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OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

FOR MONTGOMERY COUNTY

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

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

Lynn A. Robeson  
Hearing Examiner

A P P E A R A N C E S

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E X H I B I T S

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

C O N T E N T S

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

P R O C E E D I N G S

1  
 2 MS. ROBESON: We're on the record. This is a  
 3 continuation of the public hearing in the application of  
 4 Adventist Healthcare, Inc., and Cabin Branch Commons, Inc.,  
 5 requesting an amendment to the development plan approved by  
 6 the District Council on September 9th, 2003, in LMA G-806,  
 7 for property consisting of 283.5 acres east of Clarksburg  
 8 Road, west of I-270, and north of Old Baltimore Road in  
 9 Clarksburg, Maryland.  
 10 All right. I hesitate to ask this, but are there  
 11 any preliminary matters?  
 12 MR. HARRIS: I don't believe so from the  
 13 applicant's standpoint.  
 14 MS. ROBESON: Okay. Opposition?  
 15 MR. CHEN: Yes, Madam Examiner. My client, Whit  
 16 Cobb, is not present today. You may recall there's been  
 17 some discussion about the east side of Clarksburg and what's  
 18 been going on on that side, and today there's a hearing or a  
 19 proceeding for the Planning Board that deals with his  
 20 property and that's -- he called and that matter is probably  
 21 much more important to him than being present today. I  
 22 don't plan to call him as a witness.  
 23 MS. ROBESON: Okay.  
 24 MR. CHEN: So, to explain his absence, that's why  
 25 he's not here.

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

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

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1 admitted as Exhibit 123, which is Mr. Bossong's statement of  
2 qualifications.  
3 (Exhibit No. 123 was admitted  
4 into evidence.)  
5 MR. HARRIS: And we might be able to cut to the  
6 chase here. I think Mr. Bossong has been admitted as an  
7 expert, including very recently here, and --  
8 MS. ROBESON: Yes.  
9 MR. HARRIS: -- I don't, I know Mr. Kline just  
10 informed me that he had no problem admitting him as an  
11 expert.  
12 MS. ROBESON: Mr. Chen, do --  
13 MR. CHEN: Same.  
14 MS. ROBESON: Okay. You're admitted, well, as in  
15 a -- as a civil engineer.  
16 MR. HARRIS: Civil engineer, including stormwater  
17 management and water quality protection.  
18 MS. ROBESON: Okay. A civil engineer, I think, is  
19 fine. Go ahead.  
20 MR. HARRIS: Okay, that's fine.  
21 REBUTTAL DIRECT EXAMINATION  
22 BY MR. HARRIS:  
23 Q Mr. Bossong, can you explain to us, generally, the  
24 methodology for water quality review in special protection  
25 areas?

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

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

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

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

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

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

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1 MS. ROBESON: Okay.  
2 MR. CHEN: -- respectfully, that's not being  
3 factual.  
4 MS. ROBESON: I understand. Mr. Harris, can you  
5 ask, you know, whether it was approved as part of the  
6 original water quality, was it accepted, was it -- just ask  
7 it without appropriate.  
8 MR. HARRIS: Okay.  
9 BY MR. HARRIS:  
10 Q Was it accepted by the District Council in their  
11 approval of the original development plan?  
12 A Yes, it was, and I think that's shown by their  
13 approval, I think it's Exhibit 50. Park and Planning staff  
14 report basically designates that the examiner's report  
15 recommended approval and then the District Council  
16 ultimately recommended approval of development plan.  
17 Q And I believe the Council's resolution approving  
18 the development plan is an attachment to the staff report  
19 that is Exhibit --  
20 A I think it's 50.  
21 Q 15?  
22 A 50 --  
23 Q 50.  
24 A -- five oh, I think.  
25 Q You are correct, Exhibit 50, and are you referring

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

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

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

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

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

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

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

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

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

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

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

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

21 A Yes.

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

23 MR. HARRIS: Is that what it says?

24 MR. ROBINS: Yes.

25 MR. HARRIS: Okay.

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1 BY MR. HARRIS:

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

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

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

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

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

7 A Yes.

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

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

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

20 A Okay.

21 Q -- at various areas.

22 A Yeah.

23 Q Can you describe what that reference means?

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

Page 22

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

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

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

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

25 A Yes, I am.

Page 23

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

3 A I guess for, just so everybody knows where we're  
4 talking about, Pond 12 -- I'll use the exhibit Duplicate  
5 21F. On the right side of Redgrave, along the, along I-270,  
6 there's a labeling that says dedicated to public use. Just  
7 to the right of that, there's an area that's labeled OS.

8 Okay. That was an area that was designated for a stormwater  
9 management facility per previous documentations. With going  
10 forward, this area, the OS area, whether it's, you know,  
11 from the original development plan or the DPA, there will  
12 still be stormwater management facilities located in that  
13 area. So as far as concept-wise, there was stormwater  
14 management designated as a concept to go there before;  
15 there'll be stormwater management facilities going there as  
16 the project proceeds.

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

19 A Yes. Yes.

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

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

25 A Absolutely. You know, as the project moves

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

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

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

8 The other thing regarding this is there has been  
9 no change as far as imperviousness. Let's say -- let's just  
10 stay with A right now. In fact, it's gone down a fraction,  
11 and stormwater management in today's regulations, the key  
12 point of the design of stormwater management is  
13 imperviousness. So in this case, whether it's the A area on  
14 the original development plan or the A area on the DPA, the  
15 imperviousness area is, I'll say, essentially identical.

16 So, therefore, the facilities and the concept that we were  
17 proposing on the original development plan is the same as,  
18 again, meeting today's regulations, which, I agree, have  
19 evolved, and they continue to evolve, you know, through  
20 either state regulations or county regulations.

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

25 THE WITNESS: No. No.

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

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

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1 to have a certain imperviousness to it, and then you'll  
2 design the ESD measure accordingly to that drainage area and  
3 its imperviousness.  
4 MS. ROBESON: Okay. I have one more question.  
5 THE WITNESS: Sure.  
6 MS. ROBESON: I know, or for now, I know that you  
7 have been before us with preliminary stormwater management  
8 concept plans --  
9 THE WITNESS: Yes, uh-huh.  
10 MS. ROBESON: -- under the current ESD.  
11 THE WITNESS: Uh-huh.  
12 MS. ROBESON: What do you show on them for  
13 facilities?  
14 THE WITNESS: The stormwater management concept  
15 plan, it's very similar in the sense of showing locations of  
16 proposed --  
17 MS. ROBESON: I think it's one of the criteria.  
18 So I guess --  
19 THE WITNESS: There's a stormwater management  
20 concept plan as part of the water inventory --  
21 MS. ROBESON: Yes. So, I guess -- and I didn't  
22 pull one to check -- but when you have ESD --  
23 THE WITNESS: Uh-huh.  
24 MS. ROBESON: -- and you do a preliminary  
25 stormwater management concept plan for proposed mitigation,

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

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

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

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

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

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1 infiltration facility, and so forth like that, scattered  
2 throughout the buildable areas, doing the same thing today  
3 in 2013, utilizing basically only ESD structures and then  
4 taking it to maximum extent practicable.  
5 MS. ROBESON: Okay. I'm sorry to interrupt.  
6 MR. HARRIS: No, that's fine.  
7 BY MR. HARRIS:  
8 Q So taking a step backwards or away from the  
9 project a little bit, will the development plan amendment  
10 affect the area, I'll call it, preserved for stream buffers,  
11 forest conservation, steep slopes, and identified in the  
12 preliminary water quality plan?  
13 A It's exactly the same.  
14 Q Exactly the same. Does the change in use proposed  
15 in the DPA affect, first of all, the approval process for  
16 the final water quality plan?  
17 A Approval process remains identical. You have your  
18 first submission at your first application, which is the  
19 preliminary water quality plan, and then your last  
20 submission, which is the site plan, you do your final water  
21 quality plan. That has stayed exactly the same.  
22 Q Does the change in use reflected in the  
23 development plan affect the substance of the final water  
24 quality plan requirements, i.e., for ESD?  
25 A No, because, again, the basic premise of the

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1 stormwater management calculations is based on  
2 imperviousness. The imperviousness, whether it's the  
3 original development plan or the approved development plan  
4 or the DPA in front of us today, the imperviousness is the  
5 same. So, basically, the calculations are exactly the same;  
6 it's just the type of devices that you'll be using. Even  
7 though we would be using those devices based on the 2003,  
8 we're going to continue using them, but there are other  
9 devices that you will no longer be used because they're not  
10 considered ESD-type facilities.  
11 Q And would that same procedure and would those same  
12 substantive requirements for ESD apply if this project  
13 proceeded under the approved development plan?  
14 A Again, it'll be the same.  
15 Q Do you have an opinion as to whether all of the  
16 applicable provisions for water quality protection under  
17 County Code Chapter 19 and COMCOR --  
18 A Uh-huh.  
19 Q -- Chapter 19, which is really the executive  
20 regulations, can be satisfied with development of this  
21 property contemplated under this DPA?  
22 A Yeah. I think, as I stated, all the regulations  
23 can be accommodated with the DPA in front of us and will be  
24 accommodated and must be accommodated. That's the law.  
25 That's the regulations. So the design will accommodate the

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1 current requirements. So I'm not sure if -- okay. I  
2 mean --  
3 Q That's fine.  
4 A Okay.  
5 Q Looking at this, the area that's the subject of  
6 this DPA, which I think is 283 acres --  
7 A Uh-huh.  
8 Q -- do you have -- what is your level of confidence  
9 about the ability to achieve the stormwater management  
10 requirements there and does it relate at all to the status  
11 of approvals already for that area?  
12 A Okay. I guess I'll point out that the Cabin  
13 Branch project as a whole has approval of -- 81 percent of  
14 it has been approved for final site plan and final water  
15 quality plan, which leaves, you know, 19 or -- actually, let  
16 me go back.  
17 Looking at Exhibit 59, Area A and a portion of --  
18 I'll use another exhibit to be exact. I'm going to use  
19 Exhibit 109. I think this was used previously by Mr. Hughes  
20 and others. In looking at Exhibit 109, the area that's  
21 represented by a dash line and has encompassed within that  
22 dash line the number 12 --  
23 MS. ROBESON: In green?  
24 THE WITNESS: In green.  
25 MS. ROBESON: Yes.

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1 THE WITNESS: For argument sake, let's say that's  
2 part of Area A that is shown on Exhibit 59. Going down on  
3 Exhibit 109 where it says future development and there's a  
4 circle by a dashed line that incorporates the green area  
5 labeled 15, I'm going to, I want to reflect that as a  
6 portion of Area C, okay? These two portions of the project  
7 represent only 10 percent of the entire project. They  
8 also --  
9 MS. ROBESON: When you say entire project --  
10 THE WITNESS: Entire Cabin --  
11 MS. ROBESON: -- 535-acre project?  
12 THE WITNESS: Right. See, these two pods, I'll  
13 call them, represent about 55 acres. They also represent,  
14 as far as the DPA goes, an area of the DPA, it represents  
15 about 19 percent of the total area, also represents that  
16 only 19 percent of the current DPA area has not reached  
17 final site plan approval or final water quality approval for  
18 the other areas.  
19 So, in general, up to today, to answer your  
20 question, Mr. Harris, the project originally had the  
21 preliminary water quality plan approved in 2003. It  
22 followed that progression through the site plan for the  
23 final water quality plan, using that final water quality  
24 plan as a guide, and everything has been approved based on  
25 that cornerstone of the preliminary water quality plan.

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1 So I am, you know, since I have essentially 90  
2 percent of the drainage area on the entire Cabin Branch  
3 project approved from a final water quality standpoint, I'm  
4 very confident, through my experience and the hundreds of  
5 facilities I've designed, that the two areas I just  
6 designated -- one with the green area, 12; one with the  
7 green area, 15 -- will be able to accomplish and go through  
8 the final water quality plan approval and acceptance --  
9 BY MR. HARRIS:  
10 Q In a --  
11 A -- at the site plan stage.  
12 Q In a normal development plan, would any of the  
13 area that's the subject of the development plan have final  
14 water quality plan approval?  
15 A Very rare. I don't know of any other plan that's  
16 ever gone through a DPA that already had a significant  
17 portion of it or 81 percent of it already having final water  
18 quality plan approval. I think it's very rare.  
19 Q In those cases where there is no final water  
20 quality plan approval at the time of the development plan,  
21 has, have you offered an opinion that the water quality  
22 requirements can be accommodated based on your knowledge and  
23 experience with these things or matters?  
24 A I mean, I've testified, you know, on numerous  
25 plans that, you know, final water quality plans can be done,

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1 you know, and approved based on the DPA, the development  
2 plan or DPA that's in front of them at that time.  
3 Q And would your confidence be higher, even higher  
4 than that where, if 81 percent or 83 percent of the project  
5 already had final approvals?  
6 A Well, it does give you a sense of that this is  
7 achievable, it's accomplished when 81 percent of, or I'm  
8 going to say, 90 percent of the project or 81, or when 81  
9 percent of just the DPA in front of us has already been  
10 approved. So, yeah, I'm very confident that it can be  
11 approved based on the approvals that have already been  
12 granted.  
13 MR. HARRIS: I have no further questions.  
14 MS. ROBESON: Okay. Cross-examination. Who, do  
15 you have a preference as to who will go first?  
16 MR. KLINE: Well, let me try and go first, yes.  
17 MS. ROBESON: Okay. Mr. Kline.  
18 REBUTTAL CROSS-EXAMINATION  
19 BY MR. KLINE:  
20 Q Mr. Bossong, we're kind of working off, or what  
21 triggered all of this debate was our sort of stumbling  
22 around, trying to understand what was the meaning of Section  
23 59-D-1.3(1)(i), and in that it uses a term that the  
24 applicant has to submit water quality inventories. I  
25 haven't heard you use that term at all. So can you tell us

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1 what a water quality inventory is in the, in context of the  
2 other things you've been talking about?  
3 A Okay. I believe I did mention -- that was one of  
4 the first questions I was asked, about what's entailed in a  
5 water quality submission, and one of them is a water quality  
6 inventory. And, basically, a water quality inventory has,  
7 is part of the overall water quality plan, and it  
8 essentially has three specific areas. One is stormwater  
9 management concept, one is sediment control, and one has to  
10 do with impervious, evaluation of impervious areas.  
11 Q You know, as I look at the structure of 19 in the  
12 regulations, isn't the water quality plan actually a  
13 subordinate of a water quality inventory, which is the  
14 reverse of what you just said?  
15 A Well, if you -- second. The water quality plan,  
16 I'm reading from, this is COMAR 19.67.01.09, Water Quality  
17 Plan --  
18 MS. ROBESON: Wait. COMAR or COMCOR?  
19 THE WITNESS: I'm sorry. COMCOR, I'm sorry.  
20 COMCOR, sorry.  
21 BY MR. KLINE:  
22 Q Okay. Could you repeat that for us?  
23 A Okay. It's 19.67.01.09. It says water quality  
24 plan submissions, and here it has No. 1. It says elements  
25 of a preliminary water quality plan, preliminary must

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1 include, and then it says water quality inventory, and then  
2 it goes down through the other nine or 10 items that I  
3 mentioned earlier.  
4 Q Well, can I draw your attention to 19.67.01.08?  
5 A Yes.  
6 Q Which basically is entitled Water Quality  
7 Inventory and tells us what would be involved in that, and I  
8 believe this is what you had mentioned earlier.  
9 A Correct.  
10 Q And then when you go over to 19.67.01.09, when it  
11 talks about a water quality submission --  
12 A Uh-huh.  
13 Q -- it talks about the water quality inventory.  
14 A As part of the water quality plan submission.  
15 Q Is there any difference? Tell us what the -- in  
16 essence, I'm trying to just understand the difference  
17 between the two.  
18 A Between a water quality plan? Okay. The water  
19 quality plan, again, is not a piece of, simple piece of  
20 paper --  
21 Q Yes. No, I understand.  
22 A -- it has a whole bunch of components. In the  
23 water quality plan -- this is how I'm reading the  
24 regulations -- in the water quality plan, you have to, as  
25 part of that, you have to submit these elements. One is a

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

5 Q Okay.

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

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

14 MS. ROBESON: Right.

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

18 MS. ROBESON: Right.

19 THE WITNESS: Yeah.

20 BY MR. KLINE:

21 Q There was a series of questions asked you by  
22 Mr. Harris, and I guess I'll go into that. Did we conclude  
23 or did we ever find that there was a water quality plan  
24 submitted as part of the original rezoning application?  
25

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1 Mr. Harris that, because I know it was referenced in the --  
2 MS. ROBESON: Well, don't ask Mr. Harris.

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

4 BY MR. KLINE:

5 Q Mr. Bossong, were you the civil engineer,  
6 testifying as part of the original zoning application?  
7 A Yes, I was.

8 Q Okay. Was there a water quality plan submitted as  
9 part of the original application?  
10 A Yes, there was.

11 Q Okay, thanks. You talked about 19-65 and the  
12 language of 19-65. Did it read the same in 2003, when that  
13 water quality plan was reviewed, the preliminary water  
14 quality plan was reviewed, as it reads today, if you recall?  
15 A Well, as I recall, it does. I mean, 19-65 --  
16 Chapter 19 has evolved, also, based on 2007 change in  
17 regulations, you know. The county had to make the changes  
18 to match or to meet the requirements of the state. So, yes,  
19 items within Chapter 19 have changed. My understanding is  
20 the requirements for 19-65 are pretty much, if not  
21 identical, to what they were back in 2002/2003.

22 Q So would the only changes be the additional ESD  
23 language being stressed more?  
24 A It's the involvement of how stormwater management  
25 is handled in today's regulations, yeah.

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

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

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

16 MR. HARRIS: Objection.

17 MS. ROBESON: Basis?

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

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

25 THE WITNESS: All right. Could you ask the

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1 question again, please?

2 MR. KLINE: Sure. Sure.

3 BY MR. KLINE:

4 Q The state adopted the Stormwater Management Act of  
5 2007 --  
6 A Uh-huh.

7 Q -- it basically affected how, what is the test for  
8 stormwater management. What did you have to have  
9 accomplished and by what date in order to be able to not  
10 have to comply with Chapter 19 and COMCOR as it exists post,  
11 or as exists today?  
12 A Okay. In order to design stormwater management  
13 facilities based on the MDE, the state regulations of 2000  
14 -- again, it changed in 2000 -- you had to have, basically  
15 for Montgomery County you had to have approved construction  
16 drawings for the stormwater management prior to May 4th,  
17 2013. Therefore, you could utilize stormwater management  
18 techniques that would have been under the 2000 regulations  
19 versus the change in the 2007 state regulations. There are  
20 other things that go with it --

21 Q Right.

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

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

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

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

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

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

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1 MR. KLINE: Yes. Well --

2 MR. ROBESON: -- you're going, because I don't

3 know where you're going.

4 MR. KLINE: Then let me try this another way.

5 BY MR. KLINE:

6 Q Mr. Bossong, is the answer to your question,

7 Mr. Kline, we're not amending the water, preliminary water

8 requirement, it's evolving to address a different set of

9 features?

10 A Different set of features? That doesn't --

11 Q All right. If that doesn't make sense, let me try

12 it this way then.

13 A No.

14 MS. ROBESON: Now, I have Sheet 15 as Pond 12. Is

15 that what you're asking about?

16 MR. KLINE: Yes, that's probably a good example.

17 THE WITNESS: Okay. That's a good -- okay. All

18 right. So you have to refresh your question, please.

19 BY MR. KLINE:

20 Q All right. So we're looking at Sheet --

21 A 15 of --

22 Q -- 15. So we have something on here called Pond

23 12 --

24 A Correct.

25 Q -- that's got some contour lines --

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1 A Uh-huh.

2 Q -- associated with it, and would you be building a

3 pond as shown on this sheet?

4 A No.

5 Q Rephrase that. Would you be showing in the final

6 water quality plan a pond as shown on this sheet?

7 A As shown here, exactly as this? No, but --

8 Q But you're saying that you would have other

9 measures that would go in that same general area?

10 A That is correct, because, again --

11 Q Okay. So my question is, why is that not an

12 amendment of the preliminary water quality plan?

