that the entire corridor offers a reasonable possibility for office development, the northern areas are at a competitive disadvantage that potential employers will consider. Retail development offers an amenity for employees that may offset this disadvantage, which has been the case in Loudoun County where there are a lot of employers. Employers may be attracted to the more distant locations by lower rents; the proximity of retail may be an amenity that makes the location more palatable to employees. 8/14/13 T. 116-117.

He also clarified that, in his opinion, it may between 20 to 30 years for all of the office space recommended in the Sector Plan to be absorbed, even if the amount of office space is reduced by the retail proposed here. 8/14/13 T. 118. While his fiscal analysis assumed 500,000 square feet of office at the end of ten years, the actual amount of office doesn’t affect the analysis because the catalyzation of the office market is beneficial regardless of the amount. 8/14/13 T. 120.

Mr. Bogorad elaborated on the catalytic relationship between office and outlet center retail. He explained that in his earlier testimony, he could not think of any examples where an outlet center had been a catalyst for office development, although he very much believes that retail does serve as a catalyst. After this testimony, he surveyed people in his firm to see if there were any examples of the impact of a retail outlet center on the office market. Because the modern type of outlet center is relatively new, there are a limited number of examples, one of which is the Round Rock Premium Outlets (also developed by Simon Properties) that opened northeast of Austin, Texas in 2006. He characterized its locations as “outer suburban”. It opened at approximately the same time as a hospital, and was followed by more retail, another hospital, and a 135,000 square foot office building that opened in 2009. According to him, the outlet center is credited with attracting much of this development. 8/14/13 T. 122-124.

Mr. Bogorad testified that another example is a project called the Citadel in downtown Los Angeles that was developed in 1990. He acknowledged that it was hard to identify the timing of the retail versus the office because all of the uses were developed at once. Despite this, listings for vacant office space label the outlet center as one of the key amenities. In his opinion, it is clear that the outlet center and office development there have a complimentary relationship. 8/14/13 T. 123-124.

He described another, more recent example, near Salt Lake City, called the outlets at Traverse Mountain, which opened recently. While employment uses already existed in the area, in his opinion the outlet center is synergizing the development of additional spec office space. 8/14/13 T. 124.

Closer to home, Mr. Bogorad testified that the infrastructure built for the outlet center at Arundel Mills in Anne Arundel County has attracted more office development surrounding the center. In his opinion, this infrastructure would not have been built without the center at that

location. Based on this research, he opined that there is some track record of outlet centers catalyzing office development. He reiterated his opinion that office developers will not locate without retail (excluding neighborhood retail) and the only market for retail at this location is the outlet center. 8/14/13 T. 125.

Mr. Bogorad addressed questions related to the development at Great Seneca Meadows. He stated that Wegman's, which is located within the development, is typically twice as large as most full-size grocery stores and offers products usually found in full-size grocery stores as well as many prepared items that are not normally found in those markets. It draws from a larger area than a neighborhood full-service market. He testified that one does not typically find retail services within an office building, except for a coffee shop, drycleaners or deli. 8/14/13 T. 126-135. In suburban areas, one does not generally find fashion retail within office buildings. For an office development, the most important thing is the "place making" and having places to go during lunch or after work. 8/14/13 T. 136-137.

He further clarified his testimony relating to the office market in Gaithersburg and Clarksburg. According to him, attracting office is a "challenge" and opined that there is a "good chance" that it will not get "a lot better soon." 8/14/13 T. 139. He testified that it is very difficult to predict when anything is going to happen in the industry; it's possible it will never improve. The challenge stems from lack of demand in the area: the Federal government has been cutting back and this is a major source of office use in the region. In addition, both public and private employers are using much less space per employee. As a result, demand for office space will be lower even if the office market returns. According to him, the decreased amount of space per employee is considered to be a permanent condition in the industry. 8/14/13 T. 140.

He described what he meant by the "modern form of outlet center" that he believes will attract employment. According to him, it is no longer sufficient to have stores in strip settings, like the ones in Rehoboth; a lot more attention is being paid to "place-making". The older style outlet centers were not places where you would go simply to "hang out"; rather, you would drive somewhere else. 8/14/13 T. 144. The modern form makes an outlet center a really appealing place, with features such as a square or fountain and restaurants where you may eat inside or outside. This is the atmosphere that employers desire.

Mr. Bogorad acknowledged that there is little data quantifying the impact of the modern outlet center on attracting employment. He did some research on the Leesburg outlet center; however, the employment site next to the center has not developed because it passed by inheritance to a Belgium owner, although he has not contacted the owner. He believes it contains fountains and restaurants, although he thought that the restaurants were not attractive. He could not recall whether it had other features similar to the proposed development. He acknowledged that he had not done a quantifiable study of the impact on office for one of the nearby outlets because he didn't think it appropriate. There is no way to test the Leesburg outlet because of the ownership issue, he opined. He did not feel that any of the closest outlets were useful to compare because one has to be located in a "reasonable office market" to determine whether outlets will attract office development. Neither Hagerstown nor Queenstown are located within reasonable office markets, although he acknowledged that he had never studied these areas. He has done some study of the office market in Leesburg in the past, which he also characterized as

“challenged.” There is one retail project, the Village at Leesburg that has had more success at attracting office than other developments. 8/14/13 T. 144-159.

He further testified that a neighborhood center does not happen without a grocery store, thus he believes that having a grocery store in the Cabin Branch neighborhood would delay development of the Town Center. 8/14/13 T. 161.

5. Robert Cobb:

Mr. Cobb testified that he owns a small commercial property in the Historic District within the Clarksburg Town Center. He opposes the development plan amendment because it would “effectively move the heart of Clarksburg across Interstate 270.” 8/14/13 T. 168. For this reason, he believes that it will fundamentally alter the Master Plan’s vision for Clarksburg.

According to Mr. Cobb, the Historic District is located along Md. Route 355 and is one of the County’s oldest and most significant early communities. There are a several 19th and early 20th century buildings within the District, including the Gardner House, owned by him and his wife. The Historic District now contains only a few businesses that have struggled due to the lack of activity in the area. 8/14/13 T. 168-169.

He believes that the development plan amendment contravenes the intent of the Master Plan for two reasons. First, it shifts the focal point of Clarksburg from the Town Center (including the Historic District) to the Cabin Branch neighborhood. Second, it quadruples the amount of retail recommended for the Cabin Branch community. 8/14/13 T. 169.

He testified that the central vision of the Master Plan was to create a Town Center that would be a strong, central focus for the entire study area. The Town Center area contains 635 acres that was planned to include the Historic District, a neighborhood retail east of the Historic District, and commercial and residential development west of the Historic District along I-270. The Peterson Companies are proposing their retail development within the latter area. Thus, the Town Center is much larger than the relatively small neighborhood retail center that will have a grocery store. He does not believe it appropriate to consider the Cabin Branch neighborhood to be part of the Town Center. 8/14/13 T. 170.

Mr. Cobb believes that the Master Plan intended to have a mix of retail, civic and transportation uses within the Town Center. The development plan amendment, however, will establish competing uses across I-270. If approved, he believes that the goal of making the Town Center the focal point of the area will be unlikely, if not impossible. According to him, nothing in the Plan contemplates a large regional retail center on the west side of I-270 that supplants the central focus for the Clarksburg area. 8/14/13 T. 171.

In addition, the outlet proposed for Cabin Branch does not support the Town Center in any way. Amenities within the outlet center will not be within walking distance of the Town Center. He does not think it credible or intuitive that a regional outlet mall on the other side of an interstate, a mile from the Town Center, will draw people into the Town Center. In his opinion, it will instead draw people out of the Town Center and into the Cabin Branch neighborhood, leaving development scattered on the fringes of Clarksburg. People will get off the interstate to

shop and then will get right back on. If implemented, he thinks the outlet center will severely limit the amenities available in the Town Center and the Historic District. 8/14/13 T. 172.

Nothing in the Master Plan indicates that the MXPZ zoning was intended to increase the retail uses in Cabin Branch. The Master Plan only discusses neighborhood retail and employment along the I-270 high-tech corridor. Nor does the type of retail conform with that specifically recommended by the Plan. By quadrupling and changing the retail uses, the outlet center will keep the Town Center and the Historic District in their current deserted and underused state for the foreseeable future. Mr. Cobb feels that “place-making” should occur in the Town Center rather than in Cabin Branch. 8/14/13 T. 173-174.

Mr. Cobb added that he thinks that civic uses will also be delayed in the Town Center because those uses “follow the people.” If residential development is located across I-270, the demand for libraries and fire departments will be there rather than in the Town Center. 8/14/13 T. 176. He is concerned that some of the active uses associated with the outlet center, such as the amphitheater, will reduce the likelihood that these uses will be located in the Town Center. 8/14/13 T. 177. He believes that if Cabin Branch is fully built out first, it will significantly delay the timing of the Town Center retail, which is not limited simply to the neighborhood retail center owned by Elm Street. 8/14/13 T. 179. The project being proposed by the Peterson Companies would be located within the Town Center; he assumes that development of both projects will not be possible. 8/14/13 T. 182.

On cross-examination, Mr. Cobb testified that he had not performed any marketing studies on the impact of the outlet center on the retail in the Historic District and clarified that the health of the Historic District depends on development of the Town Center. 8/14/13 T. 186-189.

On cross-examination, Mr. Cobb stated that he did not have the expertise to know whether retailers like Armani or Hugo Boss would locate in the Historic District. He acknowledged that the Master Plan limits development in the Historic District itself, but stated that its success will depend on what happens in the adjacent properties to the east and west. 8/14/13 T. 189. He stated that some of the uses typically located in retail outlet centers overlapped with uses that might go into the Historic District, such as restaurants and small grocery stores. 8/14/13 T. 194. He agreed that the Plan recommends limiting new construction within the Historic District and supports using the historic structures there. 8/14/13 T. 197. While he had not done market studies of retail, he asserted that the Historic District needed more activity surrounding it to be successful. 8/14/13 T. 200.

Mr. Cobb acknowledged that he’d had discussions with the Peterson Company who indicated that they would pay for the main trunk sewer line to the Historic District. 8/14/13 T. 207. He did not know whether the Miles Coppola project had zoning approvals. 8/14/13 T. 215.

6. Bao Zhu Wei:

Mr. Wei is a resident of Clarksburg. He does not think it conflicts with the Town Center retail because it proposes a “premium mall.” 8/14/13 T. 218. Nor does he believe it will create

traffic congestion because people don't go to the mall during peak hours. He believes that the outlet center in Cabin Branch will make people's lives better. 8/14/13 T. 218-219.

7. Gary Unterberg:

Mr. Unterberg resumed his testimony from the prior hearing. He testified that Policy 8 of the Master Plan is to generate employment on both sides of I-270, and to incorporate office and retail uses as part of the neighborhood development. He opined that this development plan amendment is consistent with that goals and broadens the types of employment that may be located there to include office, research and development, light industrial, hotel, urgent care, medical office and professional services, as well as retail, entertainment and public uses consistent with other more recent office parks. It also leaves ample square footage for office use. 8/14/13 T. 222-223.

In the Cabin Branch neighborhood, the Master Plan recommends a mix of uses resulting in a comprehensively designed employment center. Residential development, including 500 senior units, is part of that mix and will not be changed by the amendment. If approved, the amendment will still result in 2,420,000 square feet of employment retail, which is also the same as originally approved. The primary change has been the type of retail proposed. The original development plan proposed 120,000 square feet of neighborhood retail; this amendment proposes between 50,000 and 120,000 square feet of neighborhood retail, which will *not* include a full-service grocery store (typically around 60,000 square feet. 8/14/13 T. 224-225.

According to Mr. Unterberg, neither the Master Plan nor the Zoning Ordinance defines "neighborhood retail." The MXPD Zone permits 20% of the site to be retail, which will include the retail outlet center. 8/14/13 T. 226.

Mr. Unterberg testified that "neighborhood retail" will be located within 3 areas of the site. The first area is north of Md. Route 121, also known as the "Gosnell Property." The Planning Board has approved a site plan for this property that includes a gas station, car wash and convenience store. The balance of the uses are a hotel and two banks, both of which the Planning Board considered to be employment uses. 8/14/13 T. 227. There second area of neighborhood retail will be located between Area B and A shown on the development plan. They have attempted to create a "place" along Wellspring Avenue, which is one of their northern east-west connections. To the west, Wellspring terminates at Burn Park, which contains both a local park and elementary school. Wellspring Avenue will have a "greenway" of about 30 feet that connects the park and school and that will front residential units along the avenue. It will connect the areas south of the stream valley proceeding north to the main activity areas in Area A. The "greenway" consists of a 30-foot wide landscaped lawn area to the side of the pave road. It will contain sidewalks as well as a meandering path. The greenway is one of the civic amenities that links the park and element school east to west. It also provides a visual opening to the Stream Valley buffer at the intersection of Wellspring and Cabin Branch Avenue that continues into Area B and A. The bulk of the retail outlet center will be in Area A. 8/14/13 T. 230.

Also included in the "neighborhood retail" category are some freestanding restaurants. Additional restaurants and a food court will be within the outlet center. In addition, there are a number of uses that could serve both as neighborhood retail and outlet center retail; some of the

coffee shops, furniture stores, and apparel shops and furniture stores could equate to “neighborhood retail.” 8/14/13 T. 230.

The third neighborhood retail area is located further south along Cabin Branch Avenue in Area C. It is located on “Skimmer” another major east-west connection located in the southern end of the site. It connects provides a connection to the community center and pool, which is to the west in the RMX Zone. It will be a boulevard and, in the block between Broadway and Cabin Branch, will have a “north” and “south” lawns, which are green open space. 8/14/13 T. 231.

Neighborhood retail will be located at the roundabout, which serves as the gateway to the employment center. It will not have a full-service grocery store, although it may have some type of food store or pharmacy. Neighborhood employment uses will be located in the Gosnell property, which may also house professional offices, realtors, etc. The development plan will include up to 275,000 square feet of public uses (recommended by the Master Plan), which may include a place of worship and a daycare center. 8/14/13 T. 231-232.

One of the neighborhood-specific Master Plan recommendations is to maximize access to open space, according to Mr. Unterberg. The development plan amendment accomplishes this by preserving the Little Seneca Stream Valley and including east/west greenways or links throughout the development. A greenway is located north of Md. Route 121 that will have a 3 or 4-foot high stone fence with entrance monuments. This will continue through the front of the employment and retail sections of Areas A and B along Md. Route 121. Further south, Tribute Parkway is what he considers to be the neighborhood’s “Central Park”—it is a divided road with a large median that has a series of outdoor rooms and sculptures. 8/14/13 T. 234. A community center will be located in near the center middle of the site. Little Seneca Parkway, in the southern part of the site, will also have a greenway and path system that connects with a sidewalk system and a trail system within the Cabin Branch tributary. 8/14/13 T. 234-235.

The main focal point of the mixed use area is located approximately where the northern tip of the Little Seneca tributary connects to Wellspring Greenway. This is the point where the mixed uses will transition to the outlet center, connect to the Greenway, and provide views into the Stream Valley. 8/14/13 T. 235-236.

Mr. Unterberg confirmed that the Master Plan recommended the property’s current MXPDP zoning, which was approved in 2003. According to him, the Master Plan “highly encouraged” the MXPDP option to provide more flexible design standards and a better mix of uses to accomplish its goals. 8/14/13 T. 236. The development plan approved meets the Plan’s recommendations to have a variety of housing types; 1,886 residential units are included in both the MXPDP and RMX portions of the property. The Plan recommends that no more than 20% of the residential units should be multi-family, single-family detached units must be a minimum of 45% of the total units, and the balance consisting of single-family attached units, or townhouses. They have a variety of townhouse styles in the neighborhood. 8/14/13 T. 237.

Mr. Unterberg testified that the proposed amendment conforms to the roadway and transportation recommendations in the Master Plan. The plan recommends an inter-connected roadway system. The main north-south roads are Cabin Branch Avenue and Broadway Avenue

with interconnecting east-west links already described. The majority of these roads will be public roads. 8/14/13 T. 238.

The amendment also conforms to the Plan's recommendations for transit. The Plan recommends a series of bus loops and convenient bus stops. These may be easily accomplished along Cabin Branch and along Broadway (north-south) within the mixed use areas in Area C and on Skimmer. They plan a series of stops along Wellspring Avenue and along Md. Route 121. Buses routes will connect the Cabin Branch neighborhood to development on the eastern side of I-270 and the transit station on the Comsat property. The current proposal for transit on the east side of I-270 is to move forward on the southern leg with either light rail or bus rapid transit. The governor recently announced that the first phase will begin at Shady Grove Road up to Metropolitan Grove Road. The future phase will extend transit through Germantown to Clarksburg, terminating at the Comsat property. 8/14/13 T. 239-240.

Mr. Unterberg explained how the development plan amendment conforms to the Master Plan recommendations for bikeways. The amendment adds some bike trails, including an 8-foot bike trail that replaced a 5-foot sidewalk. That bikeway will extend along Md. Route 121 from the northern portion of the site to Old Baltimore Road, proceed along Broadway and continue on the western portion of the site north again to the park and school. The northern portion will eventually extend to the east across I-270. Two other bike routes will be located along Cabin Branch Avenue and Little Seneca Parkway. The Little Seneca bike route will continue to the east across I-270. 8/14/13 T. 241.

Environmental issues have been studied and "held in high regard" for the Cabin Branch neighborhood and Clarksburg in general, according to Mr. Unterberg. Portions of this property are located within Clarksburg's special protection area and the developers of Cabin Branch have committed to treat the entire property as if it were in a special protection area. An "overall" forest conservation plan and "overall" water quality plan have been approved for the project. As site plans are approved, these "overall" plans are updated to coordinate with the site plan. No portion of this site is within the 10-Mile Creek watershed. 8/14/13 T. 242.

The Master Plan recommends the Clarksburg area to be developed in four stages. Mr. Unterberg testified that the Plan recommends development of Cabin Branch in Stage 3, which is triggered by changes to the water and sewer category approved by the Council in 2001. 8/14/13 T. 243.

Mr. Unterberg compared the development plan amendment with the retail outlet center proposed for the Miles Coppola site in the Town Center District. The Miles Coppola is approximately 100 acres and is in the northeast quadrant of the intersection of I-270 and Md. Route 121. At present, the site is zoned R-200, a residential zone, although it is recommended in the Master plan for the MXPDP Zone as part of the employment corridor similar to Cabin Branch. It will be necessary to undergo the rezoning process to develop a retail outlet at that location. The MXPDP Zone permits 20% of a property to be retail; this would mean that only 94,000 square feet of retail could be developed under the zoning recommended in the Master Plan. The Master Plan also recommends a neighborhood retail center in the Town Center, which is now controlled by Elm Street Development. 8/14/13 T. 244-245.

Currently, the Miles Coppola site is recommended to be developed in Stage 4, which includes those areas that drain into 10-Mile Creek. Stage 4 development may not proceed because it hasn't met the triggers included in the Plan. A pending amendment to the Master Plan covering the 10-Mile Creek watershed has two alternative recommendations for the property, each of which is accompanied by environmental requirements. One alternative proposes retail and mixed use development on that site; the other proposal recommends high-density housing. The Planning Board is scheduled to make a recommendation in September, which must then be approved by the District Council. In his opinion, it will be between five and seven years before that project may proceed to construction. 8/14/13 T. 245-246.

He opined that the amended development plan also conforms to a 2011 amendment to the Clarksburg Master Plan, approved as Council Resolution 17-188. This amendment changed the staging component of the Plan to permit limited neighborhood retail to proceed in Clarksburg Village. The Plan originally delayed retail development in Cabin Branch and Clarksburg Village (in Stage 3) until 90,000 square feet of retail was developed within the Town Center. The amendment changed that staging to permit Stage 3 retail to be developed when a preliminary plan was approved for Clarksburg Town Center. Because a preliminary plan has been approved for the Town Center neighborhood retail, a Harris Teeter grocery store is under construction in Clarksburg Village. 8/14/13 T. 249.

In his opinion, the Plan's recommendations to split zone the Cabin Branch neighborhood into the RMX and MXPD Zone demonstrate that a retail outlet center is consistent with the Plan. The RMX Zone optional method of development permits retail development only at the density and location specified in the Plan, while the MXPD Zone does not. The MXPD Zone limits retail development only as a percentage of the total development permitted. As it permits 20% of the total development to be retail, the maximum amount of retail permitted in the MXPD Zone on this property is 484,000 square feet.

The Master Plan recommended the RMX Zone for the northern and western portions of the site, as shown on page 66 of the Master Plan. The balance of the site was recommended for the I-3 Zone. The Plan's recommended zoning also located the retail core at the northern portion of the property (in the RMX Zone) and specified a numeric limit, 120,000 square feet, for neighborhood retail. Had the property been developed under the RMX optional method, it would have required this recommendation to allow development of the neighborhood retail core in the northern portion of the property. If developed under the Plan's recommended base zones, the retail would have had to be located there, because the I-3 Zone permitted only limited retail uses at the time.

As an alternative to development under the RMX/I-3 Zones, the Master Plan recommended development under the MXPD Zone. While the MXPD Zone must be recommended in the Master Plan, the specific location and density of retail development need not be designated in the Plan.

In his opinion, the Council did not know whether the property would be developed under the recommended base zones (i.e., RMX and I-3) or the alternative MXPD floating zone. Had it been developed under the RMX Zone, the density and location of the development would have had to be designated in the Plan. 8/14/13 T. 249-274.

September 4, 2013, Public Hearing

1. Gary Unterberg:

Mr. Unterberg continued his testimony on substantial compliance with the Master Plan. He testified that the development was within the 2,420,000 million square feet of commercial development recommended by the Master Plan. In his opinion, the Plan's overarching goal for the Cabin Branch neighborhood is to create a comprehensively designed and mixed-use employment center. Relying on Mr. Bogorad's and Mr. Kaplan's testimony, he opined that the retail outlet center would accomplish that goal. 9/4/13 T. 24.

He reiterated his opinion that the Plan's recommendation for 120,000 square feet of retail in the Cabin Branch neighborhood stemmed from the need to designate sufficient retail for a neighborhood center if the property was developed in the base RMX Zone, but did not intend to limit the amount of specialty retail that could be developed in the MXPDP Zone. 9/4/13 T. 27. The Technical Appendix supports this conclusion, he believes, it differentiates between neighborhood and comparison retail. For this reason, he opined that the Plan called for 120,000 square feet of neighborhood retail, but was silent on other types of retail within the Cabin Branch neighborhood. 9/4/13 T. 32.

In 2003, the Council rezoned the subject property to the MXPDP Zone. The preliminary plan approved in 2004 and amended in 2008 approves 2,420,000 square feet of undefined commercial uses in the MXPDP area. In his opinion, the Master Plan did not preclude specialty retail in the MXPDP Zone, although the zone itself limits the amount to 20% of the commercial development permitted in the zone. 9/4/13 T. 34.

Mr. Unterberg advised that other developments have similarly interpreted the requirements of the MXPDP Zone. The Washingtonian Center, approved in LMA G-439, was the first project approved within the MXPDP Zone. The Gaithersburg Master Plan called for the development to be a signature office district and residential use. The Council approved approximately 400,000 square feet of specialty retail in that development, applying only the 20% cap found in the MXPDP Zone. In doing so, the Council found that retail was an employment use. 9/4/13 T. 37. He noted that the Land Use Map included in the Gaithersburg Master Plan designated the site for "signature" office, and residential development. The development plan ultimately approved approximately 400,000 square feet of retail in the office park because the MXPDP Zone permitted that amount and does not require it to be recommended in a master plan. 9/4/13 T. 40-46.

He offered Seneca Meadows project, located within the area covered by the 2009 Germantown Master Plan, as a similar interpretation of master plan recommendations. The Germantown master plan recommended the Seneca Meadows site for industrial and technology office and residential uses to be developed under the TMX (Transit Mixed-Use) Zone. The plan recommended that 70 percent of the project should be office uses and 30 percent of the project should be residential. It further recommended that there be limited street level retail but did not specify an amount. 9/4/13 T. 46-48. The preliminary plan approved included a 207,000 square foot retail center that houses the new Wegman's in Germantown. In his opinion, the Planning

Board concluded that the retail, particularly the Wegman's, constituted an employment use, noting that a master plan cannot specify all development possibilities. 9/4/13 T. 51.