13 A Because I'm still providing stormwater management

14 for the site based on the approved preliminary water quality

15 plan. Again, the, the --

16 Q Just a minute. Just a minute. Just --

17 A Okay.

18 Q -- answer my questions. So you're just saying,

19 Mr. Kline, if I'm not going beyond the limits of

20 disturbance, I essentially have carte blanche to come up

21 with features that satisfy Chapter 19 but I'm not bound by

22 what I've got in --

23 A Okay.

24 Q -- the preliminary water quality plan?

25 A I guess what I'm saying is, I'm staying within the

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1 restrictions that were set by the preliminary water quality

2 plan, and the internal, make it simple, the internal

3 imperviousness, which is a key component of stormwater

4 management, has not changed. So my restricted area has not

5 changed. My imperviousness has not changed. I'm still

6 going to implement stormwater management techniques that are

7 per Chapter 19, which include, which includes items that

8 were shown on the preliminary water quality plan.

9 The other thing is, when you asked about that

10 specific facility, when I build that specific facility, it's

11 going to change because the site plan -- when you go to the

12 site plan, there may be some modifications that change the

13 shape, size, possible location, to some degree, and that's

14 why it's all done at, when you know more details, at the

15 site plan stage and then your final water quality plan.

16 Q You used the term restrictions, and is it fair to

17 say that's limited disturbance, those are equivalents?

18 A Restrictions is, this is my developable envelope.

19 Q The envelope, right, fine.

20 A Yeah.

21 Q And you talked about imperviousness. So that

22 means you either have or -- well, yes, you obviously have

23 done some kind of a calculation to determine that the

24 regional retail outlet center would have an imperviousness

25 equivalent to what would be a real hospital pad.

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1 A Yes.

2 Q Okay. And you shared that with what public agency

3 for any kind of confirmation that those are reasonable

4 calculations?

5 A I think the confirmation, whether I shared them or

6 not, was both DPS in, I guess it's what you talked about

7 earlier, the e-mails and the letters coming from, the

8 letters coming from -- or the letter that come from John

9 Carter from Park and Planning confirmed that they believe

10 everything is in, is good regarding the preliminary water

11 quality plan, who's one of the technical review agencies.

12 DPS, both Mark Etheridge and Rick Brush, responded, who are

13 technical reviewers regarding -- from DPS's standpoint, from

14 the executive branch, also confirmed that the preliminary

15 water quality plan is acceptable and the details will be

16 worked out at site plan. So both of those agencies, I would

17 say, were also comfortable that ESD to the MEP can be

18 accommodated at the time of site plan review and final water

19 quality plan review and approval.

20 Q And that's based on what submission you have made

21 to those two agencies?

22 A The DPA.

23 Q That's all, right?

24 A Uh-huh.

25 Q And is there --

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1 A They already have it.

2 Q Is there anything on there that tells us what the

3 imperviousness levels are or anything that tells us what the

4 measures are going to be? I mean, isn't, aren't you telling

5 us they've made a leap of faith and accepted what you just

6 told us, that you're confident you can fit everything on the

7 property?

8 A I would say they are confident that we can fit the

9 stormwater management on the property based on the DPA, yes.

10 Q But don't have any factual or empirical

11 information from which they can come to that conclusion yet?

12 A I don't know -- I don't know if they did their own

13 computations. They may have, but again, just from a general

14 standpoint, I want to -- going back to Exhibit Duplicate

15 21F, which is the approved development plan, and comparing

16 it to Exhibit 59, even from a, I can say, a layman's term,

17 without doing technical calculations, impurity calculations,

18 when you look at this layout and look at the building

19 coverage, just generally -- building coverage, road

20 coverage, parking lots -- and then you look at this from a

21 layman's standpoint, not doing a total, it looks pretty much

22 the same from, to me, from an impervious standpoint or

23 coverage, building coverage, parking lot coverage, again,

24 going back to impervious coverage.

25 Q Mr. Bossong, let me just see again, forgot

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1 something. Actually, let me go back. You were talking

2 about the Butz application, which I'll actually ask

3 Mr. Unterberg to remind me what the case number was.

4 MS. ROBESON: 881.

5 MR. KLINE: Thank you. Thank you my memory is

6 very short. Yes.

7 BY MR. KLINE:

8 Q I'll defer to your recollection that there's no

9 stormwater management ponds on the development plan; yet you

10 did testify. You must have had the exhibit at the hearing

11 because you were testifying about actual locations of

12 stormwater management ponds on the property, whether they

13 were shown on the development plan or not. Did we never do

14 that?

15 A We had a stormwater management concept plan, yes.

16 Q Yes, okay. And, in fact, the hearing examiner

17 made a recommendation in his report and recommendation that

18 we basically preserve the ability to relocate some of those

19 facilities, didn't he, if you recall?

20 A Define relocate.

21 Q He was interested in trying to preserve vegetation

22 and protect the view of properties from the west and

23 suggested that we try and put stormwater management

24 facilities in locations where they would not remove --

25 A Well --

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1 Q -- existing vegetation, and so you had to have an

2 exhibit that showed that.

3 A Well, there's a difference there. The two --

4 there were two facilities on that, on that project which

5 were on the west side of the project, adjacent to existing

6 neighborhood. Those facilities were for, basically, flood

7 control for, if you want to call it, stormwater management.

8 They were not for water quality and stormwater management.

9 The stormwater management on the Butz property was -- we

10 showed through the concept, and was approved, that we could

11 provide ESD to the MEP through all ESD measures.

12 The two facilities, I think, that you're

13 mentioning that the hearing examiner said, you know, give

14 some flexibility to adjust, and so forth, one for vegetation

15 and one for the adjacentness of the facilities to adjacent

16 properties, they were flood control measures. They were not

17 your typical ESD to the MEP. They were -- in the past,

18 stormwater management, going back to when stormwater

19 management first started, back in, basically, the late

20 '70s/early '80s in Montgomery County, stormwater management

21 was really hold the water and then let it release at a

22 slower release rate, and depending on where you were

23 located, you sized it for different storm events, 210 and

24 100 when it first started back there.

25 So back then it had very little, if no water

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1 quality features to them. I mean, there was a little bit

2 intrinsic to the facilities themselves because you would

3 have possibly some infiltration, if you held the water long

4 enough, that you'd get some uptake and stuff like that, but

5 they weren't really water quality control facilities; then,

6 as I keep on saying, stormwater management has evolved.

7 But going back to your specific question, on the

8 courts of the Butz property, the two facilities adjacent on

9 the west side, they were more for flood control issues

10 because of possible concerns of neighbors of that. It had

11 nothing to do with providing today's stormwater management

12 ESD to the MEP because that was done throughout the entire

13 project to -- per the regulations.

14 Q And you're saying they're outside of Chapter 19

15 and they didn't have to be shown on anything?

16 A What's interesting on those two facilities,

17 they're not -- and we're talking about a different case --

18 but on that case, DPS even had hesitation on saying why do

19 you need these. We were doing this in response to neighbor

20 concerns and trying to be friendly, and so forth like that.

21 So if they are built -- and that was correct, those are not

22 guaranteed to be constructed -- but if they are built, they

23 would have to abide by the regulations of Chapter 19 and

24 also state regulations, also, since they would be an

25 embankment; so you have to meet the embankment requirements.

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

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

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

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1 A But, in my opinion, we're not doing any  
2 modifications.  
3 Q No, I understand what -- I'm just asking you to  
4 tell us what the statute says.  
5 A Okay.  
6 Q Okay. So everything is deemed to be significant  
7 unless it's minor under this section?  
8 A I'm not a lawyer; so I don't know the legality of  
9 it.  
10 Q Okay. Okay. All right. Well, is it not correct  
11 that subsection E says everything is significant unless you  
12 fit in one of the minor modifications that are found in this  
13 regulation? Correct?  
14 MS. ROBESON: Mr. Kline, I don't -- he isn't an  
15 attorney.  
16 MR. KLINE: Okay, fine.  
17 MS. ROBESON: Maybe you could just ask him --  
18 MR. KLINE: Sure. Well, the --  
19 MS. ROBESON: -- whether --  
20 MR. KLINE: All right. Go ahead, sorry.  
21 MS. ROBESON: -- whether it's minor, but --  
22 MR. KLINE: Well --  
23 MS. ROBESON: -- I don't want to put words in your  
24 mouth --  
25 MR. KLINE: Not a problem. I --

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

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

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

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1 MS. ROBESON: -- so that's why I'm asking you --  
2 it says channel protection measures for this site will be  
3 provided via 13 extended --  
4 THE WITNESS: Uh-huh.  
5 MS. ROBESON: -- detention dry ponds. Okay. So  
6 which portions of that remain the same --  
7 THE WITNESS: Okay.  
8 MS. ROBESON: -- and which are not the same, you  
9 know, which --  
10 THE WITNESS: Well --  
11 MS. ROBESON: -- are no longer the case?  
12 THE WITNESS: Well, we're going to get in more  
13 technical aspects of the calculations of stormwater  
14 management.  
15 MS. ROBESON: That's okay.  
16 THE WITNESS: CPV, channel protection volume --  
17 MS. ROBESON: Yes.  
18 THE WITNESS: -- so forth like that, that has  
19 basically been changed with the 2007 regulations with the  
20 ESD. You're actually -- before, there was water quality  
21 facilities and there was channel protection volume  
22 facilities. With the new regulations --  
23 MS. ROBESON: Wait. Explain the difference.  
24 THE WITNESS: Okay.  
25 MS. ROBESON: I'm sorry I'm belaboring this --

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1 THE WITNESS: That's okay.  
2 MS. ROBESON: -- but I really want to understand  
3 this.  
4 THE WITNESS: Okay. Simplistically is that you  
5 had two areas; you had treat the water, clean the water --  
6 MS. ROBESON: Right.  
7 THE WITNESS: -- and the other one was control the  
8 water --  
9 MS. ROBESON: Right.  
10 THE WITNESS: -- from runoff --  
11 MS. ROBESON: Controls --  
12 THE WITNESS: Correct.  
13 MS. ROBESON: -- whatever the cube factor,  
14 whatever it was.  
15 THE WITNESS: Right. So when -- so you used to,  
16 previously, and again, as I keep on saying, stormwater  
17 management evolving, when the state implemented new  
18 regulations, I believe, 2008 and the county went forward,  
19 what the state wanted to do was do away with the CPV-type  
20 control features and incorporate it into the water quality  
21 control features, the ESD measures. So right now, when you  
22 design the ESD measures to the MEP, you are actually  
23 incorporating the CPV elements, if you want to say, within  
24 the design of the ESD facilities.  
25 MS. ROBESON: Okay.

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

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1 sediment control.  
2 Performance goals -- protect the streams and  
3 habitat, we're still doing that; maintain the natural  
4 on-site stream channels, we're doing that; minimize storm  
5 flow runoff increases, we do that through the ESD measures;  
6 identify and protect stream banks prone to erosion, we've  
7 already done that; minimize increasing, increases to ambient  
8 water temperature; minimize sediment loading; maintain  
9 stream base flows; protect springs, minimize -- these are  
10 all the same.  
11 MS. ROBESON: Okay. Now, if you could move to the  
12 conditions of approval.  
13 THE WITNESS: Okay.  
14 MS. ROBESON: Are these still applicable? Take  
15 your time.  
16 THE WITNESS: They all remain the same. The only  
17 one I would point out, and I don't know if this really means  
18 anything, on No. 10, final water quality plan, must show the  
19 additional recharge volume has been divided similar to that  
20 shown in the preliminary water quality plan, 150 percent of  
21 MDE requirements. When this was done in 2004, obviously the  
22 2000 regulations were not into effect, and we've raised, in  
23 a sense, the bar with the ESD structures. We're taking,  
24 we're taking the ground back to forested condition where  
25 before you weren't. So it's kind of a moot point now that

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1 we're already doing it. So, in a sense, yes, we're still  
2 doing this.  
3 BY MR. KLINE:  
4 Q And I think you said the 2000 regulations. You  
5 probably meant 2007.  
6 A No.  
7 Q No. 2000? All right. They were not in effect in  
8 2004?  
9 A What?  
10 Q The 2000 regulations were not in effect in 2004?  
11 A No, no, no, no, no. I misunderstood your question  
12 then. What I'm saying is in -- when this letter was written  
13 in 2004, it was under the premise of the stormwater  
14 management regulations of 2000.  
15 Q Right.  
16 A When 2000 they -- through the type of facilities  
17 that the state wants, they've changed it around. So, in  
18 other words, I don't want to get into the technicality of  
19 this, but you don't want to dry up the streams either. So  
20 if I'm doing the maximum amount of, you know, which I have  
21 to now, and I do 150 percent of it, I possibly violate, you  
22 know, the --  
23 MS. ROBESON: The stream flow.  
24 THE WITNESS: -- water in the streams and the  
25 habitats, so forth like that, but I mean, that's just a

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

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

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

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1 MS. ROBESON: Well, he can answer this.  
2 THE WITNESS: Ask that again, just, I guess, just  
3 the way you asked it.  
4 BY MR. KLINE:  
5 Q Looking at No. 3 --  
6 A Uh-huh.  
7 Q -- the text of No. 3 --  
8 A Uh-huh.  
9 Q -- is there an emergency situation that will cause  
10 your final water quality plan to differ from your approved  
11 preliminary, approved preliminary water quality plan?  
12 A As of right now, I know of no emergency situation.  
13 MR. KLINE: I'll leave it at that.  
14 MS. ROBESON: Mr. Chen.  
15 MR. CHEN: Thank you.  
16 MR. KLINE: Oh, no, no. I'm sorry. I wasn't  
17 going to go any further on that, yes.  
18 MS. ROBESON: Oh, I'm sorry.  
19 MR. KLINE: No, just a couple more, though.  
20 BY MR. KLINE:  
21 Q Can I draw your attention to Chapter 19, Section  
22 65?  
23 A Okay.  
24 Q Are you there? Okay. It's called (a) General,  
25 and (1) reads, coordinated with project review.

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1 A Okay.

2 Q The second and third line down says that water

3 quality review will be done in conjunction with the review

4 process for a development plan. So we're amending the

5 development plan. So doesn't this section tell us that we

6 should be conducting a review of the water quality plans at

7 the same time rather than alone? 19-65(a)(1).

8 A Uh-huh.

9 Q What does coordinated with project review mean, to

10 your understanding?

11 A Okay. What they're saying -- okay, water quality

12 review, including submittal and review of the preliminary

13 and final water quality plans, where required, must be done

14 in conjunction with the review process for a development,

15 then it goes, development plan, schematic development plan,

16 blank, blank, blank, or special, in accordance with this

17 section, and we've done that when we submitted in --

18 Q But earlier you said, when we're doing an amended

19 development plan, Chapter 19 still kicks in. So that

20 provision applies to an amended development plan, and my

21 question is --

22 A I don't --

23 Q -- why aren't we doing the water quality review

24 contemporaneous with the review of the project plan?

25 A Well, I don't see it, unless I'm missing

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1 something, I don't see it says amendment. It says

2 development plan, which we did in 2003.

3 Q No, but when I asked you the question about

4 67.01.01 that says it applies to an amended development

5 plan, you said yes, that is applicable. So that

6 automatically incorporates the applicability of this 19-65

7 and that's my question, is shouldn't we be doing -- doesn't

8 this tell us these two things should be done simultaneously?

9 A I think you misunderstood. What I'm saying is, in

10 our design process and review process, we have to adhere to

11 Chapter 19 for the design for the final water quality

12 plan --

13 Q Sure.

14 A -- which we had done at the preliminary water

15 quality plan, so you know, as it says here, including review

16 of the preliminary and final water quality plans. So when

17 we submit in the future site plans and we have to do final

18 water quality plans, it's going to have to be reviewed, and

19 it goes down further: the planning director must coordinate

20 review of the water quality plan with the DPS director. We

21 have to follow that when we submit for site plan and final

22 water quality plan on that.

23 Q So you're saying that 19-65, coordination with

24 project review, is not applicable to an amended development

25 plan?

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1 A I guess I could answer two ways by saying no,

2 because it doesn't say amended development plan. On the

3 other hand, if you read further into Section 19-65, it does

4 stipulate, you know, when possibly it could trigger a

5 further review.

6 Q Let me just pass something in here.

7 MS. ROBESON: And that is?

8 BY MR. KLINE:

9 Q Mr. Bossong, I'm handing to you an excerpt from

10 the design manual for Environmental Site Design.

11 A Uh-huh.

12 Q I don't see -- Figure 5.1.

13 MR. KLINE: And, Madam, what I guess I'd do is

14 just put the whole -- well, I'll give you this and I can, I

15 brought one copy of the entire design manual. I can put it

16 in the record if you'd like.

17 MS. ROBESON: Well, unless I hear a necessity from

18 the applicant, we can stick with this.

19 MR. HARRIS: This is from the county's -- I'm not

20 sure what this is from, Mr. Kline.

21 MR. KLINE: Yes. I'm going to ask Mr. Bossong

22 what this comes from.

23 MS. ROBESON: Well, let me mark it first, and then

24 if we need to strike it, we will, but I'll make this, mark

25 this as Exhibit 124, and it will be --

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1 MR. ROBINS: The whole document, Madam?

2 MS. ROBESON: No, just the page. It'll be Exhibit

3 124, Figure 5.1.

4 BY MR. KLINE:

5 Q Mr. Bossong, are you familiar with this figure?

6 A I've seen this figure before.

7 Q Okay. Found within this section, Chapter 5,

8 Environmental Site Design, which is a publication of the

9 county or the state?

10 A Are you asking me, or do you know?

11 Q I'm asking you.

12 A It's a state document.

13 Q Okay. The site -- I'm sorry. The document is

14 titled Design Process for New Development --

15 A Uh-huh.

16 Q -- and it describes the sequence of which things

17 should occur in terms of site design under the new Chapter

18 -- under Chapter 19 as it is today?

19 A No, because this is what the state put out. The

20 county has to adhere generally to what the state put out,

21 but they, they can change, they can -- they can develop

22 their own development process as long as it's approved by

23 MDE, which it has been, and that's the revisions of Chapter

24 19, to reflect the 2007/8 changes.

25 Q Does the -- I'm sorry. Go ahead.

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1 A I'm done.

2 Q Does the county have a similar design manual of  
3 its own?

4 A A stormwater management design manual? No.

5 Q Okay, fine. When the county basically adopted the  
6 changes in the 2007 stormwater management law, did it in any  
7 way dilute the emphasis on using ESD measures?

8 A No, because Chapter 19 says ESD to the MEP.

9 Q Right. So I look at No. 4 and the sequence --

10 A Uh-huh.

11 Q -- when you actually submit the site development  
12 plan.

13 MR. HARRIS: Objection.

14 MS. ROBESON: Basis?

15 MR. HARRIS: There's no indication that this  
16 document controls the process in Montgomery County. This  
17 was, as I understood Mr. Bossong's testimony, this was a  
18 state document that the county did not have to follow. So I  
19 think it's irrelevant.

20 MS. ROBESON: Well, do you want to ask him what  
21 this -- I heard he said it's a state document --

22 MR. KLINE: Right.

23 MS. ROBESON: -- but the county can --

24 MR. KLINE: Okay. I'll work with that. That's  
25 okay.

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1 BY MR. KLINE:

2 Q Mr. Bossong, what I want to do is just note the  
3 sequence between 4 and the highlighted triangle beyond that,  
4 showing that ESD is considered --

5 A Uh-huh.

6 Q -- simultaneous to the site development plan.

7 A Right.

8 Q The question is whether the county's adoption in  
9 its application of Chapter 19 in any way dilutes what the  
10 state thought was the proper sequence and importance and  
11 emphasis of ESD?

12 MR. HARRIS: Objection. Again, site development  
13 plan is the term here. There is none such thing as a site  
14 development plan in Montgomery County. Is that a site plan  
15 or is that a development plan? So you can't answer that --  
16 you can't ask that question and it can't be answered because  
17 this is not the process in Montgomery County. This assumes  
18 a --

19 MS. ROBESON: Okay. I understand.

20 MR. HARRIS: -- one-step process of a site  
21 development plan.

22 MS. ROBESON: Mr. Kline.

23 BY MR. KLINE:

24 Q This being a state document, you would not expect  
25 the State of Maryland to have been able to incorporate in

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1 Paragraph No. 4, Submit Site Development Plan, all of the  
2 terms that we would use through all of the counties in the  
3 State of Maryland. So would it be a generic phrase -- and I  
4 would suggest that it applies to a development plan or an  
5 amended development plan with a rezoning application --

6 MS. ROBESON: Well, that's a lot of suggestions  
7 for cross-examination. So --

8 MR. KLINE: Okay.

9 MS. ROBESON: -- can you get to the point another  
10 way?

11 MR. KLINE: Yes.

12 BY MR. KLINE:

13 Q In the review of -- rephrase this. Environmental  
14 site design is a critical element in approving a water  
15 quality plan, correct?

16 A It's an element of the water quality plan, yes.  
17 It's an element.

18 Q Doesn't the 2007 Stormwater Management Act  
19 increase the importance of an environmental site design --

20 A Yes.

21 Q -- over what existed prior to that time?

22 A Yes, more emphasis on ESD.

23 Q Right. And the section I just read about 19-65  
24 said you should be looking at water quality plan review in  
25 conjunction with the companion development plan that's

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1 triggering the review.

2 MR. HARRIS: Objection. It doesn't say that.

3 MR. KLINE: Well, this document doesn't, but 19-65  
4 does.

5 MR. HARRIS: Mr. Bossong testified earlier.

6 MS. ROBESON: Okay. Where are you going with  
7 this, Mr. Kline?

8 MR. KLINE: Sure. Sure. It all has to do with  
9 the fact that these regulations and the state's sort of  
10 concept of how you were supposed to do stormwater management  
11 was you had the ESD being evaluated simultaneously with the  
12 development plan. They're saying basically we can do it at  
13 site plan. I'm saying that the structure of the county law  
14 plus the state's philosophy as expressed in the design  
15 manual says you do the two together, and 19-65 clearly says  
16 that. And they're saying no, we don't have to do it now, we  
17 can basically postpone it until the time of site plan, and  
18 we say that's inconsistent with the philosophy and the  
19 language of the law.

20 MS. ROBESON: Well, why don't you ask him, in his  
21 experience, if it's, if those two need to be linked. No,  
22 you don't want to do that?

23 MR. KLINE: I don't think I want to -- I don't  
24 want to ask him that question, no.

25 MS. ROBESON: All right. Well, I guess where I'm

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

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1 MS. ROBESON: Well, I need a witness to tell me  
2 what it is. I --  
3 MR. KLINE: I don't have that witness.  
4 MS. ROBESON: -- I trust you implicitly, but  
5 Mr. Chen gave me a case about attorneys testifying earlier.  
6 And so I'm going to be mindful of that case, and I really  
7 don't have a foundation for that document. Is it a --  
8 MR. CHEN: This is a state reg, state reg. It's  
9 not -- he's not testifying. He is offering --  
10 MS. ROBESON: So you're saying I take official  
11 notice of it. Is it published anywhere?  
12 MR. KLINE: Sure. Sure. I mean, we would have  
13 gotten it off the Internet. I can get you the citation --  
14 MS. ROBESON: Well, I will --  
15 MR. KLINE: -- where it's found.  
16 MS. ROBESON: I would prefer to have the --  
17 MR. KLINE: Sure.  
18 MS. ROBESON: -- the official citation of the  
19 document. If we can verify it, I'll strike this as Exhibit  
20 124, which is the single sheet of paper you gave me, and I  
21 will take in that, subject to your providing  
22 documentation --  
23 MR. KLINE: Right, sure, understand.  
24 MS. ROBESON: -- of exactly where it's codified or  
25 published.

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

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1 bit confused.  
2 A What I'm saying is further review at the site plan  
3 stage level. When we submit a site plan, I have to utilize  
4 Chapter 19 for that level of stormwater management design  
5 and for the final water quality plan design. So I do have  
6 to use Chapter 19 in the future for the design of the  
7 stormwater management facilities as we move forward.  
8 Q So that, as I understand your testimony, Section  
9 19-65 would therefore, based upon what you've just  
10 explained, not be applicable to a development plan amendment  
11 process?  
12 A If -- I guess, ask the question again.  
13 Q Sure. Let me do it this way. Does Section 19-65  
14 apply to the District Council's consideration of a  
15 development plan amendment?  
16 A Yes.  
17 Q So that all the requirements of Section 19-65 are  
18 applicable to the District Council's consideration of a  
19 development plan amendment?  
20 MR. HARRIS: Objection.  
21 MS. ROBESON: Basis?  
22 MR. HARRIS: It's calling for a legal conclusion.  
23 MR. CHEN: Well, he's been testifying all morning  
24 about what the ordinance --  
25 MS. ROBESON: Just a second.

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

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

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

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

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1 at time of site plan submittal. That's the normal process  
2 in Montgomery County.  
3 Q When you say the approved preliminary water  
4 quality plan --  
5 A Uh-huh.  
6 Q -- when was that approved?  
7 A Originally, initially it was approved in 2003 and  
8 then again in 2004.  
9 Q Is there any document that is an approved  
10 preliminary water quality plan that reflects the development  
11 proposed by this DPA?  
12 A Yes. The original preliminary water quality plan  
13 showed this area, showed development very similar to what's  
14 on DPA.  
15 Q It's very similar. I'm asking specifically, does  
16 -- is there any approved preliminary water quality plan that  
17 approves, has been approved, excuse me, that reflects the  
18 development that is the subject of this DPA?  
19 A You're asking basically two, two questions there.  
20 One is, in my opinion --  
21 Q Excuse me, sir. I'm not asking for your opinion.  
22 I'm asking for, is there a document, has there been an  
23 approved preliminary water quality plan for development as  
24 reflected in the pending DPA?  
25 MR. HARRIS: Objection.

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1 MS. ROBESON: Basis?  
2 MR. HARRIS: I know of no requirement that says  
3 the preliminary water quality plan has to reflect the  
4 development.  
5 MS. ROBESON: Well, that's a legal argument. I'm  
6 going to let him answer.  
7 THE WITNESS: The exact layout of the DPA is not  
8 the same as the approved preliminary water quality plan.  
9 BY MR. CHEN:  
10 Q Similarly, is there an approved final water  
11 quality plan for the development that is proposed by the  
12 pending DPA?  
13 A Ask that question again.  
14 Q Yes. Similarly, is there an approved final water  
15 quality plan for the development proposed by the pending  
16 DPA?  
17 A Yes.  
18 Q What is that?  
19 A For a partial area. As I mentioned earlier, 81  
20 percent of the MXPDP area, which is the, you know, which is  
21 the DPA in front of you, has final water quality plan  
22 approval.  
23 Q With the form of development proposed by this DPA?  
24 A When you say form --  
25 Q Yes.

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1 A -- what do you mean by form?  
2 Q I mean the project that is being proposed by this  
3 DPA.  
4 A I would say yes, because you still have buildings,  
5 parking, roadways, open space, so yes.  
6 Q Are they the same -- excuse me. What is the date  
7 of the approved final water quality plan?  
8 A We basically have, there are several final water  
9 quality plans, being -- the latest is in, actually in 2013.  
10 Q Which one is that? What's the date of that?  
11 A I have to get the exact date. It most likely was  
12 April or May of 2013.  
13 Q Do you have that in front of you?  
14 A I do not.  
15 MS. ROBESON: Is that listed in --  
16 BY MR. CHEN:  
17 Q Yes. What exhibit?  
18 MS. ROBESON: -- Mr. Carter's letter? Is that one  
19 of the ones listed on page 3 of Mr. Carter's letter, which I  
20 will see if his, is Exhibit 122?  
21 MR. CHEN: Is the letter itself 122, or is it the  
22 whole e-mail?  
23 MS. ROBESON: The letter isn't -- it's not  
24 separately identified. Do you want it -- we can make it  
25 122B.

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

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

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1 Q Okay. So that, as I understand your testimony,  
2 sir, the April 4, 2013, approval was for the Winchester III  
3 Site Plan Amendment?  
4 A And final water quality plan.  
5 Q Yes, sir. Yes, sir.  
6 A Yes.  
7 Q Okay. And it describes the use approved. Is that  
8 right, sir?  
9 A Yes, it does.  
10 Q Does it describe the use that's being proposed by  
11 this DPA? Do you know, let me, do you know what this DPA --  
12 A Within --  
13 Q Hold on. I'll withdraw the question. Sir, do you  
14 know what is the use approved by the pending DPA?  
15 MR. HARRIS: Is there a use approved by the DPA?  
16 MR. CHEN: Yes.  
17 BY MR. CHEN:  
18 Q Do you --  
19 A Commercial.  
20 MR. HARRIS: I don't think the DPA --  
21 MS. ROBESON: No. Sought to be approved, do you  
22 mean?  
23 MR. HARRIS: Yes.  
24 MR. CHEN: I apologize, sought to be approved.  
25 BY MR. CHEN:

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1 Q Sir, what is it?  
2 A My understanding, it's commercial. I mean, it's  
3 MX, it's MXP. So it has residential components, has retail  
4 components; it has commercial components.  
5 Q I'm just talking about the pending development  
6 plan amendment that proposes and requests authority for  
7 certain uses. Are you aware of that?  
8 A Yes.  
9 Q Okay. What are the uses that are being proposed?  
10 A Well, there's a change from hospital use to  
11 commercial retail use.  
12 Q Do you know what kind of commercial retail use?  
13 A Well, it shows on there office buildings and a  
14 retail outlet and community retail.  
15 Q Okay. Going back to that page 3 and the  
16 Winchester III, are any of those uses that you've just  
17 described a subject of that approval? Do you know?  
18 A I'm reading here. My understanding, the area of  
19 those approvals has final water quality plan approval.  
20 Q Do you know if they include the use that's being  
21 proposed by this DPA?  
22 A It includes the area and use of this DPA, yes, a  
23 portion of this DPA.  
24 Q What portion?  
25 A In using Exhibit 109, the only areas, sorry, the

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

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

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1 THE WITNESS: Uh-huh.  
2 MS. ROBESON: -- but why don't you describe on  
3 Exhibit 59, the development plan --  
4 THE WITNESS: Okay.  
5 MS. ROBESON: -- which portions do not have final  
6 water quality approval.  
7 THE WITNESS: Okay. Portions that do not have  
8 final water quality plan approval, excuse me, on Exhibit 59  
9 is most of A, and you can see here, it says Cabin Branch  
10 Avenue on Exhibit 59, everything to the east would not have  
11 final water --  
12 MS. ROBESON: East of what?  
13 THE WITNESS: East of Cabin Branch Avenue.  
14 MS. ROBESON: Okay.  
15 MR. CHEN: May I approach?  
16 MS. ROBESON: Yes.  
17 MR. CHEN: Okay.  
18 BY MR. CHEN:  
19 Q Sir, what are the water quality protection  
20 facilities that are proposed for the uses that are proposed  
21 by this DPA?  
22 A It depends on where in the DPA you're talking  
23 about. As I said, some of the areas --  
24 Q How about A --  
25 A Okay.

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

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

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1 quality plan approval?  
2 A Yes.  
3 MR. CHEN: Objection. Duly noted.  
4 MS. ROBESON: Noted.  
5 BY MR. HARRIS:  
6 Q And does that require an amendment to the  
7 preliminary water quality plan, or does it simply require an  
8 approval of a final water quality plan?  
9 A It does not require an amendment to the  
10 preliminary water quality plan but will be decided at the  
11 final water quality plan stage.  
12 Q And are the impervious calculations for  
13 development recomputed at final water quality plan approval  
14 to confirm compliance with the regulations?  
15 A Yes.  
16 Q And will that be done here?  
17 A Absolutely.  
18 Q And are the specific location and design of water  
19 quality features set at preliminary water quality plan or at  
20 the time of final water quality plan?  
21 A At the time of final water quality plan.  
22 Q And can the specific design and location of those  
23 features differ from what may have been shown in a  
24 preliminary water quality plan?  
25 A Yes.

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

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1 rephrase it or ask again.  
2 BY MR. HARRIS:  
3 Q Did Mr. Kline ask you a question about the intent  
4 of Section 19-65, calling for coordinated review of water  
5 quality features and development features?  
6 MR. CHEN: Objection. He's now going to the  
7 intent of the legislation.  
8 MR. HARRIS: I just asked --  
9 MS. ROBESON: What are you asking --  
10 MR. HARRIS: I'm --  
11 MS. ROBESON: -- because, actually, I think we  
12 never got to -- he never testified on that because you  
13 objected to him asking about the intent. So is this  
14 critical, because I --  
15 BY MR. HARRIS:  
16 Q Mr. Bossong, is there a site plan approved for a  
17 hospital on this property?  
18 A Yes, there is.  
19 Q A site plan?  
20 A Oh, no, I'm sorry. No, there is not, not a site  
21 plan.  
22 Q If the project were to go forward with a site plan  
23 -- with a hospital, would that then require a site plan  
24 approval?  
25 A Yes, it would.

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

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1 MS. ROBESON: Okay. We are back on the record.  
2 At the lunch break I found an e-mail from Ehsan Motazedi  
3 from DPS, responding to the request for information on the  
4 binding element. So I'm going to mark that as Exhibit 125.  
5 Mr. Chen, I did go back and double-check what was  
6 and what wasn't in the record as far as those e-mails, and  
7 there is -- Ms. Tesfaye's e-mail on the binding elements is  
8 not in the exhibit list. It's in the record; it's just not  
9 in the exhibit list. So that -- I think you all have  
10 already received a copy because I saw all of you cc'd -- so  
11 that will be 126. All right. So this e-mail from  
12 Ms. Motazedi will be 125, e-mail from Motazedi on binding  
13 element, and then 126 will be Ms. Tesfaye's on binding  
14 element.  
15 (Exhibit Nos. 125 and 126 were  
16 marked for identification.)  
17 MR. ROBINS: Right.  
18 MS. ROBESON: Okay. All right. Now, we don't  
19 usually include, when it's from Ms. Behanna-Moseley's  
20 scheduling, you know, coming up with a date, we don't  
21 usually include those in the record. So I'm not including  
22 those right now. All right. With that, Mr. Harris.  
23 MR. HARRIS: Yes. We're recalling Mr. Len Bogorad  
24 as an expert.  
25 MS. ROBESON: Okay. Mr. Bogorad, you're still

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1 under oath.  
2 MR. BOGORAD: Yes.  
3 (Witness previously sworn.)  
4 REBUTTAL DIRECT EXAMINATION  
5 BY MR. HARRIS:  
6 Q Okay. Mr. Bogorad, with respect to testimony  
7 about demand for office development that I think  
8 Mr. Ferguson and maybe Mr. Noonan both spoke of, can you  
9 clarify what your testimony was?  
10 A Yes. They seemed to say that I was not predicting  
11 a demand for office for many years. And what I did testify  
12 to is that there is demand for office and will be more  
13 over time in the I-270 corridor but that the office market  
14 is challenged for various reasons and there's a lot of  
15 competition for the demand that will be there, and I  
16 testified that the specialty retail proposed in the DPA  
17 would help Cabin Branch be more competitive for that office  
18 demand.  
19 Q And with respect to your testimony about the  
20 impact of outlet retail and questions as to how tested that  
21 phenomenon was, can you amplify your testimony on that point  
22 as well?  
23 A Yes. I actually went back to the transcripts  
24 because I was a little confused about some of what was said  
25 about what I said. So on page 53 of my direct testimony on

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1 August 12th --  
2 MS. ROBESON: Which date? Oh, August 12th?  
3 THE WITNESS: August 12th, yeah. I said that  
4 it's, quote, it's a somewhat untested proposition that  
5 outlet retail would be the kind of catalyst that you would  
6 see demonstrated in places like Reston Town Center and  
7 Bethesda Row, closed quote. This is because the vast  
8 majority, as I think I said at the time, the vast majority  
9 of outlet retail centers have been built in more outlying  
10 areas that don't have any potential for office development,  
11 as distinct from Cabin Branch, which is in a major  
12 metropolitan area, on a prominent interstate highway that's  
13 had a long history of office development. So there really  
14 have been very few opportunities to test the impact of  
15 outlet centers on attracting office development.  
16 BY MR. HARRIS:  
17 Q Did you identify in your testimony examples of  
18 outlet retail that do have positive impact, and if so, what  
19 are your conclusions about those?  
20 A Yes --  
21 MR. CHEN: Objection, asked and answered. That's  
22 what he testified about.  
23 MS. ROBESON: Wait. Just a second. Your -- I  
24 apologize. I was looking for something, and I missed your  
25 question.

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1 MR. HARRIS: Okay, and I forgot how I asked it.  
2 BY MR. HARRIS:  
3 Q You were asked about outlet retail --  
4 A Yeah. I mean, so far I've only talked about my  
5 direct testimony, but --  
6 Q Yes, and then I believe that Mr. Noonan questioned  
7 the impact -- your testimony about the impact of outlet  
8 retail on office development, and I wanted to see if you  
9 could clarify that.  
10 A Yes. I think, just to explain what I think is the  
11 situation, they were, they were pulling -- they were asking,  
12 asking about or raising the question maybe with one of the  
13 other witnesses that asserted that I had said that it was  
14 totally untested whether outlet retail would have any effect  
15 on office or not. And I did go back to the testimony, and  
16 the fact was, in my direct testimony, I said that I thought  
17 it was untested, that the ones I could think of at that time  
18 were in areas that didn't have any demand for office, but  
19 because the questions came up even in the midst of my direct  
20 testimony and it was two days before my --  
21 MS. ROBESON: Right.  
22 THE WITNESS: -- cross-examination, I was able to  
23 actually consult with some of my compatriots in other parts  
24 of the country, and as you may or may not recall --  
25 MS. ROBESON: I do.

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

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

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

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

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

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

22 BY MR. HARRIS:

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

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

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1 their justification.

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

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

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

12 A I did.

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

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

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

20 MS. ROBESON: Okay.

21 MR. HARRIS: Not that important.

22 BY MR. HARRIS:

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

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

4 Q And could you tell us what you concluded?

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

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

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

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

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

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

16 So --

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

19 THE WITNESS: I am, yes.

20 MS. ROBESON: Okay.

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

22 MS. ROBESON: Within the --

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

25 MS. ROBESON: Okay.

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

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

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

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

17 BY MR. HARRIS:

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

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

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1 1994 actually found that there was demand for only 75,000  
2 square feet of neighborhood center retail based on build-out  
3 population and employment west of I-270. The plan went  
4 ahead to recommend 120,000 square feet, and these are both  
5 including supermarkets and other things that would be in a  
6 neighborhood center. So for whatever reason, the plan went  
7 somewhat farther, but in any case, the ultimate plan, of  
8 course, was for three full-size supermarkets in associated  
9 neighborhood centers -- one in the town center, one in Cabin  
10 Branch, one in Clarksburg Village -- but I think it's  
11 critical to recognize from a market analysis perspective  
12 that the 1994 analysis was prepared before the Washington  
13 area had anything like a Wegmans, which captures a  
14 substantial share of grocery spending in areas where it's  
15 located and is famous for drawing in shoppers from farther  
16 away than a normal supermarket would. This is, Clarksburg  
17 is clearly part of their, you know, market area and beyond,  
18 but this is, this distance, clearly they're going to get a  
19 lot of shoppers from Clarksburg, and so this is something  
20 that wasn't known at the time. So it's nothing that they  
21 did wrong, but things have changed.

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

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

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

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

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

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

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

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

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

10 MR. KLINE: Objection.

11 MR. CHEN: Objection.

12 MS. ROBESON: Basis?

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

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

18 MR. HARRIS: Maybe I can rephrase the question.

19 MS. ROBESON: That's fine.

20 BY MR. HARRIS:

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

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

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1 for a master plan community.