Mr. Unterberg further opined that master plans should be interpreted flexibly in this instance because of its age and because of the land use and market changes that have occurred over the years. Two factors are of particular warrant this flexibility. One is that the market will not support three grocery stores in Clarksburg (i.e., one in Clarksburg Village, one in Cabin Branch, and one in the Town Center District). The second is that the Plan is silent about comparison retail—while it does not specifically recommend it, the Plan does not prohibit it. In order to incorporate amenities and features such as restaurants and other amenities, he opined, it is appropriate to include this use within the parameters of the MXPZ Zone. The Plan recognizes that floating zones have more flexible development standards and may be approved if compatible with surrounding land uses and the purpose of the zone. For these reasons, he believes the development plan amendment substantially complies with the master plan. 9/4/13 T. 53-54.

He opined that the proposed land use complies with the Master Plan, based on Mr. Bogorad's testimony that retail amenities are necessary to attract office users. Further, the Plan recommended MXPZ zoning, which may accommodate the 20% retail land use proposed by the development plan. When implemented, he believes, the amendment will produce the type of mixed use environment specifically envisioned by the MXPZ Zone, including residential, office, neighborhood, specialty retail, and community-type uses. The amendment, in his opinion, is a realistic means of implementing the goals and objectives of the master plan taking into account changes in the economy, development of office parks, and needs of the community. 9/4/13 T. 56.

He opined that the circulation systems have been designed to ensure that there will be significant, meaningful connections between land uses that are safe, adequate and efficient. *Id.* With regard to stormwater management, he opined that there are no changes to the prior approved water quality plans. 9/4/13 T. 57. The documents relating to maintenance of common and quasi-public use areas from the original DPA are adequate for this DPA. The DPA meets the compatibility standards of the MXPZ Zone, nor will it adversely impact existing or proposed public services and facilities. Transportation facilities will be adequate and the application will encourage the coordinated and systematic development of the area and the regional district. 09/04/13 T. 57-58.

In his opinion, the development envisioned by the DPA will assist Clarksburg in becoming the place envisioned by the master plan. There are existing, approved environmental plans for the area, it does not exceed the existing adequate public facilities approval, it will complement and not detract from the Town Center, and roads and utilities either have been or are being constructed. For these reasons, the development plan amendment is in the public interest. 9/4/13 T. 59.

On cross-examination, Mr. Unterberg testified that the neighborhood retail is located on the RMX portion of the site because the RMX Zone requires that the location and square footage be designated in the master plan. 9/4/13 T. 64. The development described in the justification statement may not occur because the development plan amendment has a minimum and maximum square footage for each area. Thus, there could be less retail and more office. 9/4/13 T. 72. He agreed that if the uses were developed as described in the justification statement, only

approximately 25,400 square feet would be left for neighborhood serving retail. 9/4/13 T. 77. As to the Plan's recommendation that the neighborhood retail be at one location, he opined that the single location stemmed from the possible development under the RMX Zone. The MXP Zone encourages a mix of uses throughout the employment area. He disagreed, however, that the Plan requires the neighborhood retail to be at one location, although he acknowledged that the use of the word "concentration" fairly could be interpreted as meaning in one location. 9/4/13 T. 78-79.

According to Mr. Unterberg, the "neighborhood core" of Cabin Branch is a linear greenway connecting the western residential uses with the retail outlet center and stream valley. Wellspring Road, which is a greenway and is walkable, will link the local park and elementary school to the stream valley on the eastern side of the site. Along the greenway are a series of nodes, particularly in the mixed use area. These nodes will include the amphitheater, stream valley, and the plaza within the retail outlet center, and continue through the retail in Area B. The Plan recommends civic uses located within the core; these will include the linear greenway, walking trails, and the plaza within the retail outlet center. The other civic use is the amphitheater or outdoor greenspace. Churches and daycare centers may also be included in Area B. 9/4/13 T. 82-84.

He stated that the primary focal area will be within the Northern District; however, the development is large enough that they wanted to provide a second, minor neighborhood retail use in Area C that is integrated with the "green links" on the development plan. 9/4/13 T. 88. He acknowledged that the majority of the primary neighborhood retail core will be operating in conjunction with the outlet center. 9/4/13 T. 90-91.

Mr. Unterberg testified that 2011 Limited Amendment to the Clarksburg Master Plan was necessary for the Applicant to proceed with retail at this location. 9/4/13 T. 117. He acknowledged that the Applicant's Certificate of Need was denied on January 20, 2011, but was unaware whether any effort had been made to expand the scope of the limited amendment to include the Adventist property. 9/4/13 T. 126. While the amendment does not propose a binding element prohibiting a full service grocery store, it contains the Planning Board's binding element limiting retail stores to a maximum of 50,000 square feet. He acknowledged that there is no empirical testimony that the market could not support a third grocery store other than Mr. Bogorad's testimony. 9/4/13 T. 131. He did not think that failure to have a grocery store contravened the intention of the Plan even though the Plan specifically recommended a grocery store in Cabin Branch and the Town Center and all grocery stores will not be on the east side of I-170. 9/4/13 T. 133. He believes this may be explained by the different zoning on each of the properties. 9/4/13 T. 134.

In his opinion, the Plan calls for 153,000 square feet of neighborhood retail, but permits up to 300,000 square feet of "commercial" uses. In his opinion, this may include office uses. He admitted, however, that it would be possible for the Town Center to develop in a manner similar to the Washingtonian project. 9/4/13 T. 140. He does not know whether the retailers located within the Washingtonian exceed 50,000 square feet. 9/4/13 T. 141.

Mr. Unterberg agreed that the retail outlet center would be one of the first things one would see when proceeding to the west of I-270. While the retail center itself will not contribute to the image of I-270 as a hi-tech corridor, the office users it attracts will contribute to that image.

9/4/13 T. 146. The original development plan contained 120,000 square feet of retail because that was recommended in the Master Plan. He did not know why the Master Plan adopted that number. 9/4/13 T. 159-160. Nor could he recall any other instance where specialty retail was treated differently than neighborhood retail. *Id.*

He testified that he could not recall another application requesting four times the retail square footage recommended in the Master Plan. 9/4/13 T. 266.

2. James Soltesz:

Mr. Soltesz is a professional engineer but testified only as a fact witness by stipulation of the parties. He described the retail development proposed on the Miles Coppola property within the Town Center District that had been mentioned by other witnesses. He presented the boundaries of the Hyattsville special study area, the Ten Mile Creek area, the Cabin Branch neighborhood, the Brink Road transition area, the transit corridor district, the Newcut Road neighborhood, the Ridge Road transition area and the Town Center District. He pointed out that the Town Center District is larger than the Town Center neighborhood retail area. 9/4/13 T. 170-171.

The Miles Coppola property is located on the southwest portion of the Town Center District. The planned transit center is located within the Miles Coppola property. According to Mr. Soltesz, the Peterson Companies, in conjunction with Tanger Outlets, has a contract to develop that property with an outlet center. The property contains approximately 100 acres of land in the Town Center District, but is in Stage 4 because it drains to the 10-Mile Creek watershed. The Plan included several triggers that had to be implemented before proceeding with Stage 4. The first was a baseline environmental study, which was completed earlier. The second was a water/sewer plan for bringing those utilities to the area. That was completed approximately 7-8 years ago. The next trigger was to have 2,000 building permits issued either in the Town Center District or the Newcut Road neighborhood. The intent was to create a synergy of the community to be formed on the east side of I-270. After the 2,000 permits had been issued, the last trigger was a plan outlining how water quality would be preserved. The Council intervened and requested a limited master plan update in order to address certain environmental issues regarding other development. The Council expanded the scope of the study to include land uses and the limited master plan amendment should be completed by the end of the year. 9/4/13 T. 179-182.

The Miles Coppola family retained his firm to look at engineering issues related to their development. They propose a mixed-use project including a Tanger specialty outlet, hotel, office and residential uses. The sanitary sewer lines have already been designed for the property. They have not filed for rezoning to the MXPDP Zone yet because they must await adoption of the 10-Mile Creek Limited Master Plan Amendment. At this time, they have performed many environmental studies, including forest land delineations, wetlands delineations, steep slopes, and stormwater management plans. They have also laid out Observation Drive through the property and studied how they would extend sewer to the Historic District. Therefore, even though no zoning application has been filed, the proposed use has been designed. 9/4/13 T. 185.

Mr. Soltesz testified that they will be providing sanitary sewer lines to portions of the Historic District because many properties have failing septic systems. The waste is now polluting the headwaters of 10-Mile Creek. As part of the facility study required by WSSC, they are able to provide a gravity surface sanitary sewer trunk line, rather than requiring individual pumps, to the Historic District properties. Individuals would then have to pay to connect their properties to the main line. The line will proceed from the southern portion of the property northeast to Md. Rt. 355, then southwest on Rt. 355 and then along a portion of the future right-of-way for Observation Drive. The line will also run by the proposed fire station. 9/4/13 T. 186-189.

In addition, the Peterson Group and Tanger have offered to build Observation Drive (also known as the 355 By-Pass), according to Mr. Soltesz. They also plan to incorporate land for the transit station. 9/4/13 T. 191-192.

Mr. Soltesz testified that Staff has two alternative recommendations for the Miles Coppola property in the latest version of the 10-Mile Creek Limited Amendment to the Master Plan. One is for mixed use with a specialty retail outlet, residential, and office/hotel. 9/4/13 T. 190. The other is for a mixed use project with a higher residential density. In his opinion, the Staff realizes the importance of this site to the development of the Town Center District. 9/4/13 T. 192.

On cross-examination, Mr. Soltesz agreed that the Miles Coppola property is within Stage 4 of the Master Plan, is recommended for MXPDP, and is currently zoned R-200, single-family residential. 9/4/13 T. 196-197. He acknowledged that if all of the Plan's recommended 470,000 square feet of employment use is located within the Miles Coppola MXPDP zoning, only 20%, or 90,000 square feet, could be devoted to retail. 9/4/13 T. 199. He agreed that the Plan's staging element was intended to phase development in an organized fashion, and that Stage 4 would not be open until the 10-Mile Creek amendment is adopted. He expects that to occur within the next several months, although he admitted that Stage 4 may not open up at all, although he recognized that there is opposition to the development. 9/4/13 T. 202-204.

He agreed that water quality was a significant concern that had to be addressed before opening Stage 4, but felt that sufficient time and expertise had been devoted to studying the issue to ensure it would not be impaired. 9/4/13 T. 205-206. He did not know whether Peterson has done a traffic impact analysis for the project. 9/4/13 T. 207.

Mr. Soltesz testified that the sewer line serving the Historic District would originate in the southwest corner of the Miles Coppola property and proceed to the northeast toward Md. Route 355. Any portion of the Historic District that drains into the 10-Mile Creek watershed will be able to connect to the trunk lines offered by the Peterson project. 9/4/13 T. 212. He testified that the line would originate at one of two pumping stations, either on the west side of I-270 near the County detention center or on the Miles Coppola property. Because the topography falls from the northeast to the southwest, lines with gravity will drain to the pump station. At the WSSC pump station, the sewage will flow to a pressure main that is ejected through a pressure system into an existing gravity trunk line. 9/4/13 T. 215.

Mr. Soltesz described the properties to be served within the Historic District. The sewer line will serve only those properties that drain into the 10-Mile Creek watershed. Each property in the Historic District will have to make its own connection to the main line. 9/4/13 T. 221. The

system has been conceived conceptually; the exact design will have to be approved by WSSC. 9/4/13 T. 222.

He also described the Peterson Companies' proposal for Observation Drive. According to him, Peterson will pay for construction if required at subdivision. They have designed the road and have met with both the Planning Department and Montgomery County DOT about the design. He speculated that Miles Coppola would have to pay for the road anyway for frontage accessibility. 9/4/13 T. 226-228.

Mr. Soltesz was unsure whether Peterson will pay to construct the portion of Observation Drive between Stringtown Road and Clarksburg Road (Md. Route 121). They have designed scenarios that would move the Coppola property's access from Observation Drive to Gateway Center Drive. This could serve as the 355 by-pass requested by the community. 9/4/13 T. 229. He acknowledged that none of these options have been decided upon; however, they are able to demonstrate to the community that they can happen. 9/4/13 T. 230. He did not know for sure who would fund construction, but speculated that Peterson would pay for it either via an impact fee or developer contributions. At present, construction of the road is not in the Capital Improvements Program. He does not anticipate paying for the road from County funds. 9/4/13 T. 233.