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

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

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

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

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

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

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

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

24 MS. ROBESON: And that map is?

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

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1 at the entire potential demand at build-out from all of this  
2 area that was west of I-270. So, if I'm reading this  
3 correctly, that would include the Cabin Branch neighborhood,  
4 Ten Mile Creek area as well. And so they took all of the  
5 build-out here, much of which, about half of which was not  
6 part of Cabin Branch neighborhood, and said, okay, based on  
7 all of this -- which was a reasonable thing to do; there  
8 were not going to be any competitive supermarkets or  
9 whatever, neighborhood centers serving that area as directly  
10 -- so they were doing the right thing, but I heard some  
11 expert saying that this was based just on demand from Cabin  
12 Branch and that's just not the, not the way they did it.  
13 They shouldn't have done it that way, and they didn't do it  
14 that way.  
15 I think it's also, just one other note from a  
16 market analysis perspective is that, you know, as much as  
17 with planners -- and I do have a planning degree and I like  
18 walkability -- but the reality is most shopping trips in  
19 suburban areas to supermarkets are done by car. There is  
20 more walking to restaurants and banks and other things of  
21 that sort, and certainly that walkability will be quite  
22 possible to the outlet center, but this is -- you know, it's  
23 one thing to think of this as, you know, it is a  
24 neighborhood-serving center, but it's not just serving this  
25 neighborhood.

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1 BY MR. HARRIS:  
2 Q I believe it might have been Mr. Noonan who talked  
3 about the impact of specialty retail at Cabin Branch on, I  
4 think what he might have been assuming would be specialty  
5 retail in the town center. Do you, do you remember his  
6 testimony, and if so, what observations do you have about  
7 that?  
8 MR. CHEN: Objection. This is saying what did you  
9 agree or disagree with this witness. If there's a specific  
10 point that a witness has said, a specific opinion that a  
11 witness has, an expert has expressed and this expert  
12 disagrees, I have no objection to that, but the way this  
13 question is posed, I don't think it's relevant.  
14 MS. ROBESON: Why don't you just ask him whether  
15 he agrees with Mr. Noonan's testimony regarding the impact  
16 on retail in the town center.  
17 MR. HARRIS: That is fine.  
18 BY MR. HARRIS:  
19 Q Can you answer the Hearing Examiner's question?  
20 A I do not, to the extent I remember exactly what he  
21 said, I do not, did not agree with him --  
22 Q Okay.  
23 A -- and do not agree with him.  
24 MS. ROBESON: And for what reason?  
25 THE WITNESS: Yeah, several things. I mean, one

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1 reason is, as I just discussed, there is a very significant  
2 benefit to the town center, removing this potential  
3 competitor at Cabin Branch, in terms of the supermarket  
4 demand, given that the, you know, the demand is relatively  
5 limited.  
6 I also believe the specialty retail at Cabin  
7 Branch will be helpful to the town center by making  
8 Clarksburg more of a retail destination with a variety of  
9 retail in the whole Clarksburg area, and it will bring jobs  
10 to Clarksburg that will create demand for retail and  
11 residential demand that will also help the town center. And  
12 I also believe the additional retail that will be built at  
13 Cabin Branch under this proposal will not significantly  
14 compete with the retail that's likely to be attracted to the  
15 town center.  
16 MS. ROBESON: Now, when you say town center, are  
17 you referring to the, I forget the roads --  
18 THE WITNESS: Yeah.  
19 MS. ROBESON: -- I think it was Stringtown -- what  
20 do you mean by town center?  
21 THE WITNESS: Yeah, that's an, that's an important  
22 question. It's very --  
23 MS. ROBESON: Are you referring to the town center  
24 district, or are you referring to a smaller portion of the  
25 town center?

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1 THE WITNESS: I think -- you know, there's been a  
2 lot of confusion about this, and you know, you may want to  
3 ask Mr. Unterberg for more master plan elaboration, but my  
4 reading of it is --  
5 MS. ROBESON: Okay, but which town center are you  
6 talking about?  
7 THE WITNESS: Yeah. Yeah. Let me, in fact, yeah,  
8 let me, let me try to elaborate on that, ma'am. The way I  
9 read the master plan -- and I read master plans a lot in the  
10 context of my market analysis, but I don't claim to be an  
11 expert on market plans, market, on master plans -- but as I  
12 read the master plan, the, and I actually pulled out some  
13 quotes here, it says the -- what I see in the master plan is  
14 the following: I see that they're calling for a total of --  
15 this is on page 46. It clearly states to me that commercial  
16 uses proposed for the town center total 300,000 square feet,  
17 so, and I believe at that point they're talking about the  
18 entire town center district, although I -- and they were a  
19 little ambiguous, but I think that's, that's the way I parse  
20 it in looking at the different parts. And it's very clear  
21 to me in reading that that that 300,000 square feet includes  
22 office and retail. So that's the other confusion, is that  
23 we're going back and forth between retail and office, and  
24 retail is commercial. And it then recommends a maximum  
25 square footage of 150,000 square feet for the neighborhood

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1 center. So I think that is clearly that smaller town  
2 center --  
3 MS. ROBESON: Triangle.  
4 THE WITNESS: -- as opposed to the town center  
5 district --  
6 MS. ROBESON: All right.  
7 THE WITNESS: -- and that's a, I read that as a  
8 subset of the total of 300,000 square feet of retail and  
9 office that they're talking about for the entire district --  
10 MS. ROBESON: Okay. So are --  
11 THE WITNESS: -- because there wouldn't be much  
12 office in the town center. So --  
13 MS. ROBESON: So is your testimony, comparing the  
14 impact on retail in the town center, are you comparing it  
15 with the neighborhood center or are you comparing it with  
16 the whole district?  
17 THE WITNESS: Both. Let me --  
18 MS. ROBESON: Okay. So --  
19 THE WITNESS: -- that's exactly where, yeah, where  
20 I was going; so I appreciate that. So then I go to the next  
21 page of the master plan, page 47, and it says, with respect  
22 to the town center district -- as I read it, the larger area  
23 -- that, quote, the balance of proposed retail and office  
24 uses, parenthesis, 70,000 to 105,000 square feet, is  
25 proposed to be located throughout the town center district

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1 and consists of infill retail within the historic district  
2 in accord with historic preservation guidelines, closed  
3 quote.  
4 So, as I'm reading the numbers, it's a little hard  
5 to get them all to add up, but I think we're talking about  
6 150,000 office and retail, I'm sorry, 300,000 office and  
7 retail in the town center, the neighborhood center -- you  
8 know, we'll call it town center and town center district --  
9 MS. ROBESON: Okay.  
10 THE WITNESS: -- that might be clearer. Okay. So  
11 we're talking about, and perhaps I could just use the -- so  
12 it's 150,000 in the neighborhood center. That is a subset  
13 of a total of 300,000 square feet of -- and that's 150,000  
14 of retail, as I read it -- 300,000 square feet total in the  
15 town center district of office and retail. So 150,000 of  
16 that is the retail within the town center, the neighborhood  
17 center, we'll call it. That would leave about 150,000 by  
18 math, but then they proceed to say that everything that's  
19 left is 70 to 105,000.  
20 So I think there is some inconsistency there, but  
21 in general terms, we're talking about certainly less than  
22 150,000 of office and retail that they're talking about  
23 within the town center district and that that additional  
24 retail at least, a portion of that consists of infill retail  
25 within the historic district.

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1 All right. Sorry for all of that. You know, I do  
2 find it confusing, but I think that -- I think the  
3 implication, stepping back, with respect to retail, which is  
4 really the topic here, and exact numbers, I don't think one  
5 can really parse exactly, but I think the basic concept is  
6 there would be a neighborhood center anchored by a  
7 supermarket, the supermarket would be critical to getting  
8 that neighborhood center, it would total about 150,000  
9 square feet including an anchor supermarket; then there  
10 would be some additional retail, but that is going to be  
11 infill retail within the historic district. They do not  
12 contemplate any sort of larger center or whatever. They do  
13 not mention at all, despite the testimony that I heard from  
14 Mr. Noonan, they do not mention specialty retail or  
15 comparison retail in the town center district, to my, unless  
16 I'm missing it somehow, but I certainly didn't see anything  
17 that mentions that.  
18 So then the question is, okay, what is this other  
19 retail and does that -- well, let me step back a moment. So  
20 I think I've talked a lot, and I won't elaborate anymore,  
21 unless you want me to, on how the neighborhood center, this  
22 150,000, is not, in my view, going to be at all directly  
23 competitive with the retail proposed if you don't have the  
24 supermarket.  
25 Okay. So now we have the other retail.

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1 Presumably what --  
2 MS. ROBESON: Exactly.  
3 THE WITNESS: -- Mr. Noonan was talking about was  
4 going to be this maybe specialty retail, even though the  
5 plan doesn't say that. All right. So now from a market  
6 analysis perspective, I then looked at what is the  
7 likelihood that this additional retail, this infill retail  
8 would be specialty retail that would be competing with the  
9 outlet center, because that then becomes a question of would  
10 the outlet center have impact on that portion of the town  
11 center district, which is also important, presumably, to the  
12 plan, and in my view, there's several issues with that.  
13 I do not -- first of all, the types of chain  
14 retailers that would be going into the outlet center would  
15 never consider an infill kind of situation in a small  
16 concentration of retail in an historic district. They need,  
17 they -- it's critical to them that they be part of a larger  
18 concentration that can draw people from, you know, many  
19 miles, that can draw people off of the interstate highway,  
20 and so on. So you would not, you would not have the same  
21 stores. That's, there's no question in my mind about that.  
22 Beyond that, this is, even, even for other types  
23 of stores, this is just not the type of area, this little --  
24 small amount of retail in the town center historic district  
25 would not have the same potential store sizes or visibility

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1 or regional access or critical mass of square footage to be  
2 an effective comparison shopping concentration. I think  
3 it's going to be some smaller neighborhood-related stores  
4 and it would be fantastic for interesting restaurants, and  
5 so on, that would not be directly competing with the most,  
6 probably entirely chain restaurants that you'd have at the  
7 outlet center.  
8 So sorry for the long-winded answer, but I think,  
9 I think it's, you know, as I read the master plan, the  
10 outlet center would not be competing with the town center  
11 center itself and it would not be competing with the retail  
12 that they contemplate elsewhere in the town center district.  
13 BY MR. HARRIS:  
14 Q What about the question of restaurants? You --  
15 A Yeah.  
16 Q -- briefly mentioned that. Can you expand on --  
17 A Yeah.  
18 Q -- how the two areas would function together?  
19 A Yeah. So just to elaborate slightly, I want to  
20 just add that they --  
21 MS. ROBESON: Well --  
22 THE WITNESS: -- both areas would have  
23 restaurants.  
24 MS. ROBESON: Okay. Before you start, you don't  
25 need to repeat your testimony as to the neighborhood

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1 center --  
2 THE WITNESS: Right.  
3 MS. ROBESON: -- but if you want to address the  
4 other portions of it.  
5 THE WITNESS: Okay. That's fair enough, although  
6 I, you know, I did hear people say, well, maybe the  
7 supermarket would be competing but there would be  
8 restaurants competing in the town, in the neighborhood  
9 center also. And I do think, I think the same thing applies  
10 to that as well as the additional retail elsewhere in this,  
11 in this historic district, that these are going to be very,  
12 very limited, if any, chain restaurants. There might be a  
13 Chick-fil-A or a Subway possibly, something like that, but  
14 basically they will be a concentration of much more  
15 interesting restaurants but restaurants that would not be  
16 drawn to or likely to be accepted into an outlet center,  
17 quite honestly. They're, for a lot of reasons, I can  
18 elaborate on it if you want, but they're going to be  
19 different types of restaurants. There's definitely part of  
20 the demand for restaurants that wants chain restaurants and  
21 they could be the same people, but on a given restaurant  
22 trip, there's some demand that goes to chain restaurants,  
23 some of the fast-food, some of them sit-down, and some  
24 demand that goes to more interesting, usually independently  
25 owned or maybe part of a small chain. Many, many of them

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1 have international flavor, ethnic aspects to them and so on,  
2 and there's no question in my mind that both of those can  
3 survive together and can complement each other.  
4 BY MR. HARRIS:  
5 Q Let's turn to the question that, I think  
6 Mr. Noonan was the one who spoke most about it, in terms of  
7 the extent to which this development at Cabin Branch would  
8 somehow take away from the focus, whatever it may be, of the  
9 town center area. Did you hear that testimony? Can you --  
10 A Yes, I did.  
11 Q -- offer your observations on that?  
12 A Yes, I heard it. I have two comments. First of  
13 all, if the town center is not successfully developed, it's  
14 -- and a full-size supermarket, as I said, is an essential  
15 anchor to get that developed -- the town center will never  
16 become a focal point of Clarksburg, as --  
17 MS. ROBESON: Wait. Are you referring to the  
18 district or the smaller town center or both?  
19 THE WITNESS: Well, I think it applies to both. I  
20 think the -- you know, as I said, I don't, I don't think  
21 what happens in the historic district is going to be all  
22 that affected, one way or -- well, I don't think, yeah, I  
23 don't think either is going to be affected one way or the  
24 other, but the way I read the master plan, it's -- and I've  
25 been doing work in Clarksburg for many years -- it's always

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1 been this, what we've been calling neighborhood center,  
2 that's been what the residents want, what's going to be the  
3 heart of Clarksburg and was intended to be from the  
4 beginning. Yes, there was commentary about historic  
5 district, and so on, and that's important, but that -- the  
6 real focal point that I think everyone is talking about, and  
7 certainly they have been over the decades, has been this  
8 supermarket-anchored town center, whatever you want to, you  
9 know, as opposed to the whole district, although I suspect  
10 the same issues, you know, probably apply to the whole town  
11 center district. But basically, if you don't, if the town  
12 center with its supermarket, which the comprehensive plan I  
13 think correctly said was essential for having the town  
14 center go ahead, it can't possibly or logically be a focal  
15 point if it doesn't get developed, and if it continues to  
16 sit there because they don't have a supermarket for another  
17 X number of years or forever, it will never be the focal  
18 point. So it's critical, in my view, as I said, that we  
19 don't have this competitive supermarket that's hanging over  
20 the head of trying to get that supermarket there.  
21 And secondly, I see many, numerous examples,  
22 repeatedly, of retail concentrations that each have  
23 liveliness in attracting people and are, you know, good  
24 places that are relatively close to each other and they  
25 don't kill the other one. You know, a few examples include

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1 Potomac Yard and Old Town Alexandria down in Alexandria,  
2 Washingtonian Center up on 270 and Falls Grove and King Farm  
3 and now Crown Farm, all working together without killing  
4 each other by any stretch of the imagination, Downtown  
5 Rehoboth and three outlet centers out on Route 1, Bethesda  
6 Triangle and Bethesda Row, Leesburg Premium Outlets in  
7 downtown Leesburg. I mean, there's just lots of examples.  
8 There's no reason why we have to say one of these can't be a  
9 lively, exciting place and that that's going to kill the  
10 other one.  
11 BY MR. HARRIS:  
12 Q With respect to the employment issue, the, I think  
13 it was Mr. Ferguson may have testified that it was his  
14 opinion that retail did not constitute employment because of  
15 the number of employees that it has. Do you offer, do you  
16 have any thoughts about his testimony in that regard?  
17 A Yeah. I disagree with that. He's -- and I think  
18 he said hotel was an employment use and retail wasn't.  
19 Typically retail has a similar number of employees per  
20 square foot to hotel, more square, more employees per square  
21 foot than light industrial and somewhat fewer per square  
22 foot than office. We calculated that this outlet center  
23 will have 1659 total permanent employees on the site, a very  
24 substantial concentration of employees. So I don't see that  
25 as an argument for why this would be not employment and

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1 hotel or office would be employment.  
2 Q Is there any place that you've seen in the '94  
3 master plan or the appendix to it that quantifies the future  
4 demand for comparison retail in Clarksburg?  
5 A No. The technical appendix dated June 1994 on  
6 page 12 states that the staff evaluated future retail space  
7 needs for both neighborhood or convenience retail, on one  
8 hand, and comparison retail on the other hand, but for some  
9 reason it only provides results for neighborhood retail  
10 centers and that's where we've been talking about 75,000  
11 west of I-270 and 130,000 square feet in the town center.  
12 Q Final question then. You were here for most of  
13 the testimony, I think. Did you hear anything from any  
14 other witness that in any other way would cause you to  
15 change your opinion that you offered in your initial  
16 testimony?  
17 MR. CHEN: Objection. I don't -- that's not a  
18 proper question. Again, if there's a specific witness who  
19 gave an opinion that this expert wishes to contradict,  
20 that's fine, but to say did you hear anything else that you  
21 disagree with, I just don't think that's a proper question.  
22 MS. ROBESON: I'll let him answer. I think it's  
23 valid for the weight it deserves.  
24 THE WITNESS: I believe I have heard all of the  
25 testimony, actually, but no, I did not find anything that

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1 changed my opinion.  
2 MR. HARRIS: No further questions.  
3 MS. ROBESON: Okay. Mr. Kline, the finger was  
4 pointed at you.  
5 MR. KLINE: That's why you don't want to have your  
6 back to Mr. Chen.  
7 REBUTTAL CROSS-EXAMINATION  
8 BY MR. KLINE:  
9 Q Kind of doing this chronologically, Mr. Bogorad,  
10 was the name of the, I guess the retail facility in Houston,  
11 was it called Cy-Fair?  
12 A The one I just quoted about?  
13 Q Yes, exactly.  
14 A It's -- let me see. Houston Premium Outlets is  
15 what it's called.  
16 Q Okay. Well, you read something and you, I think  
17 you were quoting from somebody, Ms. Evans, and you said a  
18 lure for new business. And what I wanted to know is, did  
19 she use the term office, because that's really what the  
20 point was you're trying to make, it's a lure for office.  
21 Did she just say new business, or does it say office?  
22 A The quote says, new businesses to the area if I'm  
23 talking to company about moving here --  
24 Q Thank you.  
25 A -- so as I understand, company moving here, most

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1 likely that would be office. I'm quite sure she wasn't  
2 talking about just other retailers but, you know, could be  
3 wrong.  
4 Q The discussions we had about The Loudoun  
5 Newsletter and the Crosstrail, if I remember correctly, your  
6 testimony was that the premise that fashion retail would  
7 stimulate office development was a totally untested, I can't  
8 remember quite what the phrase was, but untested.  
9 A Well, as I elaborated in my direct testimony, I  
10 said that by the time I had my, you know, rebuttal, my  
11 cross-examination, I had concluded --  
12 Q Yes, you came up, you came up with examples,  
13 right, sure.  
14 A -- that there were some tested then.  
15 Q Right. Okay. Well, you've given us an education  
16 in other -- you have given us an education of the spectrum  
17 of retail centers that are available. Is Crosstrail a  
18 fashion retail outlet center?  
19 A It's not an outlet center. The current proposal  
20 is for a so-called power center, a big-box center with --  
21 which, you know, even though I believe that that, as I said  
22 in that report and as was quoted here, even though I believe  
23 that that will be definitely beneficial in competing for  
24 office, I believe that an outlet center with more of a good  
25 feel to it, in terms of walking around and smaller stores

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

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1 Q The applicant is not proposing a power center. Do  
2 you recall the -- and I'm working, unfortunately, off an  
3 interim reference edition; I think I've got the changes  
4 correct, or I'm sorry, the pages correct out of the master  
5 plan -- but do you recall that in the Cabin Branch section  
6 of the 1994 master plan, there was a specific reference for  
7 a grocery store within the Cabin Branch section? Correct?  
8 A That's my recollection and that's consistent with  
9 what I've been saying, yes.  
10 Q Okay. Yes, sure. Okay.  
11 A I can't say I could find the quote, but I, that's  
12 what I've --  
13 Q Understood. On my page 46 and based on you  
14 talking about page 46, I think we're talking about the same  
15 thing. It talks about a grocery store is particularly  
16 important since this type of use can serve as a magnet for  
17 other commercial operations, paren., dry cleaners and banks,  
18 for example. Now, that's --  
19 MR. HARRIS: Wait a minute. Wait a minute. Wait  
20 a minute.  
21 MR. KLINE: Okay, sorry, 46. I'm looking at my  
22 46.  
23 MS. ROBESON: Which page are you on?  
24 MR. HARRIS: Page 46, regarding the town center  
25 area?