Mr. Soltesz testified regarding the timing of the Peterson project. He stated 10-Mile Creek limited master plan amendment has been scheduled for Council approval in early 2014. He anticipates the rezoning would be adopted in May, 2014. Peterson and other Stage 4 developers have requested that the water and sewer category changes be approved simultaneously with the zoning. He acknowledged that a forest conservation plan and water quality plan will be required, but didn't know the exact status. He could not say whether it normally took 2 years to complete a water quality plan or not, although his firm has worked on the engineering for approximately 1 year. 9/4/13 T. 240. He agreed that he could not file a preliminary plan of subdivision until the water quality plan has been approved. A preliminary plan may take approximately 6-12 months. If the site plan is reviewed simultaneously with the preliminary plan, it does not add more time to the process, but if not, it adds an additional 6-12 months. Record plat approvals take approximately 4 months. During this time, engineered construction drawings for construction of Observation Drive would also have to be developed. He did not agree that the project could begin construction in the summer of 2013, but felt that they could begin grading by the end of 2014. 9/4/13 T. 241-247. He did not know whether the Tanger outlet could be pursued if the County adopted the alternative for more residential on the property. 9/4/13 T. 249. He agreed that the residential option calls for a townhouse floating zone, but did not know whether that permitted retail. 9/4/13 T. 250-251.

Mr. Soltesz stated that if the limited amendment recommends a retail outlet center, Peterson will not seek to develop the property under the MXPDP Zone.

September 6, 2013, Public Hearing

1. Gary Unterberg:

Cross-examination of Mr. Unterberg continued from the prior hearing. He testified that the maximum amount of retail permissible in the Northern District will be 484,000 square feet because Area A permits up to 450,000 square feet and Area B permits up to 150,000 square feet. 9/6/13 T. 9. Area A will be primarily specialty (i.e., outlet center) retail, although specialty retail and neighborhood retail may overlap. Area B will be primarily neighborhood retail. Neighborhood retail is also located north of Md. Rt. 121 and in Area C. Area C retail is capped at 30,000 square feet. 9/6/13 T. 10-11.

According to Mr. Unterberg, the “neighborhood core” recommended by the Master Plan will be located primarily in Area B and along Wellspring Avenue. There will not be a full-sized food store in Area B or C, but they could have a convenience food store up to 50,000 square feet in Area B or up to 30,000 square feet in Area C. 9/6/13 T. 12-14.

Mr. Unterberg agreed that the 2011 Limited Amendment to the Master Plan mentions the grocery stores to be provided in the area. He clarified that the North District illustration from Exhibit 45 shows only one possible build-out scenario. 9/6/13 T. 49. The “neighborhood square” identified in the justification statement is a linear east-west alignment along Wellspring Avenue providing view sheds to the stream valley. The buildings which face Wellspring are transit-oriented, providing opportunities for gathering places. An opportunity for an outdoor square occurs at the intersection of Golden Eye and Wellspring. Other opportunities present themselves to the north and east. He acknowledged that the Applicant’s Justification Statement states that the food court area will function as the neighborhood square, but stated that the Justification Statement is not a binding element of the development plan amendment. 9/6/13 T. 50. The neighborhood core will be primarily within the block bordered by Wellspring on the south, Golden Eye to the west, 121 to the north and Cabin Branch Avenue to the west. This is a mixed use area which may include retail, office employment, public uses, and gathering spaces that may continue further east and overlap with Area A. According to him, the “strong neighborhood focal point” recommended by the Plan is the Wellspring greenway and consists more of a linear corridor interconnecting different uses. 9/6/13 T. 51. In his opinion, this still meets the Plan’s recommendation to concentrate uses within a central area because the linear greenway is two blocks long. 9/6/13 T. 53. As to the Plan’s recommendation that the neighborhood center be located close to the highest density residential on the property, he stated that the northern area contains the bulk of the townhouse uses, although he did not know the exact densities of the different areas. 9/6/13 T. 53-57. He acknowledged that the development plan does not mandate that any neighborhood retail be located in Area C. 9/6/13 T. 59.

To address issues raised about whether a new forest conservation plan would be required, Mr. Unterberg was qualified as an expert witness in landscape architecture. 9/6/13 T. 73. He testified that, while stormwater management ponds are shown on a forest conservation plan, the two plans are for different purposes. According to him, the forest conservation plan shows the area that may be developed, what trees are protected, and then what trees are planted. In his opinion, most forest conservation plans shows the specific development that will occur on the property, but in terms of disturbed or developable area. Thus, the requirements are based on the

limits of disturbance, what trees must be removed, and what trees will be used to meet afforestation requirements. 9/6/13 T. 74-76.

He testified that a preliminary forest conservation plan was approved with the original development plan in 2003. A final forest conservation plan for the entire Cabin Branch property was approved on May 2, 2013. This application does not vary the limits of disturbance approved in the final forest conservation plan for the Cabin John property. 9/6/13 T. 76-78. He testified that the areas impacted by the amendment will be further updated at site plan approval in order to determine where forest plantings and tree save areas will be located. 9/6/13 T. 81. These updates will be minor—99% of the work has been completed. As site plans move forward for the different areas, there may be perimeter updates that the Planning Board must approve, but these must comply with the overall plan requirements. As a result, he opined, if you subtracted forest in one location, it would have to be reconciled with the final forest conservation plan. The majority of planting areas have been identified. At site plan, they may identify additional planting areas or would be able to calculate the credit for street trees. The majority of the plantings, however, are within the stream valley. 9/6/13 T. 82-83. He noted that the final forest conservation plan has been updated several times and that has been the methodology used at Cabin Branch. 9/6/13 T. 84-85.

He explained that, in his opinion, the Master Plan's recommendation that neighborhood retail be placed in one location was based on the RMX base zone recommended for the property. As noted, the MXP Zone does not require the location of retail to be designated on a Master Plan. 9/6/13 T. 85. The original approved development plan identifies retail in three locations, the property north of Md. 121, within Area B, and within Area C. It also showed limited retail in Area D, south of Little Seneca Road. The Area C retail is in approximately the same location as that proposed in the original development plan. 9/6/13 T. 86-87.

The subsequent preliminary plan, approved in 2004, included retail in those locations. The retail for Area D was 4,500 square feet, the Area C retail was approved at 19,500 square feet, and the area north of Md. Route 121 has an approved site plan for 8,600 square feet. This would leave 87,400 square feet of retail in Area B. 9/6/13 T. 88-89.

In his opinion, having the neighborhood core at the northern end of property is closer to the Pulte development north of Md. Route 121. 9/6/13 T. 94. The Technical Appendix to the Plan differentiated between neighborhood retail and comparison retail when looking at future demand. In his opinion, the Plan's Technical Appendix referred only to neighborhood retail demand, without a separate finding as to comparison retail demand. In his opinion, the Plan makes no finding about the need for comparison retail. 9/6/13 T. 96-97. In addition, the language recommending a grocery store in the Town Center is stronger than the language used to recommend a grocery store in the Cabin Branch neighborhood. 9/6/13 T. 99.

He further testified that the 60,000 square feet of neighborhood retail is consistent with the recommendations of the Master Plan, even though that recommended 120,000 square feet. If square footage of a typical full-service grocery store (i.e., 60,000 square feet) is subtracted from the 120,000 square feet of retail recommended by the Plan, only 60,000 square feet of neighborhood retail could be developed within the Cabin Branch neighborhood. Second, the Master Plan designated the 120,000 square feet of retail on the RMX, not the MXP, portion of

the property. Thus, the retail in the MXPDP portion of the property is not limited by the Plan, only by the 20% maximum contained in the Zone itself. 9/6/13 T. 101-105.

He stated that there are several examples in the Cabin Branch neighborhood where the Plan has been interpreted flexibility. The Plan originally called for what is now Little Seneca Parkway to pass completely through the property. That recommendation was never implemented after further review by the Staff. In addition, the retail location is shown in the Plan to be generally west of Broadway; ultimately, the original development locates the bulk of retail in Area B with other portions scattered throughout the site. The Plan recommended an elementary school right in the middle of the site. Ultimately, the school was moved north near the edge of the property along Md. Route 121. The local park was also moved from the location recommended by the Plan and the retail area north of Md. Route 121 was not recommended for its current MXPDP zoning. 9/6/13 T. 107-108.

He testified that there need not be one epicenter or community gathering point. There will be multiple ones, including the amphitheater. 9/6/13 T. 121. He acknowledged that he did not know why the Master Plan recommended 120,000 square feet because the Technical Appendix states that there is demand only for 75,000 square feet of neighborhood retail. 9/6/13 T. 128. He doesn't agree, however, that the Master Plan and the comprehensive rezoning should be read separately. He interprets the Plan to mean that one could alternatively develop the neighborhood under the RMX Zone and have up to 120,000 square feet, or have an unlimited amount of retail under the MXPDP Zone. 9/6/13 T. 128-129. Mr. Unterberg agreed that Plan recommended commercial uses of up to 300,000 square feet for the Town Center District, which could include comparison retail. 9/6/13 T. 145.

Mr. Unterberg agreed that the new Wegman's was important to the Planning Board's finding that retail at Seneca Meadows was an employment use. Because of the way it operates, it employs more individuals than a typical grocery store. The Wegman's made up 120,000 square feet of the 200,000 square feet of retail within Seneca Meadows. Because of the binding element limiting the size of stores to 50,000 square feet, something like a Wegman's could not be built in Cabin Branch. 9/6/13 T. 146-147.

With regard to the final, approved, forest conservation plan, Pond #12 and Pond #15 are not grandfathered under the current state stormwater management requirements and will have to be redesigned. Generally, the eastern area bordering I-270 is not grandfathered and will need to provide stormwater management under the current regulations. 9/6/13 T. 157-159. He is unsure whether the forest conservation plan would have to be redesigned to accommodate this because stormwater management may be provided within the developable area and within the limits of disturbance shown on the approved forest conservation plan. 9/6/13 T. 160-161. The minor modifications of the Forest Conservation Plan prepared in the past have been to outfalls from the stormwater management ponds. Since ponds cannot be used under the current requirements, these outfalls shown would be less likely to change. He opined that the Environmental Site Design measures may fit within the constraints of the existing approved forest conservation plan. 9/6/13 T. 163.

2. James Noonan:

Mr. Noonan qualified as an expert land planner. 9/6/13 T. 196. In his opinion, the development plan amendment does not conform to the Master Plan on two levels. 9/6/13 T. 198.

First, in his opinion, it is inconsistent because it sets up a center for urban activities that competes with the Town Center District. Second, the development plan amendment is inconsistent with the Plan's specific recommendations for the Cabin Branch neighborhood. 9/6/13 T. 198.

Mr. Noonan testified that when he first reviewed the amendment, he did not understand why people were concerned because of the development's fairly high quality. He did understand this concern after reading the Master Plan. The beginning of the Plan sets forth key policies. Policy No. 1 envisions Clarksburg as a town developed at a smaller scale than a corridor city such as Germantown. It also proposes a comprehensive transit system and reduced dependency on the automobile, envisioning a transit-oriented, multi-use Town Center compatible with the scale and character of the Clarksburg Historic District. Finally, according to him, the plan clusters development into a series of transit and pedestrian-oriented neighborhoods and lays out how development will occur in the areas surrounding the Town Center. Finally, he believes a main component of the plan emphasizes the importance of I-270 as a high technology corridor for the region, and therefore preserves key sites for future employment.

In his opinion, Policy No. 1, which encourages development at a town scale compatible with the Historic District, indicates that the Town Center is to be the center of the larger area. The need to balance higher density to support transit and still protect environmental resources is another important component. The Plan also strives to maintain an identity from Clarksburg separate from Germantown or Damascus and recognizes the importance of civic space and public uses to the development of the town concept. 9/6/13 T. 201.