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1 MR. KLINE: Yes, exactly. That's what I was going  
2 to say.  
3 THE WITNESS: Oh, the town center we're on now?  
4 MR. HARRIS: Yes, right.  
5 THE WITNESS: I'm sorry. I thought you were  
6 talking about Cabin Branch.  
7 BY MR. KLINE:  
8 Q No, I understand. I understand. All right. Now,  
9 albeit that is a quotation related to the town center --  
10 A And could you refer to me where you are now?  
11 MS. ROBESON: Which page?  
12 THE WITNESS: Oh, I see, yes. It's the same  
13 quotation I just read, right?  
14 MS. ROBESON: Wait. Which page?  
15 MR. KLINE: Okay. I believe, 46.  
16 MR. HARRIS: Yes, it is.  
17 THE WITNESS: Yeah.  
18 MR. KLINE: It is 46, yes, and it's the second  
19 paragraph, or it's, okay, it's --  
20 THE WITNESS: It's the fifth paragraph.  
21 MR. KLINE: Fifth paragraph down.  
22 MS. ROBESON: All right.  
23 BY MR. KLINE:  
24 Q Okay. It's the second sentence in the fifth  
25 paragraph down. Does that sound right?

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

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1 A I'm not a master plan expert. It seems to me that  
2 if master plans are intended to be lasting -- which, you  
3 know, in my view, they are -- that things have to be  
4 adapted, to some extent, as things change, but that doesn't  
5 mean they have to be modified. I think it's consistent with  
6 the spirit of the entire master plan to be talking about  
7 what's being proposed, but again, I'm not a master plan  
8 expert.  
9 Q You gave us a lot of information about your  
10 reading of the town center and the competition this year.  
11 What's your understanding of the total amount of office and  
12 retail square footage that is permitted in the town center?  
13 A Town center district?  
14 Q Yes.  
15 A As I, you know, as I said, it's a little  
16 ambiguous, but I read it, in terms of commercial -- so this  
17 is the fourth paragraph on page 46 -- in terms of commercial  
18 uses, up to 300,000 square feet are proposed. This --  
19 Q And you --  
20 A -- recommendation exceeds the finding of the  
21 Planning Board retail studies that up to 153,000 can be  
22 supported. Additional square footage would be desirable and  
23 would be consistent with the plan. And whether, you know, I  
24 mean, quite honestly, the amount of office that they're  
25 proposing is, you know, somewhat irrelevant --

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1 Q Right.  
2 A -- to what I've been commenting on. You could,  
3 you know, I suppose one could argue that does include office  
4 or doesn't. I think it's ambiguous.  
5 Q Well, did you think that the term, the highlighted  
6 or bold term, commercial uses, did include both retail and  
7 office?  
8 A That's, that would be my reading of it, but  
9 again --  
10 Q Okay. All right. So if I did, if I did your math  
11 right or correctly, you allocated -- I'll rephrase that --  
12 the master plan allocates 150,000 of that to a neighborhood  
13 retail center and --  
14 A I think that's quite clear, yes.  
15 Q -- and the remainder, whether that's either 150 or  
16 70 to 105, depending on how you do the numbers, would be  
17 allocated to the infill retail?  
18 A That's my reading, and of course, where they say  
19 70 to 105, they say this is retail and office. So there  
20 they are being explicit, even though when they said 300,000,  
21 they used commercial, which I interpret as retail and  
22 office, but --  
23 Q Okay. On my page 40 or whatever is Table 2,  
24 titled -- you have the same thing?  
25 A Uh-huh.

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1 Q All right. The Summary of Maximum End-State  
2 Development shows for the town center district how much  
3 square footage of employment and retail square footage?  
4 A Yeah, I saw that also. It's, I would, I would say  
5 we're into biblical interpretations. They were trying to  
6 somehow reconcile different chapters. You know, if they  
7 hadn't, if they hadn't said proposed retail and office in  
8 the town center district of 70 to 105, I would have thought,  
9 well, maybe they're just talking about retail there. That  
10 would -- then everything would actually hang together, and  
11 maybe that was where the error was. Maybe they're saying  
12 that there's about 300,000 square feet of retail, 150,000 of  
13 that is in the neighborhood center, the other 70 to 105,  
14 plus a few extras which they didn't count, is in the  
15 historic district. That would actually all hang together  
16 and would be consistent with the total of employment and  
17 retail so-called being 770 on page 40. So that's  
18 possible --  
19 Q Given that range of --  
20 A -- but none of those would change my opinion as to  
21 what I said --  
22 Q I understand, but given that range of numbers, you  
23 can understand why Mr. Noonan could have concluded that  
24 there was in fact more retail square footage there than you  
25 have estimated was available?

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1 A No, I really don't, because I think, I think the  
2 only possible, if you want to accept all these numbers, the  
3 only thing I could think, can come up with is that they were  
4 really talking about retail and they threw in an office,  
5 and so -- because this is, you know, it seems to me this is  
6 all, the only --  
7 MS. ROBESON: It threw in an office on page 46?  
8 THE WITNESS: On page 47 but not page 46.  
9 MS. ROBESON: 47, yes.  
10 THE WITNESS: Yes. So that they were really  
11 saying retail is 300,000 or maybe a little less and maybe a  
12 little of that was office but that they were mostly thinking  
13 about retail, and then they knew they needed some retail in  
14 the historic district because that's the logical use and, if  
15 they didn't allow for that, the historic district wouldn't  
16 be lively. They knew they needed a good-size neighborhood  
17 center with that critical supermarket. That was 150,000,  
18 and so that was the retail they were talking about. And  
19 then when you go over to the total over here, 770,000, so if  
20 that was 300,000 of retail, then you have 470,000 of other  
21 employment uses, that, you know, I mean, I'm getting way  
22 beyond what I should be trying to judge, but I guess the  
23 point I'm making is that that's -- I don't see any reading  
24 that would indicate that they're talking about more retail  
25 than that, certainly in the heart of this town center

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1 district.

2 BY MR. KLINE:

3 Q And that being 300,000 or --

4 A Than the 300,000, yeah.

5 Q Correct. Okay. Okay. Thank you. I had a series

6 of questions, but I guess it starts with a foundation

7 question, and the answer will be yes or no. Is

8 Washingtonian itself -- are you familiar with Washingtonian?

9 A Yes, in general terms.

10 Q Okay. Would you consider that to be a town center

11 development?

12 A It's debatable. I suppose, in some fashion or

13 other --

14 Q Okay. Are you --

15 A -- but it's also a power center with other

16 specialty -- it's an interesting hybrid, to say the least,

17 but --

18 Q Are you familiar with the tenant base at

19 Washingtonian?

20 A In very general terms. I couldn't quote the

21 numbers or even specific tenants, although I'm not sure --

22 Q Do you know if there are tenants in Washingtonian

23 Town Center that would also be on the list of tenants that

24 you mentioned in Leesburg Premium Outlet Center?

25 A I did look at it after the -- it's, unfortunately,

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1 been a few weeks. I think you mentioned a few that --

2 Q Yes.

3 A -- seem to be actually the only ones that I saw

4 that were; so if you want to repeat those. I believe you

5 were correct in asking about those two or three, but there

6 weren't very many.

7 Q Okay. Do you recall if I mentioned Joe Banks --

8 A Yes.

9 Q Black and White?

10 A Yes.

11 Q Loft?

12 A I believe loft, yes.

13 Q Okay, fine.

14 A But, you know, I didn't -- I did go back to the

15 list of Washingtonian, and I believe you had found all of

16 them.

17 Q Right. So it is conceivable then that in a town

18 center you could have some uses that also would like to be

19 in a retail outlet center?

20 A Well, that's why I said it's a hybrid. The

21 Washingtonian is anchored by big-box stores. They happen to

22 have two stories, but they are serving exactly the, you

23 know, the Target kind of thing and that if you had those

24 kinds of stores in a, quote, town center, unquote --

25 Q Yes.

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1 A -- and the reason I'm calling it a town center is

2 it does do a good job of having a walkable area and --

3 Q Right.

4 A -- smaller stores and so on -- but the reason why

5 those stores are there is it's right on 270 and, most

6 importantly, it has that base of large anchors that are

7 drawing in those kinds of customers.

8 Q There was a series of questions asked you about

9 the loss of focus from the town center. Do you see that the

10 focus of Clarksburg now will move to the west side of Cabin

11 Branch because of the dynamism of the retail outlet center

12 and the restaurant package and everything else that, amenity

13 package that goes with it?

14 A No, I don't.

15 Q Don't. And that's because?

16 A I believe that if the -- assuming, again, that the

17 town center actually has anything happening -- but if that,

18 if that is done with the necessary supermarket and with the

19 associated restaurants and other interesting retail that I

20 think they have the market potential to attract, if they

21 have that supermarket and other amenities, and so on, that

22 make it a gathering point, and the fact that it is sort of

23 embedded in the, in the overall community rather than sort

24 of at the, you know, an exit on the interstate, I think it

25 definitely has the opportunity to be the focal point that

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1 everyone's wanted for many years. That's, you know, so that

2 I don't, I don't see this as adversely affecting that.

3 As I said, I think you can certainly have lively,

4 two lively places in an area like Clarksburg and will, and I

5 think this will attract more customers, some of whom -- you

6 know, I can certainly see people who are coming to shop at

7 the outlet who don't want a chain restaurant, they look up

8 in Yelp and they say, wow, there are actually some

9 interesting restaurants in the historic district, it's only

10 a few minutes away, very interesting restaurants in the town

11 center proper, you know, I'm going to eat there instead, and

12 that provides business for those, for the town center and

13 support for that.

14 Q Thank you.

15 MR. KLINE: I have no further questions.

16 MS. ROBESON: All right. Mr. Chen.

17 MR. CHEN: Thank you.

18 REBUTTAL CROSS-EXAMINATION

19 BY MR. CHEN:

20 Q Sir, on page 46 it does project 300 square feet of

21 commercial use. Is that right?

22 A 300,000 square feet proposed, yes.

23 Q How many employees do you think that would have?

24 A It's going to depend on the mix exactly, but let's

25 see -- and you know, this does range quite a bit -- we've

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1 looked at, we've analyzed amount of square feet per employee  
2 in retail and in office many times and it's not always --  
3 650 perhaps.  
4 Q And --  
5 A That's just an approximation, of course, but --  
6 Q Thank you. And how many employees did you say  
7 were going to be in the outlet center and the associated  
8 uses?  
9 A Yeah.  
10 Q Was it 1300, you say?  
11 A Sixteen hundred and -- 1659 is what we had  
12 calculated based on the in-plan model, and you know, it's  
13 possible this, you know, depending on the mix of the  
14 300,000, it might be more, it might be more than I said, but  
15 that's, that's what we calculated for the mix of stores that  
16 were expected to be in the power, in the outlet center.  
17 Q And under the master plan, sir, how many employees  
18 would be generated by the retail uses that are provided for  
19 for the Cabin Branch area?  
20 A Let's see. If you could first, that was a hundred  
21 and --  
22 Q Twenty.  
23 A Hundred and twenty thousand. Again, it really  
24 depends on the mix. Supermarkets tend to have a relatively  
25 small number of -- about, perhaps 270, something like that.

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1 Q Okay.  
2 A Again, very much approximations, to say the least,  
3 but --  
4 Q Okay. And in your testimony -- and the question,  
5 the terminology used by Mr. Harris and then you relative to  
6 the grocery store, you used the term market perspective. Do  
7 you remember that, sir?  
8 A No, I don't.  
9 Q Okay. I thought that you were expressing your  
10 opinion that from a market perspective --  
11 A Oh, okay, that from a market analysis -- from the  
12 perspective of the work I typically do every day, yeah.  
13 Q Yes, that your opinion was that the Cabin Branch  
14 area should not have or would not be appropriate to have a  
15 full-size grocery store.  
16 A Well, it's -- I mean, I think I need to elaborate  
17 to answer, rather than yes or no. It's, I, I calculated how  
18 much demand there was for a neighborhood shopping -- for  
19 supermarkets and other grocery stores in the Clarksburg  
20 area. In my view, you could have --  
21 Q Was it two point four?  
22 A It was two point four. From a market analysis  
23 perspective, there is support -- you could have a full-size  
24 supermarket eventually in Clarksburg, in Cabin Branch, but  
25 also from a market analysis perspective, in my view, that

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1 would make it extremely difficult to also have one in the  
2 town center because there's not enough demand for both. And  
3 from, you know, I'm trying to look at the market analysis  
4 issues that are associated with everything that the master  
5 plan is calling for, not just what they're saying with  
6 respect to Cabin Branch, because they are so closely  
7 intertwined, and you know, and I've been involved with  
8 various aspects of implementing things in Clarksburg and  
9 arguments over implementation of the master plan, and in my  
10 view, the creation of a successful town center is very much  
11 part of what the master plan's priorities were. And from a  
12 market analysis perspective, I'd love to say you could do  
13 that and do one in Cabin Branch, but in my view, you can't;  
14 so there has to be a choice.  
15 Q When did you do this analysis?  
16 A It was after, it was after Mr. Unterberg was  
17 questioned about, I think he said, you know, I think -- I  
18 think one of you asked him how did you, you're asserting  
19 that there, you couldn't support a supermarket in both, both  
20 the town center and at Cabin Branch, and he said that he was  
21 relying on my professional opinion. And you asked him,  
22 well, that's just an opinion, isn't it; and so I was, I  
23 thought it was an accurate judgment that I made originally,  
24 but I was a little offended, I guess, and I did some  
25 calculations and found that I was right.

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1 Q So you did your market analysis relative to  
2 grocery stores in the last two months?  
3 A Yes. It's not, you know -- the calculations, yes.  
4 Q And based upon your market analysis, you have  
5 concluded that in the Clarksburg area the population would  
6 support two point four grocery stores?  
7 A At the build-out of, at -- once all the houses are  
8 built, yes.  
9 Q But the master plan calls for three, isn't that  
10 correct?  
11 A That's correct.  
12 Q So am I correct in concluding that in your opinion  
13 the master plan's recommendation for three grocery stores is  
14 no longer correct?  
15 A Yeah. I think I explained that in some, in some  
16 length, but I'm happy to go through it again. The, because  
17 of changes in, you know -- and retail changes all the time  
18 and it's been changing a lot, and in particular, the  
19 appearance of Wegmans, which had not been anticipated, has  
20 changed things. And so it's not a huge difference between  
21 three and two point four, but the reality is that's enough  
22 of a difference. So that, in my view, you cannot have two  
23 more supermarkets beyond the one that's already under  
24 construction.  
25 Q Would you recommend that the master plan

1 recommendation therefore be changed?  
 2 A I don't think it's necessary. It seems to me  
 3 that's the kind of thing that -- I mean, if we started  
 4 changing master plans every time there was some change in  
 5 market dynamics of this sort, you'd have to be changing them  
 6 all the time, but that's, you know, again, I'm not an expert  
 7 in master plans, but that's certainly my opinion, as a  
 8 master's in planning, city planning, and some other works  
 9 with that.

10 Q But given that educational background, you do  
 11 recognize that the master plan does explicitly provide for a  
 12 grocery store in the --

13 MR. HARRIS: Objection.

14 BY MR. CHEN:

15 Q -- Cabin Branch community, doesn't it, sir?

16 MS. ROBESON: Just a second. Basis?

17 MR. HARRIS: I don't think the master plan says  
 18 that.

19 MR. CHEN: Oh, okay. We'll leave it at that then.

20 MS. ROBESON: Okay. That's not really an  
 21 objection but that's okay. If you're going to leave it,  
 22 it's okay.

23 MR. CHEN: That's fine. That's fine. I  
 24 appreciate Mr. Harris's candor. That's all I've got.

25 MR. HARRIS: No further -- no questions.

1 MS. ROBESON: Oh, that's all you had?  
 2 MR. CHEN: Yes, ma'am.  
 3 MS. ROBESON: Oh, I had a question based on some  
 4 questions from Mr. Kline, and I guess that my concern is  
 5 there's no, nothing in this plan that says neighborhood  
 6 services are going to be provided to the residents of Cabin  
 7 Branch. And as I read the plan -- let's set the grocery  
 8 store aside for a moment -- if you except out, you know, the  
 9 chain restaurants that you say are overlapping neighborhood  
 10 services and, and I was rereading the staff report and I  
 11 read that they considered the neighborhood core that little  
 12 bit of commercial down in Area C, which I think is  
 13 practically capped at, for some reason 30,000 square feet  
 14 comes to mind based on the testimony, so what assurance is  
 15 there that aside from, you're not having grocery store,  
 16 aside from chain restaurants, what assurance do we have that  
 17 these residents are going to be, and future office tenants,  
 18 are going to be served by neighborhood retail --

19 THE WITNESS: Well, first of all, there's --

20 MS. ROBESON: -- because the plan doesn't --

21 THE WITNESS: Yeah. There's never assurance that  
 22 anything will be built, first of all. So from my --

23 MS. ROBESON: But there's no --

24 THE WITNESS: Is there an --

25 MS. ROBESON: -- assurance in this plan, because

1 the way the structure is, all the areas go from zero to a  
 2 max. Why they go from -- they could just have a max, but  
 3 anyway, so they only have maxes --

4 THE WITNESS: Uh-huh.

5 MS. ROBESON: -- and they don't have a minimum,  
 6 saying I am going to have X amount of this.

7 THE WITNESS: Well, yeah, that's, I mean, that's  
 8 more or less what I was about to say, is that you never, you  
 9 know -- there's no way to guarantee that anything will  
 10 happen. The market is going to be a determinant of that.  
 11 If it's not allowed, you can't do more than a certain  
 12 amount, but you can't build something that there's not a  
 13 demand for.

14 I believe that the plan is a great way to get  
 15 those neighborhood services in, that these master plan  
 16 community residents and employees will take advantage of,  
 17 that you do have a good shot at getting some time -- and,  
 18 you know, timing on these is difficult to predict on things  
 19 that are outside of the outlet center -- but sooner or later  
 20 I do think in, potentially in that 30,000-square-foot area,  
 21 or whatever, that that could be a good place to get the  
 22 MOM's or the Harris Teeter, whatever, potentially. I'm not  
 23 -- you know, where exactly is also difficult to judge this  
 24 far in advance, but that's a possibility as I would think  
 25 from a market perspective.

1 The thing that -- the type of retail that there is  
 2 really a demand for, as evidenced by all of the interest in  
 3 getting them developed, is an outlet center.

4 MS. ROBESON: The regional. Would you consider an  
 5 outlet center regional retail, in general?

6 THE WITNESS: Yes.

7 MS. ROBESON: Because there's not going to be a  
 8 daycare in the outlet center unless it's to serve the  
 9 shoppers of the outlet center.

10 THE WITNESS: Yeah, and I don't know how many  
 11 daycare centers you're really going to, neighborhood  
 12 centers, you know, some of that can happen. It's -- and I  
 13 don't, I don't claim to know the exact plan and how much  
 14 there is on the edges; you often get all kinds of things  
 15 near regional centers. But I do think that if we're trying  
 16 to get this development moving in ways that do provide some  
 17 walkability, have some services and retail that residents  
 18 want and need and desire, there's a lot better chance, in  
 19 fact, almost guaranteed probably that it will happen if we  
 20 are talking about the types of retail and restaurants that  
 21 they will have as part of the outlet center or associated  
 22 with it.

23 So I do think, you know, as much as I was  
 24 commenting that there's demand and need for non-chain  
 25 restaurants, there's no question that chain restaurants are

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1 very desired and lots of people love them and that's why  
2 they do well. And so I think having the various types of  
3 chain restaurants that you will almost certainly get as part  
4 of this outlet center is a huge advantage in terms of  
5 providing neighborhood services that you would have real  
6 trouble getting if you were saying, okay, we're just going  
7 to do a neighborhood center, here is the plan contemplated  
8 and --  
9 MS. ROBESON: What about demand, though, for dry  
10 cleaners and everything that's going to be up in the town  
11 center?  
12 THE WITNESS: I mean, there would be demand. I  
13 could, you know, a logical thing associated with a  
14 20,000-square-foot food store like a Harris Teeter or a  
15 MOM's would be exactly those types of things, dry cleaners.  
16 You're already going to have a bank, which is another major  
17 neighborhood thing, which is already, already provided for,  
18 but you know, a dry cleaners, potentially a daycare center  
19 certainly could go in there, you know, smaller, smaller  
20 types of stores that do see enough market surrounding them  
21 as houses get built out within Cabin Branch to serve them.  
22 I think trying to do more than they're allowing  
23 for, without, without a supermarket, is probably -- you're  
24 going to have just vacant land sitting there and you're  
25 going to have another town center situation where, yes,

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1 we've promised to do X amount of retail but there's not  
2 enough demand for it, and so the neighbors say, you know,  
3 you had it in the plan, there's a potential neighborhood  
4 center there, where is it; well, we can't get it to happen  
5 unless there's demand and, you know, it's not coming yet.  
6 So I think timing is a -- you know, we do a lot of  
7 work on so-called master plan communities, on large  
8 mixed-use/multiuse developments, and I think Mr. Kline asked  
9 me a question about it in my original testimony, an article  
10 that I'd written about it. I mean, it's, it is, you know,  
11 it's a challenge to get neighborhood-serving retail into a  
12 master plan community. It's very difficult to get it if  
13 it's not right on the highway because you do often need  
14 demand captured from elsewhere, and I think this is a really  
15 good opportunity to get things that the residents are going  
16 to want, that they can walk to, if they want to, that will  
17 provide a lot of those services. And there is this other  
18 area that, down the road, could well get the kinds of things  
19 we're talking about. I mean, you're not -- these other  
20 uses, like dry cleaners, don't take very many thousand  
21 square feet; so you can certainly accommodate them.  
22 MS. ROBESON: Okay. Any questions based on my  
23 questions? No. I mean, cross-examination, and then you'll  
24 get redirect.  
25 MR. HARRIS: Oh, okay.

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1 MS. ROBESON: Any questions, Mr. Chen, Mr. Kline?  
2 REBUTTAL CROSS-EXAMINATION (Resumed)  
3 BY MR. CHEN:  
4 Q You just --  
5 MR. KLINE: Go ahead.  
6 BY MR. CHEN:  
7 Q You just mentioned MOM's and Harris Teeter. What  
8 was the context of that, sir?  
9 A The context is that in my calculations there is  
10 demand for an additional 20,000, or thereabouts, square  
11 footage of food stores over and above two supermarkets --  
12 one at, one will be soon at Clarksburg Village and, in my  
13 view, from the speculative master plan, one at the town  
14 center -- and then you could still accommodate something  
15 like MOM's or Harris Teeter.  
16 Q Is there a Harris Teeter already in the Clarksburg  
17 planning area?  
18 A Not that I'm aware of, no.  
19 Q Thank you.  
20 MS. ROBESON: Mr. Kline.  
21 REBUTTAL CROSS-EXAMINATION (Resumed)  
22 BY MR. KLINE:  
23 Q Mr. Bogorad, I'm not sure there was actually a  
24 definitive answer to the question, and that is, would you  
25 recommend that the plan be annotated to specify a minimum

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1 amount of neighborhood retail in the Cabin Branch area?  
2 A I may not -- you know, I'll be honest. From a  
3 market perspective, I don't, I don't believe that would be  
4 advisable. I believe that if there's demand for it and it's  
5 allowed, there, there will very much be, it will be  
6 developed. I mean, all master plan community developers  
7 that I work with -- and I work with hundreds -- would love  
8 to have some neighborhood retail in their development. It's  
9 often, they all, they go out to the market, they do this,  
10 they do that, they can't get anybody to go into it, but if  
11 they can get it, they'd love it. And so I don't see any  
12 reason why, if it's allowed, it would not happen if there's  
13 a market. And so putting a minimum or not, in my view, you  
14 wouldn't get anything different. You're going to get up to  
15 the maximum if there's demand. If there's no demand, you,  
16 you're still not going to get the minimum. It doesn't,  
17 you're not requiring them to build if they can't get the  
18 market for it, get the market for it.  
19 MS. ROBESON: All right.  
20 MR. KLINE: Thank you.  
21 MS. ROBESON: Mr. Harris, redirect.  
22 REBUTTAL REDIRECT EXAMINATION  
23 BY MR. HARRIS:  
24 Q I think a point of clarification here. In your  
25 direct testimony you spoke about MOM's and a Trader Joe's,

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1 and then when you were answering questions of the Hearing  
2 Examiner, might you have been mistaken when you talked about  
3 MOM's and a Harris Teeter at Cabin Branch?  
4 A Oh, I'm sorry. I'm sorry. Yes, definitely not.  
5 Harris Teeter is the one that's going in Clarksburg Village.  
6 That's a full-size supermarket. If I said that, I certainly  
7 meant Trader Joe's, not Harris Teeter. Thank you.  
8 MR. HARRIS: That's all I have.  
9 MS. ROBESON: Any recross solely based on that?  
10 All right. Thank you, Mr. Bogorad. You may be excused.  
11 THE WITNESS: Thank you. Thanks very much.  
12 MS. ROBESON: And the next up is Mr. Unterberg?  
13 MR. HARRIS: Mr. Unterberg, back again.  
14 MS. ROBESON: Mr. Unterberg, you're still under  
15 oath.  
16 MR. UNTERBERG: Can we take a quick break?  
17 MR. HARRIS: Oh.  
18 MS. ROBESON: Yes. We can take 10 minutes. We'll  
19 be back at 2:30.  
20 MR. UNTERBERG: Thank you. I'll be right, I'll be  
21 right back.  
22 (Whereupon, at 2:20 p.m., a brief recess was  
23 taken.)  
24 MS. ROBESON: All right. We are back on the  
25 record with Mr. Unterberg. Mr. Unterberg, you're still

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1 under oath.  
2 MR. UNTERBERG: I understand.  
3 (Witness previously sworn.)  
4 REBUTTAL DIRECT EXAMINATION  
5 BY MR. HARRIS:  
6 Q Okay. All right. Mr. Unterberg, there's been a  
7 lot of discussion about the town center and what it consists  
8 of. Can you briefly describe the components of the town  
9 center so it's clear on the record here, as you see the  
10 components?  
11 A Yes, I can. The town center district that's in  
12 the master plan, it's primarily three components. The first  
13 is the town center mixed-use project itself, which is also,  
14 it's been called the neighborhood center. This was also  
15 known as the Terrabrook and then the Newlands development.  
16 This is what's primarily east of Route 355, Maryland Route  
17 355, north of Stringtown Road. It's primarily housing and  
18 it has a neighborhood retail center. It's currently owned  
19 by Elm Street Development, and I believe it has the  
20 ownership entity of Third Try, LLC. The second component is  
21 the historic district, which is primarily along Route 355,  
22 and that's intended to remain, remain intact. The third  
23 component, which is primarily west of Route 355, is the  
24 Miles-Coppola properties, and also north of that is the Egan  
25 properties.

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1 These are in the district, but they're also within  
2 Stage IV of the master plan, which has not opened for  
3 development yet, and there's the ongoing question right now  
4 when to open Stage IV, and the Planning Board is evaluating  
5 that right now and that may be sited sometime next year.  
6 Q Can you describe your interpretation of the master  
7 plan with respect to the overall development envelope for  
8 the -- for the overall town center district and the  
9 respective components of it about which you just discussed?  
10 MR. CHEN: Objection. The document speaks for  
11 itself.  
12 MS. ROBESON: Well, he asked for the overall  
13 development envelope. I'm going to let him answer that. I  
14 don't see that in the master plan.  
15 THE WITNESS: Well, and let me just summarize what  
16 my understanding of the three components are, and there's --  
17 just prior to this discussion about the numbers,  
18 particularly with the employment and retail. On page 40 it  
19 talks about the town center district as a whole is 770,000  
20 square feet, and I believe that's broken down into roughly  
21 300,000 square feet east of Route 355, which would be the --  
22 MS. ROBESON: Wait. Wait. Can you just get me to  
23 that -- oh, I've got it. On page 40.  
24 THE WITNESS: Page 40 --  
25 MS. ROBESON: Okay.

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1 THE WITNESS: -- and there's the summary table,  
2 and it's the one right at the top. It says --  
3 MS. ROBESON: Oh, I see.  
4 THE WITNESS: -- town center district.  
5 MS. ROBESON: Okay. I've got it.  
6 THE WITNESS: And then if you go over to the  
7 right-hand side, the employment/retail square-foot grand  
8 total is there, the 770,000. And I believe how that breaks  
9 down is there's discussions about the 300,000, which is east  
10 of, primarily east of Route 355, and then there's another  
11 470,000 that's west of 355, which is the Miles-Coppola  
12 property. Again, with the Newland or the Third Try, the  
13 neighborhood center, that has a maximum of 150,000 square  
14 feet of retail, and there's been a couple different plans.  
15 I think the current plan has a range of 150,000 to 170,000  
16 of which 150,000 is retail. That leaves, of that 300 that's  
17 in the master plan, that leaves anywhere, if you say the  
18 retail neighborhood center is 150,000, that leaves another  
19 150,000. If that's in the neighborhood center, that would  
20 have to be office because there's a maximum of retail that's  
21 noted, and -- but there's also, that overlaps with what  
22 could be developed in the historic district.  
23 I think with the Miles-Coppola property, the,  
24 that's where the 470,000 square feet comes from. That's  
25 currently zoned R-200, but it's recommended to be rezoned

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1 MXP, and in that case, of the 470,000 square feet, if it  
2 were rezoned MXP, 20 percent of that could be retail or  
3 94,000 square feet.  
4 BY MR. HARRIS:  
5 Q Based on your interpretation of the numbers, do  
6 you have an opinion about the ability of the town center  
7 district overall under the master plan to provide specialty  
8 comparison or outlet retail that would compete with what is  
9 proposed at Cabin Branch?  
10 MR. CHEN: Objection.  
11 MR. KLINE: Objection.  
12 MS. ROBESON: And the basis?  
13 MR. CHEN: This is way beyond his expertise. He's  
14 a land planner. I thought Mr. Bogorad was just here.  
15 MS. ROBESON: Mr. Bogorad is a market analysis.  
16 Do you have, are you testifying based on your experience as  
17 a land planner as to square footages? Is that what you're  
18 testifying to?  
19 THE WITNESS: That's what I was going to testify  
20 to, is the square footage --  
21 MS. ROBESON: Okay. I'll let him do that.  
22 THE WITNESS: -- and the general, what's, what --  
23 MS. ROBESON: But don't go into market analysis.  
24 THE WITNESS: Okay.  
25 MS. ROBESON: All right.

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1 THE WITNESS: Generally, from my experience, the  
2 outlet centers are looking for 350,000 square feet of retail  
3 or more.  
4 MR. CHEN: Object. Just for the record, I object.  
5 This is way beyond his expertise, but I understand and I  
6 just want to note it clear in the record.  
7 MS. ROBESON: Okay.  
8 THE WITNESS: And so with that, if you look at  
9 the --  
10 MS. ROBESON: Have you participated in outlet  
11 center developments or -- wait. What did you say? What's  
12 looking for 350K, thousand?  
13 THE WITNESS: The -- generally, an outlet center  
14 wants to have a critical mass of 350,000 square feet or  
15 more.  
16 MS. ROBESON: What's your basis for that?  
17 THE WITNESS: The primary basis is based on Simon  
18 Companies and what they're looking for, and they've been  
19 looking at different sites. And also, I've seen what the  
20 Tanger companies have been looking for, and actually, both  
21 of their proposals are in the range of 450,000 square feet.  
22 MR. CHEN: If that's the --  
23 MS. ROBESON: I'm going to let it in and give it  
24 the weight, and I'll note your objection.  
25 MR. CHEN: Thank you.

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1 MS. ROBESON: All right. Go ahead, Mr. Unterberg.  
2 THE WITNESS: So if we look at the district as a  
3 whole and the three components, something that size, of  
4 300,000 or 350,000 or larger, would not go in the historic  
5 district because that's going to remain as is. The Newland  
6 or the Third Try neighborhood center, that is to be  
7 neighborhood retail and it's also a maximum of 150,000  
8 square feet. And then if you go over to the Miles-Coppola  
9 property, with the recommendation, it has a maximum density  
10 of 470,000 square feet under the MXP, but only 20 percent  
11 or 94,000 square feet of that could be retail. So none of  
12 those three components can meet that requirement, and so  
13 for, doesn't -- it would not work to have a center that  
14 large in either of those three components of the town center  
15 district.  
16 BY MR. HARRIS:  
17 Q Do you believe the relationship of the town center  
18 to the rest of the development master plan in the Clarksburg  
19 area in any way precludes outlet retail development at Cabin  
20 Branch?  
21 A I do not.  
22 MR. CHEN: Objection. Object, same reason as  
23 before.  
24 MS. ROBESON: I was going to ask you, I didn't get  
25 all of the question. I apologize. Can you --

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1 MR. HARRIS: Okay.  
2 BY MR. HARRIS:  
3 Q Do you believe the relationship of the town center  
4 to Clarksburg as a whole precludes outlet retail development  
5 at Cabin Branch?  
6 MR. CHEN: Objection.  
7 MS. ROBESON: Well, I'm going to let him answer  
8 because I think there is a land use issue here, but I'm  
9 still not sure I understand, but I'm going to let him  
10 answer.  
11 MR. HARRIS: I would add, Mr. Noonan, a planner,  
12 essentially testified to the opposite, which was the reason  
13 for this question.  
14 MS. ROBESON: Mr. Noonan said that would become  
15 the town center --  
16 MR. CHEN: That's right.  
17 MS. ROBESON: -- because of its mass and its, the  
18 number of area, more area-wide activities. So are you  
19 asking him will this preclude the town center from becoming  
20 a regional focus? Is that what you're trying to get at?  
21 MR. HARRIS: How about if I ask him to comment on  
22 Mr. Noonan's testimony that you just summarized?  
23 MS. ROBESON: Comment on Mr. Noonan's testimony.  
24 THE WITNESS: I disagree with Mr. Noonan's  
25 testimony that the focus would be redrawn and moved to the

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

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

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1 role of the town center district to the other MXPDP areas?  
2 MR. CHEN: Objection. The master plan speaks for  
3 itself. It explains the relationship of these different  
4 components among each other in the planning area.  
5 MS. ROBESON: I'm going to let him answer and take  
6 it for the weight it deserves.  
7 THE WITNESS: Well, I think it does and indicates  
8 the town, town center district, which is 770, and then you  
9 go to a smaller size, which is then the Newland or the Third  
10 Try neighborhood center. It's small in scale compared to  
11 the other neighborhoods within the master plan, and it has  
12 the appropriate size for that type of development  
13 recommended.  
14 BY MR. HARRIS:  
15 Q So would you characterize that in any way compared  
16 to a small town?  
17 A It --  
18 MR. CHEN: Objection.  
19 MS. ROBESON: Well, he can -- basis? He can  
20 answer that as a land planner.  
21 MR. CHEN: Well, if he has a basis. I mean, I  
22 have not heard any analysis that has been undertaken. What  
23 is a small town? What --  
24 MS. ROBESON: Well, I --  
25 MR. CHEN: -- is the median size of a small town?

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1 What is the average size of it?  
2 MS. ROBESON: Well, maybe he'll, maybe he will  
3 answer that question, and I note that the master plan uses  
4 the phrase town scale of development. So --  
5 BY MR. HARRIS:  
6 Q That's really the question. What does that --  
7 MR. CHEN: It's not trying to replicate a small  
8 town.  
9 MS. ROBESON: Well, I'm going to let him answer.  
10 Go ahead.  
11 BY MR. HARRIS:  
12 Q What does the town scale --  
13 A What was the question?  
14 Q Let me rephrase. What does the town scale of  
15 development recommendation for the town center district mean  
16 to you?  
17 A Well, and the master plan generally outlines  
18 the --  
19 MS. ROBESON: As an expert, what is town scale  
20 development?  
21 THE WITNESS: It talks about the scale of  
22 buildings. It talks about the -- particularly in the master  
23 plan, it talks about a main street. It includes  
24 neighborhood services, retail services, post office, other  
25 services, public services, firehouse, post office, library,

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1 community center; also, particularly for Clarksburg, it  
2 talks about a transit stop. And those, within context of  
3 those neighborhood services, that, as far as a town scale,  
4 is -- that defines it and how it comes together.  
5 BY MR. HARRIS:  
6 Q And do you have an opinion as to the propriety of  
7 an outlet center within that context as compared to an  
8 outlet center at the Cabin Branch property?  
9 MR. CHEN: Objection. The outlet center, the  
10 proprietariness of a -- I'm not sure I even understand the  
11 question, but, or where he's trying to get to, but --  
12 MS. ROBESON: What I -- okay.  
13 MR. HARRIS: I can rephrase it.  
14 MS. ROBESON: Do so.  
15 BY MR. HARRIS:  
16 Q From a master plan objective standpoint, do you  
17 believe a town center district or the Cabin Branch property  
18 is a more suitable location for outlet retail?  
19 MR. KLINE: Objection, and the objection is, and  
20 the objection is, is because we're talking about the Cabin  
21 Branch application. We're not doing a comparative --  
22 MS. ROBESON: No. You are doing the -- there are  
23 comparisons going all over the place. What I am, what I  
24 want to hear from him, and I think where Mr. Harris is  
25 going, is what type of regional center was envisioned for

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1 the town center as opposed to the neighborhoods.  
2 MR. KLINE: Well, yes --  
3 MR. CHEN: I was going to say, that's the  
4 question. Have him respond to that question.  
5 MR. KLINE: But using the phrase regional center  
6 in the context of town center, I mean, the master plan does  
7 not use the phrase regional center --  
8 MR. CHEN: That's right.  
9 MR. KLINE: -- so I'm not sure why we would be  
10 looking at that. If you said what is the quality or the  
11 character the town center is supposed to be, that, I think,  
12 is --  
13 MS. ROBESON: Can I pass my questions through you  
14 and then, or we could just trade places.  
15 MR. CHEN: Certainly, Madam Examiner, you --  
16 MS. ROBESON: No, I know what you're saying. I  
17 just want to get to the chase because I think it's a valid,  
18 what he's -- can you describe the nature from a land use  
19 perspective of the town center as opposed to the other  
20 MXPDP-zoned locations in the master plan? Describe the  
21 characteristics.  
22 THE WITNESS: The -- well, I think there's a  
23 number in the master plan, but for the town center district,  
24 which is the, which includes the Newland or the Third Try  
25 neighborhood center, that actually is not -- that's an RMX

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1 zone; so it's not MXPDP. It --  
2 MS. ROBESON: Well, what's your point about the  
3 scale of the town center? What is the, how is the town  
4 center supposed to function under the master plan? What's  
5 it -- and I mean the town center district --  
6 THE WITNESS: Uh-huh.  
7 MS. ROBESON: -- what's it supposed to do?  
8 THE WITNESS: Well, again, if you break down the  
9 components, you have the neighborhood center itself --  
10 MS. ROBESON: Yes.  
11 THE WITNESS: -- which is the Third Try. That has  
12 a maximum of 150,000 square feet of retail and that's for  
13 neighborhood, and that has --  
14 MS. ROBESON: So one part of it is a neighborhood  
15 retail, serving what?  
16 THE WITNESS: Serving the residents of that  
17 district, and there's --  
18 MS. ROBESON: Okay. Go ahead. Keep going.  
19 THE WITNESS: -- up to 2,600 and that's -- it also  
20 has an employment component, which is the west side, the  
21 majority of the employment component, which is the west side  
22 of 355, which is recommended to be rezoned MXPDP and has the  
23 470,000-square-foot limit. Of that, if it was to be rezoned  
24 MXPDP, of that, 20 percent or 94,000 square feet could be  
25 retail, okay? Both, or neither of those under the master

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1 plan scenario could accomplish an outlet center at 350,000  
2 or larger.  
3 MS. ROBESON: Now, what about the third component?  
4 The third component is the historic district.  
5 THE WITNESS: The historic district and that, for  
6 lack of a better term, that's supposed to stay as is.  
7 There's some development opportunities, but respecting the  
8 historic character of that and maintaining the historic  
9 structures, that may have some additions to it but it's  
10 primarily to remain as it is. So that, again, that could  
11 not accommodate an outlet center.  
12 MS. ROBESON: Now, how does that function compare  
13 with the satellite, the more satellite MXPDP under the master  
14 plan? What are you saying?  
15 THE WITNESS: Well, when you go -- if you go to  
16 Cabin Branch, which is recommended for the 2,420,000 MXPDP,  
17 which is actually zoned MXPDP, and this whole discussion,  
18 where 20 percent is the 484,000 square feet, the outlet  
19 center can be accommodated, and we've shown that on the --  
20 MS. ROBESON: And why doesn't this outlet center  
21 make this more of a focal point from the area than the town  
22 center should be?  
23 THE WITNESS: I think you're looking at -- the  
24 town center actually is a neighborhood center that serves  
25 that neighborhood, whereas Cabin Branch, it's going to be a

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1 hybrid that serves the neighborhood of Cabin Branch; plus  
2 it's also a regional shopping or retail opportunity.  
3 MS. ROBESON: Well, okay, I'm going to let  
4 Mr. Harris continue on his questions. I guess my question  
5 is somewhere in here -- and I'm looking for it -- it says  
6 the town center. Maybe it's Policy 10. No.  
7 THE WITNESS: Policy 6.  
8 MR. KLINE: What page number?  
9 MR. HARRIS: Two six.  
10 MS. ROBESON: Yes. What -- somewhere it says that  
11 it's the center of community life.  
12 MR. HARRIS: Page 26.  
13 MS. ROBESON: Yes. So are you saying -- so  
14 explain what, as you see it --  
15 THE WITNESS: Uh-huh.  
16 MS. ROBESON: -- explain what that means.  
17 THE WITNESS: Well, part of it says Clarksburg is  
18 one of the county's oldest and most significant early  
19 communities. It's designated as a historic district on the  
20 master plan for historic preservation for many reasons, one  
21 of which is that it remains a large degree of the early  
22 19th/20th century character. The plan continues the  
23 historic function of Clarksburg as a center of community.  
24 It will be part of an expanded town center which will  
25 include a variety of uses -- a school, civic, retail, and a

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

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

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

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

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

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

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

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

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

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

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

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1 says.