In light of the Plan's overall policies, he reviewed its specific recommendations for the different neighborhoods. The Plan sought to create the Town Center District as the strong, central focus for the entire study area. The first element of implementing the "town scale" and first element of the Plan focuses on what's going to happen at the Town Center. 9/6/13 T. 202. Because Clarksburg had virtually no development except for the Historic District at the time it was adopted, it lays out a very long-term future for a totally new development, similar to Columbia. Like Columbia, it had a defined town center with defined neighborhoods surrounding it. While not completely comparable, in his opinion, the two are similar because they set up a hierarchy of places, focusing on the Town Center as the strong, central focus for the entire study area supported by a number of residential neighborhoods. The Plan also added a transit serving the Town Center and recognized I-270 as a major transportation hub. Thus, it altered the traditional "look" of a town center because of the need to include locations of high density that vary from a perfect circle surrounding the town center. Nevertheless, in his opinion, the Town Center was envisioned to be the strong, central focus of the area. 9/6/13 T. 202-203.

The Plan also encouraged a mixed use pattern of development in the Town Center to create a lively and diverse place. This differs from the Plan's recommendations for neighborhood centers in other neighborhoods because it envisioned the Town Center as the center of activity for

the whole planning area with a mix of uses to draw people in to the center, and in particular, the Historic District. This concept is illustrated in the sketch for the Town Center District included in the Master Plan. The sketch shows an amphitheater, a fairly large, residential neighborhood with a neighborhood center, surrounded on one side by the Historic District and the other side by enough density, employment and retail services to support a transit center. In his opinion, the Plan did not envision the Town Center as just another neighborhood; it is supposed to be the center of activity with enough density to support a transit use there. He testified that the four major conceptual illustrations appearing in the Plan show many activities occurring in the Town Center. According to him, the civic uses included within the illustrative sketches also indicate that will have enough activities to make it a viable center for the Clarksburg area. 9/6/13 T. 203-206.

In contrast to the Plan, many of the activities that one would associate with a “town center” are included within the Cabin Branch development plan amendment. This includes nighttime activities, such as restaurants and entertainment uses, employment uses, and civic uses like the amphitheater, which are shown on the sketch of the North District. Because of these overlapping uses, the development plan amendment competes with the Town Center District as the central focus point for the area. 9/6/13 T. 208.

In contrast to the Plan’s recommendations for the Town Center, the Plan’s recommendations for Cabin Branch target preserving the area for employment users supported by I-270. The transit pattern described in the Plan orients the neighborhood to the MARC station at Boyds and the future transit way in the Town Center. In contrast to the Plan’s recommendation that the Town Center be a strong, central focus point for the entire area, the Plan recommends that a Cabin Branch have a strong neighborhood focal point created by concentrating public and retail uses in the same general area. 9/6/13 T. 208-209. The importance of implementing a high-tech employment corridor here is reflected in its recommendations for Cabin Branch, he opined. The Plan broadens the employment base by identifying areas for non-office, low-intensity industrial uses and incorporate office and retail uses as part of a neighborhood development, not as part of a central focal point for the area. In his opinion, the Plan’s overall vision is to take advantage of I-270 and its visibility to attract the high-technology employment that existing prior to the dot com crash of 2000. According to him, the scale of employment recommended for Cabin Branch (i.e., 2.5 million square feet) is much larger than that recommended in the Town Center, not because the Plan wanted Cabin Branch to compete with the Town Center, but to take advantage of I-270. The original development plan, with a hospital and medical offices, fit much better with that vision. 9/6/13 T. 209-211.

This is supported by the language in the Technical Appendix. Everywhere the Appendix refers to retail; it refers to neighborhood retail uses, such as shopping centers with grocery stores and ancillary uses like dry cleaners, pharmacies, etc. Only the recommendations for the Town Center District refer to 300,000 square feet commercial uses that are not specifically neighborhood retail uses. While it may be silent on the possibility, the Town Center District was the only area where the Plan took the opportunity to encourage additional retail uses.

In his opinion, this also begins to further fragment the Plan’s vision because not only does the development plan amendment compete with the Town Center in terms of scale, intensity and uses, it begins to fragment the neighborhood-oriented scale intended for the Cabin Branch

community. If approved, Cabin Branch will have the same scale of residential development as Clarksburg Village (the Newcut Road neighborhood in the Plan), but significantly less of the neighborhood-oriented services that the other neighborhoods will have. Under the proposed development plan, the retail uses could be reduced as low as 24,000 square feet. At the same time, it will have the advantage of being walkable to much more upscale retail services in the northern part of the development plan. This will require residents of Cabin Branch to get into the car and drive over to the Town Center or Clarksburg Village, where the residents will have that service in place. 9/6/13 T. 212-214.

Mr. Noonan testified that the Plan's staging recommendations reflect the scale and focus of its recommendations. The Plan wanted early development of the Town Center District and properties located on the east side of I-270. In his opinion, the Plan took great care to recommend a land use pattern that fosters a mix of housing, retail, employment, community uses, and transit that best support a strong town center identity early in the process. The Plan also intended to create a strong sense of community identity, and a model for later development in the surrounding neighborhoods. These recommendations reflect that the planners were working with an empty stage, other than the Historic District, rather than a well-established town center with an existing identity. Thus, the focus was to prioritize early development of the town center, with much less intensive retail uses in the surrounding neighborhoods. 9/6/13 T. 215-216.

The 2011 Limited Amendment to the Clarksburg Master Plan restated that the Council did not intend to change these overall policies stated in the Plan; rather, it was a very narrow amendment to permit existing residents access to some neighborhood services. 9/6/13 T. 217.

According to Mr. Noonan, the Applicant's justification statement illustrates why the amendment contravenes the Master Plan. The statement pronounces that the amendment will establish a "true identity" for Clarksburg that is "unique" to the County. It also states that the development will "put Clarksburg on the map" as a one-of-a-kind and highly desirable community. 9/6/13 T. 219. In his opinion, the Plan wanted that to be the role of the Town Center rather than the Cabin Branch neighborhood. The amendment proposes a significant amount of highly desirable public use space, including the outdoor amphitheater, gathering places and other community activities. The Plan envisioned the level of activity associated with this development to be located at the Town Center. 9/6/13 T. 220.

In his opinion, the key to the Plan's recommendations for the Cabin Branch neighborhood is to take advantage of I-270. In the absence of that occurring, the Plan's core goal is to create a viable Town Center with sufficient neighborhood development around to ensure that it will be the center of activity for the area, (i.e., where people will go on weekends and see concerts, go to restaurants, and participate in other community activities.) 9/6/13 T. 221. He pointed out that, even with this development, Mr. Bogorad testified that office development might not occur for 10 to 20 years. In his opinion, this is not the type of catalyst that will bring employment immediately after construction. Rather than satisfying the Plan's goal for Cabin Branch to preserve employment opportunities along I-270, in the short term there will be a large retail center without a significant amount of neighborhood services. In his opinion, this delays and undercuts the kind of development the Plan envisions for Town Center, and its transit-oriented policies. Whatever happens in Clarksburg, it will need the densities envisioned in the Plan to move forward and development should be staged in the method prescribed by the Plan. 9/6/13 T. 222.

Mr. Noonan believes that the Master Plan already has sufficient flexibility in its recommendations because it does not prescribe precisely where the mix of units should go or internal densities, although it does specify the staging of development. The Council, in its 2011 Limited Amendment, did not find that the Plan had failed because it recommitted to the overall policies stated in the Plan. In his opinion, if it has failed, the correct approach is not to make it more difficult to implement the existing Plan, as this amendment would do, but look at the issue comprehensively under the master plan amendment process. 9/6/13 T. 224.

The Cabin Branch neighborhood contains the largest amount of employment recommended in the Plan. Residential, retail and civic uses are about the same as other neighborhoods. To the extent these are not supported with the type of retail uses that make a good place to live undercuts the neighborhood community aspect envisioned by the Plan by fragmenting the uses and replacing them with more regional types of public spaces. 9/6/13 T. 226.

Mr. Noonan testified that he did not agree with Staff's analysis of Master Plan compliance because it focused very narrowly on one aspect of the Master Plan. The Staff's rationale for compliance states only that the development proposes the same amount of square footage recommended in the Plan and that the buildings step down in height and density from I-270 to the RMX-1 neighborhood to the west. In his opinion, Staff analyzed only whether the building height and density are the same as recommended in the Master Plan, which in his opinion, is a very narrow interpretation. The "town scale" policy in the Master Plan is much more than one single bullet in the Plan. Other bullets discuss creating an identity separate from Germantown and Damascus, recognizing the importance of civic spaces and public uses, and overall goals of the Plan. 9/6/13 T. 233. Nor does the amendment further the Plan's goal to broaden the employment base for office, research and development, light industrial, hotel, urgent care facilities, etc. The amendment does not broaden these uses; rather it adds retail, entertainment and public uses that compete with the Town Center. 9/6/13 T. 234.

Nor did he see significance in the Plan's recommendation for MXPZ Zoning for the subject property. Because it is a county-wide zone, it may have many uses that are permissible which may or may not be consistent with a master plan. He opined that the Master Plan informs as to what should occur, and is not driven by a generic zoning classification. In his opinion, the Plan encouraged a mixed-use office and residential development, rather than 484,000 square feet of retail. The Plan easily could have said that it encouraged higher amounts of retail under the MXPZ option. 9/6/13 T. 236.

Mr. Noonan described the area surrounding the Leesburg outlets. There are some office complexes, most of which are two to three stories. There is little pedestrian access to the outlet center—it is not a planned development. The Leesburg outlets were developed independently of the surrounding development and functions without any coordination with those uses. He visited the Leesburg outlet center to assess whether it had had any impact on generating employment uses. They really did not find that it had had any impact on office development in the area. 9/6/13 T. 266.

Mr. Noonan opined that during the preparation of master plans, planners will assess projected population and employment and compare that ratio to the amount of commercial necessary to support those uses; they don't typically project out commercial space. In this case, the Technical Appendix to the Plan states that approximately 75,000 square feet of retail will support the residential and employment uses in the Cabin Branch neighborhood, although he did not know why this was raised to 120,000 square feet in the Master Plan itself. 9/6/13 T. 273. The development plan reduces this amount of neighborhood retail down to 28,000 square feet in scattered locations, which is contrary to the intent of the Plan. In his opinion, the overlapping "neighborhood uses" will have some neighborhood function, but the vast majority of the space will function regionally. In his opinion, it is not neighborhood retail. He also believes that the 2011 amendment emphasizes the importance of grocery stores to the neighborhoods because it amended the staging requirements to permit construction of neighborhood grocery stores. He opined that from a planner's perspective, it would be prudent to reserve some square footage for a grocery store at Cabin Branch to serve the development at full build-out. 9/6/13 T. 275-277.

According to Mr. Noonan, the fact that the density of development at Cabin Branch will not change is less important to plan consistency than the fact that this will remove the focus of community activity from the Town Center to Cabin Branch. The amendment contravenes the Plan's staging policy, as that called for development on the east side of I-270 to occur first in order to ensure that the Town Center had some viability and weight. 9/6/13 T. 283-284.

September 6, 2013, Public Hearing

1. Mr. Gary Unterberg:

On cross-examination, Mr. Unterberg testified that the depiction of the "North District" shown on the Applicant's slide presentation is intended to show only one potential build-out scenario for the development plan amendment. In his understanding, the Applicant's statement indicating that the food court in the retail outlet will be the "neighborhood square" is not binding; the neighborhood square could be different places and different configurations, including a linear greenway along Wellspring Avenue. In his opinion, the central focal point recommended in the Plan will be the Wellspring greenway, which is more of a corridor interconnecting sections of the project. 9/6/13 T. 6

September 12, 2013, Public Hearing

1. Mr. James Noonan:

Mr. Noonan testified that the Leesburg Town Plan contained recommendations for economic development. The Leesburg plan encouraged attraction of office users, such as high technology, bio-technology and telecommunications, identifying them as industries important to the economic competitiveness of the area. It also mentions that tourism and retail do not provide the high wage jobs that come with the corporate offices. 9/12/13 T. 22.

On cross-examination, Mr. Noonan testified that he had not assessed whether the Peterson project complied with the Clarksburg Master Plan other than it would be physically located within the Town Center. 9/12/13 T. 34. Nor had he done an assessment of the Peterson proposal on

traffic or the environment. 9/6/13 T. 36. He acknowledged that the Leesburg Town Plan was silent as to whether retail attracted office users. 9/6/13 T. 42.

Mr. Noon agreed that the Leesburg outlets are distinguishable from those proposed in the development plan amendment because they were built 10 or 15 years ago and pre-dated much of the surrounding development. Nor is it located within a mixed-use, walkable development. 9/12/13 T. 43-44.

He disagreed with the proposition the Clarksburg Town Center will fare as well as other town centers that have outlets on the perimeter. In his opinion, the other towns in the region where outlets are located, including Leesburg, Hagerstown and Rehobeth, already had strong town centers before the arrival of the outlets. The Clarksburg Plan attempts to build a town where one did not exist, which is why the staging is set out so carefully in the Plan. According to him, there has been “discussion” in the planning community for many years about the adverse impact of commercial development in peripheral areas on existing downtowns. He stated that it is only within the last 10 to 15 years that many of these town centers have started to recover economically. 9/12/13 T. 65. He believes that the Clarksburg planners were very careful and concerned about creating a viable town center that could survive this type of competition from a retail center in the neighborhoods, as demonstrated by the staging proposal. 9/12/13 T. 66.

He did not know of any room for a retail outlet center in the area designated for neighbor retail/mixed use project in the Town Center portion of the Master Plan, nor did he think that the Historic District itself would be able to accommodate it. 9/12/13 T. 67.²⁰ It is his opinion, however, that the illustrative sketch of the Town Center included in the Master Plan demonstrates a mix of use that would be typical or desired for the Town Center. He assumes that the western portion of the Town Center District would be the place anticipated for the additional Town Center retail mentioned in the Plan because of the location of the transit center and commercial community activity space separate from the neighborhood oriented retail center on the other side of the Historic District. In his opinion, that is the vision that the Plan attempts to achieve for the Town Center. 9/12/13 T. 75. He opined that there could be some very high end and specialty retail or commercial development in the Town Center west of the Historic District. 9/12/13 T. 76.

He testified that the undefined terms used to describe the retail in the development plan amendment confuses what is being proposed. The illustrative sketches, in his opinion, show high-end retail centers, but is inconsistent with the typical outlet center, which would not provide the attraction for commercial office. Nor does it provide a neighborhood environment or neighborhood services/retail. He opined that whether termed as an “outlet center” or not, when one provides that type of high-end, specialty retail and community activities for the whole area that conflicts with the Master Plan’s vision for the Town Center. 9/12/13 T. 77.

He acknowledged that he does not have any empirical data to negate the proposition that the outlet center will not attract employment. 9/12/13 T. 94. In his opinion, the Plan recommends 300,000 square feet of commercial uses in addition to 153,000 square feet of retail uses. 9/12/13 T. 103. He believes that the 2011 Limited Amendment to the Master Plan reaffirmed the need for a grocery store in the Cabin Branch and New Cut neighborhoods. 9/12/13 T. 105. The purpose

²⁰ The “mixed-use project” referred to is located east of Md. Route 355, north of Stringtown Road, and south of Md. Route 121. 9/12/13 T. 67.

of the 2011 Limited Amendment was to assure that a limited amount of neighborhood serving retail was available to serve the neighborhood. In order to do that, the Council amended the Master Plan to permit that to go forward. 9/12/13 T. 106. The Limited Amendment could have reassessed the need for neighborhood retail recommended and adjusted the square footages listed in the Plan, but it did not. 9/12/13 T. 108. Regardless of the current market in the grocery business, he opined, the Master Plan views the grocery store as being essential for the livability of the neighborhoods. 9/12/13 T. 114.

He does not agree with Technical Staff that the age of the Master Plan justifies this development. In his opinion, the Plan's vision calls for the Town Center District to be the central focal point for the area. Technical Staff failed to look at the Master Plan recommendations in context and viewed certain recommendations very narrowly. The illustrative drawing of the North District of Cabin Branch gives one a sense that the development proposed there has the scale and community features that were envisioned to be in the Town Center District rather than the surrounding neighborhoods. The regional retail and amphitheater are examples of this. 9/12/13 T. 123-129. The purpose of the 2011 Limited Amendment reinforced the need to provide neighborhood services in the surrounding neighborhood. 9/12/13 T. 130.

2. Mr. Phillip Hughes, III:

Mr. Huges qualified as an expert civil engineer and testified in support of the application. He testified that the Applicant received a preliminary water quality plan in 2003. In 2007, the Applicant received approval of a final water quality plan covering the entire Cabin Branch neighborhood. This has been updated several times as projects go through site plan. All portions of the 283-acre development plan amendment are subject to that final water quality plan. Approximately 81% of the 283-acre area is served by stormwater management facilities that are grandfathered under the old regulations. An update to the final water quality plan for the portions of the site that are not grandfathered will be prepared at site plan. Facilities proposed will be ESD facilities that conform to the new regulations. 9/12/13 T. 150. For approximately 90% of the site, new water quality plans have gone forward with the site plans without questions from the Planning Board. 9/12/13 T. 151. Based on the previous approvals for the remainder of the site, he believes that the remaining area will also be approved. He opined that there will be no problems meeting the current stormwater management regulations on the portion that is not grandfathered. 9/12/13 T. 152. The ESD updates will likely include standard micro-bio filtration, landscape infiltration, and possibly green roofs depending on the usage and pervious pavement. 9/12/13 T. 150.

He opined that when the site is a green field facility, or a site that has never been developed, the first step in the approval process is to identify the natural resources and delineate any forest which exists on the property. These features include stream valley buffer areas, wetlands, areas of possible erosion due to difficult soils and steep slopes. 12/13 T. 12. The next step is to prepare a preliminary water quality plan, which is basically a bubble plan showing that you will be able to accommodate sufficient stormwater management facilities on the site. This is calculated by taking the proposed green space and dividing it by the filter area necessary to manage the project storm water runoff. The preliminary water quality plan has both a graphic and narrative component to demonstrate where features will be located and what their function will be. 9/12/13 T. 152-155.

The 2003 approved preliminary water quality plan conceptually meets the intent of the newer stormwater regulation because it did not use underground vaults; rather, the approved preliminary water quality plan uses micro-bio-retention, including sand filters, which are no longer permitted, that were spread throughout the site. DPS then reviews the preliminary water quality plan and provide a general guideline for where to start design. The preliminary water quality plan basically assesses whether the stormwater measures proposed are feasible. 9/12/13 T. 156.

After the preliminary plan, the next step is a final water quality plan, which looks at the site and the development design in more detail. It contains more detailed design and locations of the facilities that will be used to treat storm water. 9/12/13 T. 156-157.

Development outside a special protection area has a two-step process, typically. This includes a preliminary stormwater management concept plan and a final stormwater management plan. Development in a special protection area has a three step process: a preliminary water quality plan, a final water quality plan, and then construction plan. 9/12/13 T. 157-158.

The final water quality plan was done for the project in order to construct the roads, which is not normally part of the process but was requested by Technical Staff. This resulted in a final water quality plan for the entire site. Because, however, the individual land bays were not included in the final water quality plan, each project must prepare a final water quality plan for that particular portion of the site. After the final water quality plan for a project is approved, it is possible to proceed to construction drawings. 9/12/13 T. 160.

Mr. Hughes testified that the ponds included within the area of the regional outlet center are ponds 1, 11, 12, 13 and 15. He was uncertain whether the ponds are finally designed on the final water quality plan prepared for the roads. Ponds 12 and 15 are not grandfathered. According to him, the Department of Permitting Services (DPS) and the Applicant verbally agreed that when the Applicant did their final water quality plan for this section, these ponds would be eliminated and stormwater management under the existing regulations would be provided. 9/12/13 T. 186. He stated that DPS does not consider this change significant enough to warrant a preliminary water quality plan. 9/12/13 T. 188.

In response to questions from the Hearing Examiner, Mr. Hughes stated that stormwater management requirements are based on impervious area rather than the limits of disturbance. 9/12/13 T. 190. He testified that he “couldn’t imagine” that the impervious area is going to be more than what is shown under the existing development plan, which is approximately 85% of the total site. The original development plan included much surface parking; the proposed development may have more green area within which to implement ESD because the space will be broken up with a lot of facilities. 9/12/13 T. 193. In addition, this proposal presents the opportunity to include green roofs, which hospitals don’t normally do because of the concern regarding fungal infections. 9/12/13 T. 194.

He testified that he “has no doubt” that stormwater can be managed on-site and knows how that will be done. 9/12/13 T. 196. This will be accomplished through micro-bio filtration facilities that may be incorporated into open space areas. 9/12/13 T. 196. While the micro bio-

retention facilities will be new, the pond outfalls will remain the same because the County does not permit transferring stormwater into another drainage divide. 9/12/13 T. 206. The development plan amendment includes a lot of space to accommodate these facilities. While he is unsure what will be parking and what will be green area, there are methods to accommodate stormwater on these areas. Although he has never designed stormwater facilities for an outlet center, he has designed them for dense commercial uses. 9/12/13 T. 197-198.

3. Mr. Mark Ferguson:

Mr. Ferguson qualified as an expert land planner. 9/12/13 T. 216. He opined that the application does not substantially conform to the Master Plan. Because the MXPDP Zone requires a development plan, which he considers part of the zoning approval, compliance with the master plan focuses on whether the land use and density of the proposal complies with the Plan, rather than a more “holistic” finding of conformity. It is apparent to him, based upon the purpose clause of the PD Zone, that these must be closely tied to the Plan. 9/12/13 T. 217-219.

In his opinion, retail and employment are not the same use. Employment uses operate generally during the date and involve bringing large numbers of people to one location on a regular schedule. Conversely, according to Mr. Ferguson, involves having a small number of people employed during the day with large numbers of visitors arriving and leaving at varied times, and particularly at times outside the peak hours. He believes that a hotel is justifiable as an employment use because it’s not a retail destination and is sufficiently ancillary to employment concentration. Similarly, a hospital is closer to a purely employment use because there is a concentration of employment activity there.

Typically, Euclidean zones are characterized into three categories: industrial, residential and commercial zones. In some cases, these uses overlap, as industrial zones often include office as well as manufacturing and industrial uses. That is not true of retail; in his experience as a land planner, he has never heard the term “retail employment” used in a planning context. In his opinion, the Master Plan conceived of “employment” use as a use similar to the Comsat facility that is solely office or R&D use. In his opinion, the Master Plan used the term “office” and “retail” in the commonly understood sense of the words. 9/12/13 T. 219-222.

Nor does he find that the projects found comparable by Technical Staff support this development plan amendment. The Park Potomac project is located in the I-3 Zone, which is not a planned unit development zone and does not have the same requirement to conform to the land use and density recommended in the Master Plan. The master plan recommendations for the Rock Spring Park project in North Bethesda specifically called for a substantial amount of retail in conjunction with the office uses there. The master plan called for a base amount of retail in conjunction with the office uses, but permitting that amount to increase if the office space were reduced. Thus, this project conforms exactly to the use and density of the master plan involved, in his opinion. While planners may wish to repeat that method for this project, the MXPDP Zone does not permit one to substitute current judgment for the recommendations of the Plan. The Washingtonian Center is an MXPDP project within the Shady Grove Sector Plan area. The Sector Plan did not recommend a specific use and density mix for that project—he believes that in that case, the Council had a great deal of latitude to find an appropriate mix of uses. 9/12/13 T. 223-224.

In his opinion, the fact that the MXPDP Zone permits 20% of a project to be retail does not override the recommendations of the Plan because the Zone is intended to implement the Plan. If the Master Plan does not recommend that intensity of retail use, the uses permitted are not fixed by the Zoning Ordinance. He believes that the appropriate method for accomplishing this development would be to defer it until the Master Plan is amended to permit it. This method provides a broader ability for the public to participate in the process. This also permits the Council to review the broader ramifications project because an outlet center may vary in terms of operations; some rely heavily on buses that bring people to the project and are, in essence, a captive audience that do not generate activity outside of the site. There are also ramifications to be considered in the design of the project; specifically whether certain aspects of the center will truly act as “neighborhood” or community uses. Aspects of the design and operations could have a great deal of impact on the viability of retail on the Town Center District. 9/12/13 T. 225-228.