2 MS. ROBESON: Well, your proffer was, your proffer

3 was to impeach the Peterson Company, and you can get it in

4 the record, but you can't say this is what it was intended

5 to do.

6 MR. HARRIS: Okay. So your ruling is, because

7 this is not a certified copy, it can't be admitted?

8 MS. ROBESON: I'm saying that it's not proper for

9 him, for Mr. Unterberg. I'm going through and thinking of

10 the exceptions to the foundation rules, the evidence rules,

11 all right? He can't bring it in because he didn't write it,

12 and then there's the due process rule, that he's not there,

13 that Mr. Flanagan isn't here to be cross-examined on what it

14 says and what it doesn't say.

15 The only exception that I can think off, off the

16 moment from Chapter 5 in the Maryland Rules is you could get

17 it in maybe as an official document but that still means

18 that he can't, you can't make an assertion about it; it has

19 to speak for itself.

20 MR. HARRIS: Okay. Then I accept that ruling. By

21 that notion, Exhibit No. 94 should be stricken from the

22 record because that was a memo that Mr. -- that no one

23 testified to, no one. Mr. Unterberg, they attempted to

24 cross-examine Mr. Unterberg about it. He said he didn't

25 know what it was. So we have no proof that it's a certified

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1 copy, and we have no foundation for it.

2 MS. ROBESON: Well, that, there wouldn't be a

3 certified copy.

4 MR. HARRIS: Why not?

5 MS. ROBESON: Because it's not a public record.

6 MR. HARRIS: That's where they purported to get

7 it.

8 MR. CHEN: As I recollect, this is a document

9 issued by Mr. Harris himself. There's a big difference.

10 MR. HARRIS: I never admitted that.

11 MR. CHEN: Well, it --

12 MS. ROBESON: Wait.

13 MR. CHEN: -- bore your name and signature. Let's

14 get the document out.

15 MR. HARRIS: Do you want to call me as a witness?

16 You can call me as a witness and be bound by whatever I say.

17 MR. CHEN: I can call you as a, call you as a

18 witness, say is this your letter, yes, bam, that's it.

19 MR. HARRIS: There's still no foundation.

20 MR. CHEN: That is a foundation.

21 MS. ROBESON: Well, no, we're not calling

22 Mr. Harris as a witness because he can't testify in his own

23 case, all right?

24 MR. HARRIS: I had voiced an objection previously

25 to Exhibit 94 --

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1 MS. ROBESON: Yes, and I don't have the record.

2 I, I remember the objection, and I -- I don't know what day

3 this was.

4 MR. HARRIS: That was September 6.

5 MS. ROBESON: Well, let's find it then.

6 MR. HARRIS: It's a document that --

7 MS. ROBESON: Yes, I know what the document is. I

8 remember it.

9 MR. HARRIS: Okay. But, I mean, there has been no

10 foundation for it, and per your -- I agree with your

11 assessment of the rules of procedure. I accept it with

12 respect to what would have been Exhibit 128, but to the

13 extent that is the rule, that rule applies equally to

14 Exhibit 94.

15 MR. CHEN: And if he's going to be allowed to go

16 back into my case --

17 MS. ROBESON: Well, that's why I, that's why --

18 let me see what we said because I wasn't 100 percent sure it

19 was admitted.

20 MR. HARRIS: My recollection was that it was

21 offered, I reserved judgment on it because I had not read it

22 at that time, we proceeded with the case; subsequently, I

23 renewed --

24 MS. ROBESON: Okay. Just --

25 MR. HARRIS: -- or voiced my objection.

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1 MS. ROBESON: -- just let me read for a minute.

2 MR. HARRIS: Okay, sure.

3 MS. ROBESON: If we want to go off the record for

4 five minutes, we can.

5 MR. CHEN: If we're going to talk about evidence

6 and going back into my case, I want to stay on the record.

7 MS. ROBESON: Well, I'm just reading for --

8 MR. CHEN: Oh, okay.

9 MS. ROBESON: That's why I went off the record.

10 If you want to sit here while I read, that's fine.

11 MR. KLINE: So she can --

12 MR. CHEN: We can take a break for five minutes.

13 MR. KLINE: -- stretch her fingers.

14 MS. ROBESON: Yes.

15 MR. CHEN: Take a break for five minutes.

16 (Whereupon, at 3:12 p.m., a brief recess was

17 taken.)

18 MS. ROBESON: Okay. We're back on the record. I

19 did look at the transcript from the 6th, and I used both the

20 table in the front where the exhibit was introduced on page

21 4 of the transcript and then the index in the back, and I

22 don't see an objection for Mr. Harris about admission of

23 that exhibit. So the cat is out of bag on that one.

24 MR. HARRIS: Well, let me, may I clarify? What I

25 see in the transcript is they offered it, I said wait a

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

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

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

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

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1 know?

2 A Well, I believe it's all aspects of the master

3 plan with substantial conformity.

4 MS. ROBESON: What was the citation on that, State

5 Finance and Procurement, because I looked for that the other

6 day and I couldn't find it.

7 MR. HARRIS: There are two provisions, Madam

8 Examiner. There is Section 1-101 of the Land Use Article

9 and Section 1-304 of the Land Use Article. 1-304 of the

10 Land Use Article specifically refers you to the definition

11 of priority funding areas that's in the other code.

12 MS. ROBESON: Okay.

13 MR. HARRIS: Okay.

14 BY MR. HARRIS:

15 Q Did Mr. Ferguson's discussion of the Washingtonian

16 project and the master plan recommendations for that reflect

17 to you a misunderstanding of the master plan there?

18 A I believe there was a misunderstanding because I

19 believe he testified to the 1990 amended, amendment to the

20 Shady Grove Master Plan when he was speaking to

21 Washingtonian. Actually, the development plan for

22 Washingtonian was approved in 1985, which the 1985

23 Gaithersburg Vicinity Plan would apply that development

24 plan, not the later 1990 amendment.

25 Q And did the 1985 master plan make any

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1 recommendation that would allow retail as part of the MXPDP

2 there?

3 A Well, and I've already testified to this, but the

4 '85 master plan talked about corporate employment uses, but

5 the Council approved the development plan with 20 percent

6 retail per the MXPDP zone.

7 Q Turning towards the County Council's approval of

8 the original development plan and the rezoning in Cabin

9 Branch, do you recall whether the Council made any finding

10 with respect to the permitted amount of retail at Cabin

11 Branch, and if so, what was their conclusion?

12 MR. CHEN: Objection. The Council resolution is

13 in evidence. Its findings are in the resolution. The

14 Examiner, yourself, has --

15 MS. ROBESON: Actually, which resolution are you

16 referring to? The Planning Board or the Council --

17 MR. HARRIS: The Council's resolution.

18 MS. ROBESON: For what?

19 MR. HARRIS: For G-806, which is an attachment to

20 the staff report, which maybe I can find it here.

21 MS. ROBESON: Oh, okay. All right, yes.

22 MR. HARRIS: Okay. The staff report in this case.

23 MR. CHEN: Is it 5?

24 MR. HARRIS: Pardon?

25 MR. CHEN: Is it 5? What's the resolution number?

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1 MR. HARRIS: Oh, part of the staff report,

2 Mr. Chen.

3 MS. ROBESON: Well, it has to be filed with this

4 development plan. So --

5 THE WITNESS: It was, yeah, it was also filed.

6 MR. CHEN: It's an -- yes.

7 MR. HARRIS: It -- yes.

8 MS. ROBESON: -- it would be in the earlier --

9 MR. HARRIS: It shows up in a few places.

10 MS. ROBESON: 5.

11 MR. CHEN: Look at Exhibit 5.

12 MR. HARRIS: That would be it, yes, correct.

13 Thank you, Mr. Chen.

14 MR. CHEN: I'm glad you found it.

15 MR. HARRIS: That's one of the places. So --

16 MR. CHEN: Objection for the --

17 MS. ROBESON: And your objection is what?

18 MR. CHEN: The document speaks for itself. It

19 contains findings you've even --

20 MS. ROBESON: What are you intending to show with

21 this document?

22 MR. CHEN: No, he's not asking for the document.

23 He's asking the witness to --

24 MS. ROBESON: No, I know. What do you want the

25 witness to testify to?

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1 MR. HARRIS: That at that time the Council

2 acknowledged that under that development plan approval up to

3 10 percent of the two point four million square feet could

4 be retail.

5 MS. ROBESON: Is that written in the document?

6 MR. HARRIS: Yes, ma'am. That was --

7 MS. ROBESON: Okay. Then --

8 MR. HARRIS: -- what I was going to have him read.

9 MS. ROBESON: Well, we don't need to, he doesn't

10 need to read it.

11 MR. HARRIS: Okay.

12 BY MR. HARRIS:

13 Q Okay. So if that document does indicate that up

14 to 10 percent of the two point four million square feet can

15 be retail, does that tell you anything with respect to

16 whether the 120,000-square-foot recommendation in the master

17 plan was an absolute cap?

18 MR. CHEN: Objection. Again, the document speaks

19 for itself. In fact, the resolution cannot alter the master

20 plan. As a matter of law, it can't.

21 MS. ROBESON: Well, that's legal argument. That's

22 not the --

23 MR. CHEN: Well, okay.

24 MS. ROBESON: -- basis of an objection. So I'm

25 going to let him testify whether that would have permitted

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

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

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

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

16 BY MR. HARRIS:

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

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

25 MS. ROBESON: Why?

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

9 BY MR. HARRIS:

10 Q Did he admit that a hotel is an employment use?  
11 A I believe he did.

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

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

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

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

22 MS. ROBESON: Exactly. So --

23 BY MR. HARRIS:

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

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1 than office uses?  
2 A I believe he did.

3 Q Looking at the MXPDP zone, how does that classify  
4 uses?  
5 A It classifies -- well, there's four different  
6 classifications, which is residential, commercial, the  
7 industrial, and transitory.

8 Q And under what group would office fall?  
9 A Office falls under the commercial category.

10 Q Where would retail fall?  
11 A Retail also would fall under that commercial  
12 category.

13 Q Does the commercial category refer to uses  
14 permitted in any other zone?  
15 A Well, MXPDP refers to the C-2 zone, which has a  
16 wide variety of uses permitted.

17 Q Are uses in the C-2 zone permitted in the MXPDP  
18 zone?  
19 A Yes.

20 Q And is retail use permitted in the C-2 zone?  
21 A Yes, which is under that same category:  
22 commercial.

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

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1 A There's no place that says that.

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

4 MS. ROBESON: Noted. You can keep going.

5 BY MR. HARRIS:

6 Q Do you believe the MXPDP zone allows the proposed  
7 retail services as part of a mixed-use employment center?  
8 A Yes, it does.

9 MR. CHEN: Same objection.

10 THE WITNESS: It does.

11 MS. ROBESON: What's your basis for that?  
12 MR. CHEN: He's --  
13 MS. ROBESON: Just --  
14 MR. CHEN: Oh, I apologize. I thought you were  
15 talking --

16 MS. ROBESON: No, his basis.

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

20 MS. ROBESON: Okay. Go ahead.

21 BY MR. HARRIS:

22 Q Turning to Mr. Noonan's testimony about the 2011  
23 Clarksburg Master Plan and, I believe, his opinion that it  
24 effectively reconfirmed all of the other provisions of the  
25 '94 plan, do you have an opinion as with respect to whether

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1 that is the case or not?  
2 MR. CHEN: Objection. The document speaks for  
3 itself, and it's my recollection that his testimony was that  
4 when you look at the document itself, meaning the 2011  
5 document, that the document recognized that, not that it was  
6 his land planning expert opinion; it was that the document  
7 itself, and my recollection is he even pointed to language  
8 in the 2011 amendment.  
9 MS. ROBESON: Why don't you ask him whether the  
10 2011 amendment intended to whatever, do you agree with that.  
11 BY MR. HARRIS:  
12 Q Did the 2011 amendment intend to make any land use  
13 -- any recommendations with respect to the nature of land  
14 uses at Cabin Branch?  
15 MR. CHEN: Objection. The document speaks for  
16 itself.  
17 MS. ROBESON: That's noted. I'm going to let it  
18 in.  
19 THE WITNESS: Well, I believe that that was narrow  
20 in scope to change the staging for the neighborhood retail  
21 and did not address any of the land use recommendations.  
22 BY MR. HARRIS:  
23 Q You were asked about Policy 7 in the master plan  
24 with respect to transit- and pedestrian-oriented  
25 neighborhoods. Do you have an opinion of how the Cabin

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1 Branch project and this DPA respond to that?  
2 MR. CHEN: Say it again. I apologize. I  
3 apologize, Mr. Harris. Would you repeat the question?  
4 BY MR. HARRIS:  
5 Q Policy 7 --  
6 MR. CHEN: Right, yes.  
7 BY MR. HARRIS:  
8 Q -- you were asked about that.  
9 MR. HARRIS: I wanted to know if he has any  
10 opinion as to how the Cabin Branch project and the DPA  
11 respond to that policy.  
12 THE WITNESS: Yeah, and a couple thoughts. Policy  
13 7 is page 28 in the master plan, talks about transit-,  
14 pedestrian-oriented neighborhoods. Both, well, the Planning  
15 Board and then, with the original development plan, the  
16 hearing examiner and the Council recognized the  
17 transit/pedestrian orientation.  
18 If you go back, the big picture with the policies,  
19 the titles: Mix of Uses, and then it has a number of bullet  
20 points. It's been demonstrated and I've testified that  
21 there are mixed uses, not only employment, retail, office,  
22 the whole MXPDP grouping we've been talking about, it also  
23 has the residential, the public, and so forth.  
24 Interconnected Streets. We have a gridded street  
25 pattern and that's been reinforced and particularly

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

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1 recreation facilities. And whether it's a five-minute walk,  
2 10-minute walk, 15-minute walk, depending on where they live  
3 or where they, their destination is, that's, that's all  
4 facilitated in the plan.  
5 Q And will the outlet facility itself be a walkable  
6 environment?  
7 A It will and it's part of that network, and it, the  
8 outlet center itself, by definition, has pedestrian malls or  
9 pedestrian walkways within it, and then those are connected  
10 with the system, with the neighborhood. Not only we've  
11 talked about the Wellspring greenway and the trail system  
12 that connects east to west, also would be access to the bike  
13 route on 121.  
14 Q Do you believe this DPA is in substantial  
15 compliance with the master plan recommendations?  
16 A I believe it is.  
17 Q Do you believe it meets the technical requirements  
18 of the MXPDP zone?  
19 A Yes. I've testified to that.  
20 Q To what extent have you observed public support  
21 for this proposal?  
22 MR. CHEN: Objection. Objection.  
23 MS. ROBESON: Yes. You don't need to answer that.  
24 MR. HARRIS: Okay.  
25 BY MR. HARRIS:

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

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

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

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

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

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

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

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1 MR. CHEN: Tell that to Mr. Kline.  
2 BY MR. KLINE:  
3 Q Then let me put it this way. On the right-hand  
4 side, we have a column that has several boxes, and in the  
5 box titled MXPYD Yield Summary, the employment category for  
6 Cabin Branch that says retail, please read it.  
7 A Retail not to exceed 120,000 square feet.  
8 Q All right. So that may or may not be -- is that  
9 intended to be a binding element?  
10 A I'll leave that up to the attorneys.  
11 MS. ROBESON: Well, I will point out that the  
12 zone, if I recall, the zone requires the commercial to be  
13 described, the MXPYD zone, and I don't know where it is, but  
14 part of the, requires the breakdown -- and this is something  
15 we can argue about later. Why not? I don't have in my  
16 papers at the moment the MXPYD zone, but there is a section  
17 of the MXPYD zone that says you have to show the general  
18 category of commercial uses.  
19 MR. CHEN: Madam Examiner, if you wish.  
20 MS. ROBESON: Do you have it?  
21 MR. CHEN: Yes.  
22 MS. ROBESON: I think it's the zone.  
23 MR. CHEN: Yes, it is.  
24 MS. ROBESON: Thank you. So -- it is. It's  
25 59-C-7.5(b)(1), and they have to be approved by the location

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1 in general type of commercial uses on the site, must be  
2 shown on the development plan submitted and must be approved  
3 by the District Council as part of the development plan  
4 application. Thank you. I don't know where mine went.  
5 MR. CHEN: Can I draw --  
6 MS. ROBESON: No. I --  
7 BY MR. KLINE:  
8 Q So, Mr. Unterberg, could I ask you to go back and  
9 do that computation for me, since I don't have a calculator,  
10 of what is 120,000 square feet of the total permitted,  
11 2,420,000 square feet? What is that percentage?  
12 A It's roughly five percent. It's --  
13 Q Five percent?  
14 A -- a hair under, but it's five percent.  
15 Q Okay, fine. Then -- well, is there anything in  
16 the technical staff, to your recollection, is there anything  
17 in the technical staff report that suggested, as you  
18 testified, that there would be up to 10 percent retail uses  
19 permitted in Cabin Branch?  
20 A From the original or -- which technical staff  
21 report?  
22 MS. ROBESON: Yes, I'm confused on that one --  
23 MR. KLINE: Sure. Okay.  
24 MS. ROBESON: -- I don't know --  
25 MR. KLINE: Sure, fine.

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1 BY MR. KLINE:  
2 Q As part of G-806 --  
3 MS. ROBESON: Oh.  
4 BY MR. KLINE:  
5 Q -- did, and I'll ask it this way, did either the  
6 technical staff report or the hearing examiner note that  
7 there could be as much as 10 percent of the uses devoted to  
8 retail uses?  
9 A Oh, offhand, I don't know.  
10 Q Okay. My understanding of your testimony was that  
11 the Council -- the Council acknowledged that retail uses  
12 within Cabin Branch could be as much as 10 percent. Is that  
13 the way you said it?  
14 A Based on the resolution.  
15 Q Okay. Well, the wording is retail uses would  
16 occupy roughly 10 percent of the commercial floor area, and  
17 you just told me that it's actually not more than five  
18 percent. So this does not, to me -- does this say you can  
19 have as much as 10 percent?  
20 A I think it acknowledges that there was other  
21 retail contemplated.  
22 Q Okay. And where does that come from? Where in  
23 the record would that come from?  
24 A From this document.  
25 Q From this document, which is --

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1 A Which is the --  
2 Q -- which is inconsistent with the five percent  
3 number that is shown on there as not to exceed. Okay.  
4 A It's a different number.  
5 Q Well, why doesn't the sentence say then retail  
6 uses could occupy roughly 10 percent instead of would?  
7 Doesn't the would imply that the 120,000 square feet that  
8 was shown on that table was the number that that sentence  
9 was referring to?  
10 A That, I don't know.  
11 Q So you don't know where that 10 percent came from  
12 other than it's your understanding that the Council was  
13 saying that you could go that high?  
14 A Correct. I don't know where that number came  
15 from, but it is in the resolution --  
16 Q Right.  
17 A -- that acknowledges -- it talks about 10 percent,  
18 but it also acknowledges 20 percent for the zone.  
19 Q Sure, understand that.  
20 A Yeah.  
21 Q And wouldn't you agree that the hearing examiner's  
22 report would be the most comprehensive document that would  
23 suggest how this language came about?  
24 MS. ROBESON: If you can answer that.  
25 THE WITNESS: Generally, but again, I don't know

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1 the specifics of it.  
2 MS. ROBESON: You know, the document -- I'm  
3 surprised Mr. Harris isn't jumping up and saying the --  
4 MR. KLINE: Or Mr. Chen objecting.  
5 MS. ROBESON: Well --  
6 MR. HARRIS: Yes. Yes. I don't necessarily  
7 believe in that objection.  
8 MR. CHEN: I would never object to that question.  
9 MR. KLINE: Hopefully, I'm not belaboring it.  
10 BY MR. KLINE:  
11 Q To the best of your knowledge, does the hearing  
12 examiner's report, G-806, say anything about retail uses  
13 could have gone up to 10 percent in Cabin Branch?  
14 MS. ROBESON: If you know.  
15 THE WITNESS: Well, I believe that's what it  
16 says --  
17 BY MR. KLINE:  
18 Q No.  
19 A -- roughly 10 percent. Now --  
20 Q No. I said, does the hearing examiner's report  
21 make that suggestion or recommendation?  
22 A Oh, independent of the resolution?  
23 Q Right. No.  
24 A That, I don't know.  
25 Q Okay.

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1 MR. CHEN: No further -- actually, let me just  
2 check something here. I have no further questions. Thank  
3 you.  
4 MS. ROBESON: All right. Mr. Chen.  
5 MR. CHEN: Thank you.  
6 REBUTTAL CROSS-EXAMINATION  
7 BY MR. CHEN:  
8 Q Mr. Unterberg, go to, back to Policy 7, would you  
9 please, sir, on page 28 of the master plan?  
10 A Okay.  
11 Q Doesn't the policy statement recognize two  
12 different land uses, one being retail and one being  
13 employment?  
14 A Where do you specifically see that?  
15 Q I'd say it'd be the fourth bullet down under Mix  
16 of Uses. Why don't you read the bullet, if you would,  
17 please.  
18 A Well, yeah, the fourth bullet says, proposes  
19 retail and employment use at a pedestrian scale --  
20 Q No.  
21 A -- and oriented to the needs of the residents.  
22 Q Did you say use or uses?  
23 A Proposed retail and employment uses at a  
24 pedestrian scale and oriented to the needs of the residents.  
25 Q Thank you. So that it recognizes two different

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1 land uses, right?  
2 A That bullet does, yes.  
3 Q Thank you. Would you please go to the 2011 update  
4 of the master plan?  
5 A Do you have that handy?  
6 MR. HARRIS: I got it.  
7 THE WITNESS: Okay.  
8 MR. CHEN: Do you guys have it?  
9 MR. HARRIS: What page?  
10 MS. ROBESON: That is --  
11 MR. CHEN: 11.  
12 MS. ROBESON: Do you have the exhibit number?  
13 MR. CHEN: Yes, ma'am. It's -- yes, Madam  
14 Examiner. It's Exhibit No. 86.  
15 MS. ROBESON: Okay. Well --  
16 MR. CHEN: Hang on.  
17 MR. HARRIS: Do you want mine?  
18 MS. ROBESON: Hold on. Thank you.  
19 MR. CHEN: Thank you.  
20 MS. ROBESON: Do you need it?  
21 MR. CHEN: Yes. I think I got it in my head.  
22 MS. ROBESON: Okay.  
23 BY MR. CHEN:  
24 Q Do you have the 2011 amendment?  
25 A Page 11, yeah.

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1 Q Yes, sir. Do you see down at the bottom there's a  
2 string of bullets?  
3 A At the very bottom, yes.  
4 Q Yes. And there's a paragraph just above them.  
5 A Okay.  
6 Q Could you read the first sentence of the  
7 paragraph?  
8 A The amendment retains the plan's overall land use  
9 policies and objectives, parens, 1994 plan, pages 16 through  
10 34, end parens. Is that, or do you want me to read the  
11 whole paragraph?  
12 Q No, that, that first sentence is all I asked you  
13 to read. So that, the 2011 master plan update does in fact  
14 retain the master plan's overall land use policies and  
15 objectives, is that correct?  
16 A I believe that's what it says.  
17 Q Thank you.  
18 MR. CHEN: That's all I've got.  
19 MS. ROBESON: All right. Redirect.  
20 MR. HARRIS: No, no questions.  
21 MS. ROBESON: Okay. Now, are you, would you like  
22 to do -- so that's the end of your, just to make sure,  
23 that's the end of your rebuttal case?  
24 MR. HARRIS: Yes, with, with one note here. I  
25 have sensed from you and, to some extent, from the

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1 opposition that there is concern about whether or not  
2 neighborhood retail would be constructed at Cabin Branch.  
3 We've talked repeatedly about 50,000 square feet of retail  
4 that would be classified as neighborhood retail, but the  
5 comment has been there's nothing in here that obligates us  
6 to do that.  
7 If the Hearing Examiner would find it helpful for  
8 the record in this case to add a binding element that says  
9 we would do a minimum of 50,000 square feet of neighborhood  
10 retail, then we would consider writing something up and  
11 submitting it when we submit the final version of the  
12 development plan.  
13 MS. ROBESON: Okay. All right. My concern about  
14 it -- and I'm saying this so the parties can respond -- my  
15 concern about the neighborhood retail, as when I read Policy  
16 7 -- and I know you brought, had Mr. Unterberg testify on  
17 Policy 7 -- but I, I can see how this development is  
18 walkable, but I thought that Policy 7 was indicating that  
19 people shouldn't have to travel between neighborhoods to,  
20 travel between neighborhoods to get local services. And so  
21 if you have a witness -- that was, it is what he testified  
22 to.  
23 I don't know, at the same time -- and I'm just  
24 thinking out loud -- that we have, you know, we have a lot  
25 of square footages in the master plan, that 20 years later

1 it's going to be -- I hesitate to mandate a certain amount  
 2 of particular square footage, although I would feel more  
 3 comfortable if -- I don't know if it has to be a particular  
 4 square footage. I can't think of the answer, but I would  
 5 feel more comfortable if there was something in here just  
 6 stating that there -- and not just the restaurants, the  
 7 overlapping uses -- but if there was something stating  
 8 portions of Area C will be set aside for neighborhood retail  
 9 or, if not otherwise provided on the site, or something like  
 10 that. I don't know if we need a square footage.  
 11 And the other, if we're talking about amending  
 12 binding elements -- and after I say this, I'll hear from  
 13 everybody -- if we're talking about amending binding  
 14 elements, I'm looking at this Exhibit 125, which is the  
 15 statement from Motazedi about the binding element, and much  
 16 as I trust the government to pick up all the pieces and tie  
 17 them, make sure all the ends meet, I think it's typical that  
 18 the Planning Board incorporate the binding elements in the  
 19 site plan, but because I have had cases here where things  
 20 get lost in the shuffle, I wonder if it would be possible to  
 21 change that Binding Element 10, which is the Planning  
 22 Board's recommended binding element, simply to say the --  
 23 which the applicant will propose as a condition of site plan  
 24 approval, and that way we get it both ways. And I don't  
 25 want to go into the two other cases I've had where something

1 fell through the cracks, but I would feel more comfortable  
 2 just knowing that you're under an obligation -- assume, yes,  
 3 the Planning Board will do it, but you're under an  
 4 obligation to propose it as part of the binding elements.  
 5 MR. HARRIS: The cases in which I've been  
 6 involved, as I think you indicate, I've always seen the  
 7 binding elements re-incorporated --  
 8 MS. ROBESON: Right.  
 9 MR. HARRIS: -- but there is no, I would agree  
 10 with you, there's no mandate for that to be done.  
 11 MS. ROBESON: Right.  
 12 MR. HARRIS: I think they still remain binding  
 13 elements irrespective, but for that reason I have no --  
 14 MS. ROBESON: Well, it's to pick up --  
 15 MR. HARRIS: -- I have no problem including that  
 16 additional language.  
 17 MS. ROBESON: I have had cases with DPS review of,  
 18 that things fall through the crack. So --  
 19 MR. HARRIS: Yes.  
 20 MS. ROBESON: -- I would prefer that just to be  
 21 added to that Binding Element 10 that the Planning Board  
 22 recommended.  
 23 MR. HARRIS: No objection here.  
 24 MS. ROBESON: Now, Mr. Kline and Mr. Chen, do you  
 25 have any comments on what I just stated?

1 MR. CHEN: I don't think the Examiner should be  
 2 telling an applicant what they should be doing to make their  
 3 application more complete and acceptable to the District  
 4 Council, frankly. That's part of my problem with the e-mail  
 5 exchanges, to raise that. I understand and appreciate the  
 6 notion of an examiner seeking to have a complete record, but  
 7 this is a quasi-judicial proceeding and that's how it's  
 8 recognized in the law. And I apologize, I seem to be  
 9 sometimes, be a little bit too much of a stickler on the  
 10 form of questions because, notwithstanding the fact that  
 11 it's an administrative proceeding, there still are rules to  
 12 be followed, and I am very, very troubled by the exchange  
 13 I've just heard, as I was with --  
 14 MS. ROBESON: Which exchange?  
 15 MR. CHEN: The recommendation to the applicant as  
 16 to how they should reword a binding element. I mean, it's  
 17 the applicant's burden of proof and burden of persuasion,  
 18 and you've got well-experienced representation by legal  
 19 counsel and consultants and an experienced developer. It's  
 20 their obligation to put their case on. And I walk into  
 21 your --  
 22 MS. ROBESON: But my obligation is, I don't know  
 23 if the District Council is going to approve this or not, and  
 24 that suggestion for Item 10 is to make sure that if they do  
 25 approve it, it really happens.

1 MR. CHEN: That should be stated then in your  
 2 report and recommendation.  
 3 MS. ROBESON: And I will.  
 4 MR. CHEN: That's the time to do it.  
 5 MS. ROBESON: And I don't understand your point  
 6 about the e-mail exchanges either because -- let me finish  
 7 -- I have the ability to call on technical staff for advice  
 8 and that's what I was doing.  
 9 MR. CHEN: No doubt. No doubt and I'm not going  
 10 there.  
 11 MS. ROBESON: And I still haven't decided the  
 12 issue. So I don't understand what your objection is.  
 13 MR. CHEN: Cross-examination. While the Examiner  
 14 certainly does have the right, and I respect that --  
 15 MS. ROBESON: Well, you can ask for  
 16 cross-examination. If you want Mr. Etheridge and Mr. Carter  
 17 to appear, they can -- I will entertain a request for  
 18 cross-examination, absolutely I will.  
 19 MR. CHEN: I would ask then that they be available  
 20 on the 2nd or March, Tuesday.  
 21 MS. ROBESON: All right. Do you have any  
 22 objections?  
 23 MR. HARRIS: I've not seen that done before. I  
 24 think, you know, the documents speak for themselves.  
 25 MS. ROBESON: Well, they don't. They don't

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1 really. We have had technical staff appear and staff from  
2 DPS appear and be subject to questions based on their  
3 interpretation of the law. So what I don't want to do is  
4 unnecessarily, given your schedule, Mr. Chen, of -- I don't  
5 want to unnecessarily delay the case, but I will ask them if  
6 they are available.

7 MR. CHEN: Is there a middle ground that, because  
8 I agree with you completely about -- I join with Mr. Harris.  
9 I'm not interested in extending the proceedings. Maybe  
10 there's a middle ground that can be dealt with with this.

11 MR. HARRIS: For what it's worth, Madam  
12 Examiner --

13 MR. CHEN: Okay. You got a --

14 MS. ROBESON: No, let him say his middle ground.

15 MR. HARRIS: Oh, okay. Oh, I'm sorry. I didn't  
16 know he was going to propose something. I'm sorry.

17 MS. ROBESON: I want to hear the middle ground.

18 MR. CHEN: I'm looking for a middle ground. Do  
19 you have a suggestion?

20 MR. HARRIS: Well, okay, what I was going to say  
21 is, I think the middle ground has already been there. Each  
22 of us communicated with everyone else during this discussion  
23 about binding elements and the discussion about the water  
24 quality plan. So DPS and Park and Planning had full  
25 opportunity -- we all had full opportunity to make our

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1 positions known and we did, and so it's redundant really, to  
2 me, to subject them now to cross-examination. We're not  
3 subjecting the Planning Board to come in for  
4 cross-examination on their unanimous recommendation of  
5 approval. That just isn't done.

6 MS. ROBESON: Well, what's your concern, because  
7 the two prohibitions are ex parte contacts, which has not  
8 been done because the communications were on the record, or  
9 the due process, which is the ability to cross-examine.

10 So --

11 MR. CHEN: I, in this particular case, I'll let it  
12 go with what Mr. Harris -- I disagree with the analogy to  
13 the Planning Board. I don't think that's a good analogy,  
14 but the rest of it, as far as the -- the e-mails were  
15 shared, and opportunity was afforded to comment on it, but  
16 let's let it go at that.

17 MS. ROBESON: All right. So you're not asking for  
18 cross-examination?

19 MR. CHEN: No. Mr. Harris was, to a certain  
20 extent, persuasive with me this afternoon.

21 MS. ROBESON: Wait. Wait. We have the -- no.

22 MR. CHEN: Let it go.

23 MS. ROBESON: All right.

24 MR. CHEN: I appreciate what he's saying. I don't  
25 like -- as I said, I don't think the Planning Board analogy

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1 is a good one, but I do, the other comments he said about  
2 the participation occurs to me --

3 MS. ROBESON: Whether I agree or not with the  
4 e-mails, I mean, I --

5 MR. CHEN: You said what I just -- you said what I  
6 wanted to hear you say. That's important. That was very,  
7 very important.

8 MS. ROBESON: Because, you know, there's two  
9 things -- and I'll just tell you before you make oral  
10 argument -- there's two things going on in my head, and one  
11 is that I have to give weight to the administrative, the  
12 agency responsible for implementing the law, and two is, you  
13 know, there's some pretty explicit language. So how do you  
14 balance that?

15 So with that, are you prepared to make closing  
16 statements today or do you want to wait for --

17 MR. CHEN: We could wait for Mr. Harris to make  
18 closing statements, and I'm sure Mr. Kline and I would then  
19 be ready Tuesday morning.

20 MR. KLINE: Well, I was going to ask this: I was  
21 going to ask that the record remain open until noon tomorrow  
22 because I'd like to basically review the staff report and  
23 the hearing examiner's report, G-806, and submit to you a  
24 one-line sentence that says there is or there is no  
25 reference to a 10 percent number in the Council resolution.

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1 And you can, you can --

2 MS. ROBESON: Well, I'm not going to close the  
3 record because --

4 MR. KLINE: -- it's in the record already. So you  
5 can take --

6 MS. ROBESON: I'm not going to close the record,  
7 well, (a) --

8 MR. KLINE: Well, they have to submit a  
9 development plan.

10 MR. HARRIS: Right. Right.

11 MR. KLINE: Right.

12 MS. ROBESON: -- they have to, if they choose to  
13 submit a development plan, they -- so I'm going to hold the,  
14 typically we hold the record open for 10 days because we  
15 don't get the transcript literally for 10 days. So -- and  
16 then there was something that you were going to provide, the  
17 state --

18 MR. KLINE: Oh, yes, the Chapter 5 from the state  
19 design manual --

20 MS. ROBESON: Correct. There's that --

21 MR. KLINE: -- yes, and I'll circulate it tonight.

22 MS. ROBESON: There's that and then --

23 MR. KLINE: Well, would you, would you agree to  
24 allow me to submit something, because you have those two --

25 MS. ROBESON: On what?

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1 MR. KLINE: That's on the staff report and the  
 2 hearing examiner's recommendation, G-806.  
 3 MS. ROBESON: You want to submit written argument?  
 4 MR. KLINE: I just want to submit a one-liner that  
 5 says there is or there is no reference in those documents to  
 6 the 10 percent number that appears in the Council  
 7 resolution. You have them in the record. You can take  
 8 administrative record of it. I'm just trying to facilitate  
 9 your review of it.  
 10 MR. CHEN: Why couldn't that wait until closing  
 11 argument?  
 12 MS. ROBESON: Yes, wouldn't that be more  
 13 appropriate for closing argument, because, because it's  
 14 already in the record.  
 15 MR. KLINE: Yes, I -- well, I will do it that way  
 16 if that's what you'd like, yes. I mean, frankly, I think  
 17 that's more of a housekeeping issue and a fact issue --  
 18 MS. ROBESON: Well --  
 19 MR. KLINE: -- and I didn't want to waste my oral  
 20 argument time on it.  
 21 MS. ROBESON: Yes, and the other reason I'm not,  
 22 don't want to close the record exactly yet is I want to make  
 23 sure that -- sometimes people copy Ms. Behanna-Moseley and  
 24 sometimes they don't, and I, Mr. Chen found --  
 25 MR. KLINE: And sometimes you forget.

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1 MS. ROBESON: Yes, I know. I did it. I was  
 2 trying to avoid that, but yes. So I just want to make sure  
 3 that everything that passed is actually in the record, all  
 4 right?  
 5 MR. HARRIS: That's fine. I'm interpreting your  
 6 conclusion that the record is open for limited purposes:  
 7 Chapter 5 --  
 8 MS. ROBESON: Yes, no more testimony.  
 9 MR. HARRIS: Right. Right, but we need to --  
 10 okay. Thanks.  
 11 MS. ROBESON: Unless, you know -- technically  
 12 under the case law, if you come in with a change in the plan  
 13 that somebody wants to cross-examine on, you know, we would  
 14 have to do that, all right? So what I'm going to do is stop  
 15 for today so everybody is on the same playing field. I  
 16 think there's enough in this record to adequately prepare  
 17 for closing arguments. And we will schedule closing  
 18 arguments for 9:30 on Tuesday, October 15th, and I, what  
 19 we'll do is we'll have Mr. Harris, he will get, if we can --  
 20 well, I don't usually put time lines on it, but I want to  
 21 make sure --  
 22 MR. HARRIS: I'm okay with time lines.  
 23 MS. ROBESON: Okay.  
 24 MR. KLINE: Yes, probably a better --  
 25 MS. ROBESON: Are all parties in agreement as to

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1 time lines, because I don't want to have to bump up against  
 2 Mr. Chen's deadline of noon, okay? So a half hour for  
 3 yours, a half hour -- a half hour for all three, and then  
 4 Mr. Harris will get 15 minutes for rebuttal. Do I hear any  
 5 objections?  
 6 (No audible response.)  
 7 MS. ROBESON: All right. So with that, we will  
 8 adjourn this hearing until Tuesday, October 15th, at 9:30,  
 9 and it will be in this room.  
 10 (Whereupon, at 4:21 p.m., the hearing was  
 11 adjourned.)  
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1 C E R T I F I C A T E  
 2 DEPOSITION SERVICES, INC., hereby certifies that  
 3 the attached pages represent an accurate transcript of the  
 4 electronic sound recording of the proceedings before the  
 5 Office of Zoning and Administrative Hearings for Montgomery  
 6 County in the matter of:  
 7 Adventist Healthcare, Inc., and Cabin Branch Commons, Inc.  
 8 Case No. DPA 13-02  
 9  
 10  
 11 By:  
 12  
 13  
 14 Wendy Campos, Transcriber  
 15  
 16  
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 25

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