Mr. Ferguson did not take a position as to whether the retail outlet was a good project outside of conformance with the Master Plan. In his opinion, it is important to evaluate the pros or cons of the project within the Master Plan process so that all of its ramifications may be considered. He could not opine on whether the use would, in fact, promote office development based on this record. There may be uses that are complementary, but without more knowledge of operations, uses, and site design, it is difficult to say whether it will act as a catalyst for office. In his opinion, if only 25,300 square feet of neighborhood retail were developed, this would be on the “low side” of the amount necessary to provide services to the neighborhood. To finally determine this, one would need more information on demographics of the neighborhood. He noted that, at the time the Master Plan was adopted, there was little internet shopping and there has subsequently been a proliferation of retail throughout the region. He would have to “defer to the market” to determine whether that amount of retail is sufficient. 9/12/13 T. 229-234.

Mr. Ferguson testified that the Master Plan is obsolete in many respects, particularly because absorption of office space has been far less than what the Plan envisioned. Despite this, however, the Master Plan recommendations should be adhered to because the MXPDP Zone is a “plan implementation” zone and is tied specifically to the land use and density of a master plan. This is particularly true, in his opinion, because the 2011 Limited Amendment to the Master Plan could have changed the overall goals, but did not do so. Because the MXPDP Zone is designed to implement the applicable Master Plan, he does not agree that the MXPDP Zone provides a basis for deviating from the Plan’s recommendations. He opined that the mix of uses called for in the Master Plan is a mix of office and residential rather than larger scale retail. 9/12/13 T. 236-240.

He believes that the neighborhood retail approved on the Gosnell property is high-way oriented retail because of its location on Md. Route 121, near I-270. In his opinion, it is too remote to serve as pedestrian-oriented neighborhood retail. For this reason, he does not think that this retail alone will fulfill Policy 7 of the Master Plan, which calls for a mix of uses to reduce dependency on the automobile. 9/12/13 T. 279-283.

October 10, 2013, Public Hearing

1. Mr. Frank Bossong, IV:

Mr. Bossong qualified as an expert in civil engineering. 10/10/13 T. 8. He described, in his opinion, the process for approving water quality plans. According to him, they are required only for properties within special protection areas. Approval is a two-step process. If more than one development approval is needed, a Preliminary Water Quality Plan (PWQP) is submitted at the initial approval and a Final Water Quality Plan (FWQP) is approved at the final approval, in this case, at site plan. 10/10/13 T. 9. In this case, he testified, the first step (i.e., the approval of a PWQP) was accomplished with the PWQP approved in 2003 in conjunction with the original development plan. 10/10/13 T. 9-10.

In his opinion, a PWQP has two functions: 1) it sets forth the concept for how stormwater management can be accomplished on the site, and 2) it generally designates the areas where the features may be located to treat stormwater. He testified that the actual stormwater facilities are not designed at the PWQP stage; design is deferred until approval of the FWQP at site plan. Therefore, the term “plan” does not mean specific locations of specific features; rather, it’s the conceptual foundation for the site design. T. 10/10/13 T. 10-11.

Mr. Bossong testified that the PWQP has several components. These include a Water Quality Inventory and a description of the project. The description includes the zoning, overall imperviousness of the project, disturbance of environmentally sensitive areas, applications for federal permits (such as wetlands permits), and a description of mitigation techniques. The latter may include the Best Management Practices to be used, stabilization requirements, grading, road features, and natural features such as stream valley buffers, methods of ground water recharge and documentation of performance of a non-standard measure. Stormwater management features and design change so frequently, according to him that an applicant may have to demonstrate the effectiveness of new measures. Mr. Bossong advised that all of these items had been submitted as part of the PWQP for the original development plan. 10/10/13 T. 11-12. The PWQP is reviewed and approved by the Montgomery County Department of Permitting Services (DPS) and staff of the Montgomery County Planning Department. Both agencies are looking to see if the design provides sufficient flexibility to sustain modifications when it goes to the final review at site plan. 10/10/13 T. 13-14. According to him, the review agencies know that there will be modifications as the project moves forward. 10/10/13 T. 15-17.

The FWQP is approved at site plan, Mr. Bossong reported. This stage incorporates the detailed design, shape, size, and location of the facilities that are then approved by the Department of Permitting Services (DPS) and the staff of the Planning Department. These specific features are not known at the time the development plan is submitted. He testified that the PWQP builds in enough flexibility for design of buildings, parking, and other impervious area for the details to be addressed in the FWQP. 10/10/13 T. 13-14.

Mr. Bossong testified that there have been numerous site plan submissions for Cabin Branch where detailed stormwater management has been finalized. These include site plans for the Gosnell property, Winchester Phases I and II, and Toll Brothers Phases I and II. None of these were required to submit a new preliminary water quality plan. 10/10/13 T. 19.

Mr. Bossong opined that the original PWQP remains in effect today. It does not specify any particular stormwater management features. He opined that in his experience, actual stormwater management features have never been shown on the development plan itself. 10/10/13 T. 20.

The ponds shown on the PWQP for the subject property are not true ponds that hold water continuously; rather they are dry ponds designed to hold water and release it at a slower rate, thereby reducing the environmental impact on streams. These are only one element of the stormwater management treatment proposed for the development. There will be some type of stormwater management facilities in the area labeled as "Pond 12"; these areas will also be used for sediment control during construction. 10/10/13 T. 22-23.

When asked whether Mr. Bossong had "thought about" how he would design and obtain approval of a FWQP for the retail outlet center, he responded:

The open space area will have stormwater management facilities. I think it's part of the amphitheater, so it would be accommodated as part of the amphitheater. Environmental site design to the Maximum Extent Practical (MEP) will be infiltrated throughout Area A [of the Development Plan Amendment].

He testified that he "looked at" the possibility of using parking lot islands, where he can use micro-bio retention facilities and bio-facilities. Pavement may also be used for these items. Micro-bio retention facilities can go between buildings, bio-swales may be located along the roads. According to him, these are "no different" than the types of facilities contemplated at PWQP, they will just be shifted around. 10/10/13 T. 24-25.

He stated that there was no change in the imperviousness of the site, as this is calculated based on the Limits of Disturbance. At FWQP, he must define the drain sheds and design the ESD features for those drainage areas. 10/10/13 T. 24-28. He also acknowledged that while the locations of the facilities will not be changed, the types of facilities used will be different. 10/10/13 T. 29.

He acknowledged that he prepares preliminary stormwater management plans in rezoning cases. These are also conceptual plans that show where stormwater management features may be located, along with the type of facility they propose at the time. They do not revise that concept until the final plan; otherwise, according to him, they would be revising the concept all of the time. *Id.*

Mr. Bossong determines whether there is sufficient space for the stormwater facilities by assuming that ½ acre is the maximum drainage distance for an Environmental Site Design (ESD) measure. Therefore, he subdivides each building into ½ acre sections to see if there is sufficient room within that half-acre to accommodate an ESD measure. In his opinion, there is "plenty of room to implement ESD measures" on the property.

Mr. Bossong performed this same calculation for the 2003 PWQP; the major difference is that the implementation measures, or stormwater management facilities, will be different. He

explained that the overall stormwater management methodology has not changed. It consists of (1) capturing the stormwater, (2) cleaning it, and (3) infiltrating it back into the ground. The 2000 stormwater management regulations (in effect at the time the PWQP for Cabin Branch was approved), mandated Best Management Practices (BMPs). Types of ESD structures such as bio-filtration facilities were in use then and these features remain in the stormwater management “toolbox” today.

The 2007 stormwater management regulations changed the State’s approach to stormwater management by calling for all stormwater to be treated using ESD structures to the Maximum Extent Practical (MEP). 10/10/13 T. 34-35.

The DPA does not affect the use of ESD. The imperviousness is the same; only the types of stormwater management facilities will change. He stated that the dry ponds shown on the PWQP may no longer be used if ESD measures can be implemented. In his opinion, all applicable regulations can and must be satisfied for the development. 10/10/13 T. 35-36.

When asked how confident he was the regulations may be satisfied on the property, he testified that only 10% of a 535-acre project does not have FWQP approval.. He is very confident that the 2 areas shown where Ponds 12 and 15 are located will be able to accomplish stormwater management for the site. Typically, in his experience, none of the project has FWQP approval; in this case, 81-83% of the project has been approved. 10/10/13 T. 37-38.

He described the elements of a Water Quality Inventory. This includes a stormwater management concept plan, sediment and erosion control concept plan, and an evaluation of impervious areas. The difference between a water quality plan and a water quality inventory is that the inventory focuses on the amount of impervious area to determine whether there is sufficient room for the stormwater treatment facilities. 10/10/13 T. 41.

Mr. Bossong further testified that a project had to be approved for construction by May 4, 2013, to be granted under the 2000 stormwater management regulations. He acknowledged that this area of the Cabin Branch project is not grandfathered; therefore, the dry ponds generally may not be used because of 2007 change requiring an applicant to use solely ESDs to the maximum extent practical. 10/10/13 T. 46-48. Despite the fact that the ponds will not be used, he does not believe that he is amending the PWQP because a significant portion will be utilized. In his opinion, eliminating Pond 12 is not an amendment because the applicant intends to use the area for different stormwater facilities. He acknowledged that he will have to recalculate whether the regional retail outlet would have equivalent imperviousness to the former hospital planned for the site. T. 10/10/13 T. 52.

When asked how he knew that DPS and Planning Department Staff found the existing approved PWQP acceptable for the proposed development, he cited to Mark Etheridge’s e-mail from DPS and the Planning Departments memorandum as confirming “that they believe everything is in, is good regarding the preliminary water quality plan.” He further opined that Mark Etheridge’s e-mail “confirmed that the preliminary water quality plan is acceptable and details will be worked out at site plan...both of these 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.” 10/10/13 T. 53. As to DPS’s review, the following exchange occurred (10/10/13 T. 53-54):

MR. KLINE: And that’s based on what submission to both agencies?

MR. BOSSONG: The DPA.

MR. KLINE: That’s all, right?

MR. BOSSONG: Uh-huh...They already have it.

Opponents queried Mr. Bossong as to whether he had made a “leap of faith” about the impervious levels for the project. He replied, “I would say they [DPS and Planning Staff] are confident that we can fit everything on the property.” 10/10/13 T. 54. He did not know whether those agencies had done independent calculations of the impervious area; he opined that “from a layman’s standpoint”, just looking at the layout and coverage of the development indicates that the imperviousness of the site has not changed. 10/10/13 T. 54.

He further testified that the development plan amendment did not affect how he would satisfy the stormwater management based on impervious coverage. When asked whether the reconfigured building layout affected the way he would address stormwater management, he responded:

MR. BOSSONG: I’m going to provide water quality measures for the layout at the time of site plan, yes.

MR. KLINE: There are going to be different configurations of what was conceived in the PWQP?

MR. BOSSONG: Yes, that’s what you do at site plan.

Mr. Bossong reiterated that the applicant was not making any changes to the PWQP because they are unnecessary as long as the buildable envelope doesn’t change. According to him, the major issues such as sediment controls, steep slopes, and forest conservation are not changing. 10/10/13 T. 63-64.

Mr. Bossong listed which items listed in the textual approval of the PWQP were no longer applicable. According to him, channels will not be used along the roads and surface sand filters will not be utilized. The sediment controls which may be used under the regulations have changed, but the overall performance goals are the same. All of the conditions of approval still remain applicable except that No. 10 is outdated that level of that can impair stream flow.

When asked about exemptions to the requirement that a PWQP be filed with a development plan amendment, he testified that changes to the approved PWQP will not be necessary because of minor modifications and that there is no emergency situation affecting the property. He acknowledged that “coordinated project review” means that water quality review must be done in conjunction with the review process for development plans. 10/10/13 T. 72-74.

Mr. Bossong acknowledged that the 2007 Stormwater Management Act increases the importance of ESD and that ESD needs to be evaluated with the development approval. He also agreed that §19-65 of the County Code applies to a significant amendment of development plans. In his opinion, this amendment was not significant because DPS and Technical Staff concurred

that it is not; according to him, it does not impact the preliminary water quality concept. The e-mails from Mark Etheridge and Rick Brush and the memorandum from Technical Staff were “reconfirmation that the original approval is still valid.” He admitted, however, that the exact layout of the development proposed in the DPA is not shown on the approved PWQP. 10/10/13 T. 80-90.

Mr. Bossong pointed out that a FWQP has been approved for 81% of the MXPDP area; the only areas that are not approved include Ponds 12 and 15 plus some areas outside of that. According to him, development east of Cabin Branch Avenue as shown on the DPA does not have FWQP approval. He intends to use infiltration facilities, bio-facilities and grass swales and these are listed on the approved PWQP. At site plan, the impervious surface will be recomputed and the features may vary. In his expert opinion, ESD can and will be accomplished on the site. 10/10/13 T. 99-103.

2. Leonard Bogorad:

Mr. Bogorad clarified that he did not mean to imply that there will be no office development for many years. In his opinion, there is demand for office, but the market is “challenged” and there is much competition for users. The specialty retail proposed would help Cabin Branch become more competitive. 10/10/13 T. 107.

He acknowledged that there have been few opportunities to test whether outlet centers will spur office development like other retail because outlet centers are generally located in outlying areas where no office market exists. He believes that it will have that effect on office development in Clarksburg because it is a major metropolitan area with a long history of office development. 10/10/13 T. 108.

In support of his opinion, he quoted Mary Evans, the President of the Houston Chamber of Commerce, who stated that the Houston Premium Outlets has become a “lure” for new business to the area. The developer seeking to develop an outlet center on the Miles-Coppola property asserted the same argument for a development application in Loudon County, Virginia. 10/10/13 T. 109-112.

Mr. Bogorad continued to maintain that there is insufficient demand for three full-size grocery stores in Clarksburg, even assuming full residential build-out in Clarksburg. Using data collected by a respected industry firm on grocery spending per household, he concluded that there is demand for only 129,000 square feet of supermarket space (or 2.4 supermarkets) in Clarksburg (assuming that each store is 53,000 square feet). Because full residential build-out will not occur for many years, there is currently room for only one full-sized supermarket in addition to the Harris Teeter in Clarksburg Village. In fact, he asserted, he would be very concerned about even recommending another full size grocery store in Cabin Branch because it would make it harder for the Town Center to attract a store. Without a supermarket, which is a critical “magnet” for the other neighborhood retail businesses, it will be difficult to achieve the neighborhood center within the Town Center. There may be sufficient demand in the future for a small grocery store, like a Mom’s or Trader Joe’s, in the Cabin Branch neighborhood. In his opinion, Staff’s assessment of the demand for three supermarkets may have been reasonable at the time, however, this analysis occurred before Wegman’s came to the area and big box users had significant grocery components. Currently, Target, Wal-Mart, and Costco are all located in Germantown or

Gaithersburg. The 2011 Limited Amendment to the Master Plan did not update this analysis. 10/10/13 T. 116-121.

Nor did Mr. Bogorad believe that elimination of a grocery store in Cabin Branch would negatively impact pedestrian and transit use. He stated that approximately half of the demand for neighborhood shopping would come from Cabin Branch residents. With three grocery stores so close together, residents would choose between stores on each trip for a variety of reasons, such as proximity to errands and current sales prices.

Mr. Bogorad opined that Staff did credit the employment uses in Cabin Branch as creating some demand, although the calculations are not entirely clear. Potential demand comes from both Cabin Branch and the 10-Mile Creek area. 10/10/13 T. 122-125.

Mr. Bogorad also stated that elimination of the Cabin Branch grocery would not affect the Plan's goal for pedestrian and transit usage because, in reality, most grocery trips are by car; the grocery store would not just be serving the Cabin Branch neighborhood. 10/10/13 T. 126.

He also opined that specialty retail at Cabin Branch will help development of the Town Center by making Clarksburg more of a retail designation within the area. He does not believe that the specialty retail at Cabin Branch will not "significantly compete" with the retail likely to be attracted to the Town Center neighborhood center.

Nor did he believe that the regional outlet center would compete with the type of retail recommended for the balance of the Town Center. That specific amount is difficult to ascertain because at one point the Plan recommends 300,000 square feet of commercial uses in the Town Center, including the neighborhood center, but at another it refers to 70,000 to 105,000 square feet of commercial uses exclusive of the neighborhood center. Nevertheless, he believes that the Plan's basic concept called for less than 150,000 square feet of infill office/retail to be located within the Historic District. In his opinion, the kind of retailer seeking to locate in an outlet center would "never consider" an infill kind of situation in a small concentration of retail in a historic district. It would be critical to them to draw people from an interstate highway. Even without the access, the small amount of retail in the town center historic district would not have the same potential store sizes, visibility, regional access or critical mass of square footage to be an effective comparative shopping situation. In his opinion, the likely uses will be smaller neighborhood-related stores and interesting restaurants that will not compete directly with the chain restaurants at the outlet center. He believes that the smaller, independent restaurants in the Historic District and the neighborhood center will not compete with chain restaurants in the outlet center. Many of these types of restaurants tend to be ethnic restaurants, and these can survive together with and complement the chain restaurants located in the outlet center. T. 129-136.

In Mr. Bogorad's opinion, the Plan intended the neighborhood center in Town Center to be the "heart of Clarksville"; not the Historic District. He has worked in Clarksburg for many years, and the main commentary has been to achieve a grocery store-anchored neighborhood center, rather than a focus on the Historic District. The critical item for the neighborhood center to achieve is a grocery store. Without this, the focal point of a neighborhood center will not happen. In addition, he has seen numerous examples where retail concentrations with "liveliness in attracting people" complete other areas that are relatively close to one another. He cited

Potomac Yard, Old Town Alexandria, Washingtonian Center, and King Farm as examples of retail developments that have succeeded despite being in close proximity. 10/10/13 T. 137-138. Other examples include the downtown Rehoboth shopping area and the Route 1 outlet centers in Rehoboth, Bethesda Triangle and Bethesda Row, and Leesburg Premium Outlets in Leesburg. 10/10/13 T. 138.

Mr. Bogorad disagreed with Mr. Ferguson's testimony that retail is not an employment use. The numbers of retail employees are similar to those of hotels, more than industrial office uses and somewhat fewer than office uses. The outlet center proposed will employ 1,659 permanent employees, which is a substantial number. 10/10/13 T. 138-139.

When asked whether the loss of a grocery store would impact the neighborhood center in Cabin Branch, Mr. Bogorad responded that master plan's should be read flexibly. He interpreted the Plan's recommendations for Town Center to permit 300,000 square feet, including the neighborhood center, which exceeded the 153,000 recommended by the Planning Board. When the Plan used the term "commercial," he interpreted that to be either office or commercial. He admitted that the Plan was ambiguous as to the amount of retail recommended for the Town Center District, although he believes that the additional commercial square footage primarily related to retail use to be located within the Historic District. 10/10/13 T. 149.

In his opinion, the outlet center will not shift the central focus of the area from the Town Center to west of I-270. He acknowledged that some uses that could locate in Town Center may wish to locate in the outlet. He believes, however, that the Town Center has the market potential to attract other users and the supermarket and neighborhood center will be a community gathering point rather than an exit on the interstate. He believes that there is the potential to have two lively places in an area like Clarksburg and will attract additional people to the Town Center and Historic District. 10/10/13 T. 152-153.

Mr. Bogorad estimated that 300,000 square feet of retail would generate approximately 650 employees. The neighborhood center of 120,000 recommended by the Master Plan for Cabin Branch would generate approximately 270,000 employees. 10/10/13 T. 154-155.

Mr. Bogorad acknowledged that the Plan's recommendation for three grocery stores is no longer valid, but did not recommend changing the Master Plan because it is not possible for it to change with the market. 10/10/13 T. 157.

He stated that the DPA could not guarantee neighborhood services within Cabin Branch because whether they come is dependent on demand. According to him, the Plan offers a good location for a limited service grocery store, but the current demand is for an outlet center. 10/10/13 T. 160. Outlet centers are regional retail and don't know how many have child care centers, but these types of uses may be located on the edges. In his opinion, the chain restaurants that will be coming to the outlet center offer a much needed neighborhood service. Trying to place neighborhood retail into a planned community is often a challenge because demand is needed from outside the community to support it. He did not see why neighborhood retail would not come in long-term, but whether it comes is based on demand. 10/10/13 T. 161-167.

3. Mr. Gary Unterberg:

Mr. Unterberg opined that the Town Center cannot accommodate the outlet center under its existing zoning because, in his experience, outlet centers look for approximately 350,000 square feet. In support of this, he described the three components of the Town Center development for clarification. There is a Town Center mixed-use project, also called the neighborhood center and formerly known as Terrabrook and then Newlands Development. It is bordered by Route 355 to the west, Stringtown Road to the south and is recommended primarily for housing and the neighborhood retail center. 10/10/13 T. 167.

The second component of the Town Center District is the Historic District, which is intended to remain intact. The third component, according to Mr. Unterberg, is the Miles-Coppola, which is in Stage IV of the Master Plan. A limited master plan amendment is pending to open Stage IV. 10/10/13 T. 168. The current Master Plan recommends a development envelope of 770,000 square feet. This breaks down into 300,000 square feet east of Route 355 (of which 150,000 is the neighborhood retail center) and 470,000 west of Md. Route 355. In his opinion, if the 300,000 square feet of commercial uses are located in the neighborhood center, 150,000 square feet would have to be office, because 150,000 is reserved for the neighborhood retail center. The balance (net of the neighborhood center) could also be located within the Historic District.

The Plan recommends 470,000 square feet of commercial uses in the MXPDP Zone. The MXPDP Zone, however, permits only 20% (or 94,000 square feet) to be retail. 10/10/13 T. 166-171.

Mr. Unterberg did not think that the Plan's recommendations for the Town Center District precluded an outlet center in Cabin Branch. This is because the Town Center is the smallest of the three MXPDP developments recommended in the Plan, which is complemented by a relatively small neighborhood center. The Plan recommends a total of 770,000 square feet of development in the Town Center, and 470,000 square feet of commercial uses in the Miles-Coppola property. In comparison, the Plan recommends 4.24 million square feet of MXPDP development in Cabin Branch, and 5 million square feet at the COMSAT property. The Town Center's is actually the smallest square footage of the three. 10/10/13 T. 175-176.

In his opinion, the "town scale" of development recommended by the Master Plan refers to the scale of buildings: It talks about a main street with neighborhood services, retail services, a post office, and public services such as a firehouse, post office, library, and a community center. In addition, the Plan calls for a transit stop. As a result, he opined, these neighborhood uses define the smaller, "town-scale" envisioned by the Master Plan. 10/10/13 T. 177-178. In comparison, he believes that Cabin Branch is a more appropriate location for a regional use such as an outlet center because the Plan anticipated a regional use (i.e., an employment center) that permitted up to 484,000 square feet of retail. This leads to the conclusion, according to him, that the Plan intended the Town Center retail component to operate as a neighborhood center serving the Town Center District. To the contrary, the Cabin Branch neighborhood retail is a hybrid that serves both the Cabin Branch neighborhood and a regional retail or shopping opportunity. 10/10/13 T. 182.

He reflected that the Plan's recommendation that the Town Center operate as the center of community life refers to its historic function, but on a slightly expanded scale. The Plan's goal is to expand the town center to include a variety of civic, retail, and housing types that are compatible in scale with the Historic District. He interprets this to mean that the Town Center (and the Historic District) is intended to serve the neighborhood in a manner compatible with the Historic District, but regional uses are reserved for the much larger developments in Cabin Branch and the Comsat properties. None of the Plan's descriptions for the Town Center lend themselves to a regional outlet center. 10/10/13 T. 182-183.

He further commented that the Master Plan does not preclude the regional outlet. The Plan makes only three specific retail recommendations; these are for the three neighborhood retail centers in the Town Center District and the Cabin Branch and Clarksville Village neighborhoods. While the Technical Appendix to the Plan contemplated comparison retail, they made no recommendations for that use. He opined again that he believed the neighborhood centers were specifically recommended in the Master Plan because it was a requirement for the recommended zoning. 10/10/13 T. 186-189. In further support of this, he observed that the District Council's Resolution in G-806, the original development plan, recognized that 10% of the 2.42 million square feet approved could be retail. This, in his opinion, confirms that the Plan anticipated more than 120,000 square feet. T. 188-206.

Mr. Unterberg commented that the development will be walkable and pedestrian oriented due to its interconnected streets, bike and nature trails. A bike trail will cross I-270 to connect people to work and recreation facilities. 10/10/13 T. 211-214.