

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY

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:
APPLICATION OF ADVENTIST : DPA 13-02
HEALTHCARE & CABIN BRANCH COMMONS :
:
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A hearing in the above-entitled matter was held on
September 12, 2013, commencing at 9:11 a.m., at the Office
of Zoning and Administrative Hearings, 100 Maryland Avenue,
Rita Davidson Memorial Hearing Room, Rockville, Maryland
20850 before:

Lynn A. Robeson
Hearing Examiner

A P P E A R A N C E S

On Behalf of the Petitioner:

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For the Respondent:

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E X H I B I T S

Exhibit No.		Marked/Received
106	Town of Leesburg master plan	23
107(a)	Aerial photograph marked to show locations of photos	26
107(b)	Narrative description of photographs	26
108	Hughes Resume	143
109	Storm water management drainage area	165

C O N T E N T S

Witnesses:	Direct	Cross	Redirect	Recross
James Noonan				
By Mr. Chen:	20			112
By Mr. Harris:		27		127
By Mr. Kline				97
Phillip Hughes				
By Mr. Harris:	142			
By Mr. Kline:			152	
Mark Ferguson				
By Mr. Kline	214			276
By Mr. Harris			240	

P R O C E E D I N G S

1
2 MS. ROBESON: Are we on the -- we can go on the
3 record. I'll call the case of DPA 13-02, a, the application
4 of Adventist Healthcare, Inc., and Cabin Branch Commons
5 requesting an amendment to the development plan and zoning
6 application G-806, approved by the District Council on
7 September 9, 2003, in Resolution No. 15-326. Are there any
8 preliminary matters? Mr. Chen?
9 MR. CHEN: Thank you, Madam Examiner. As we left
10 it last time we convened, you requested that Mr. Noonan e-
11 mail the parties with a cite for the Leesburg Master Plan.
12 MS. ROBESON: Yes.
13 MR. CHEN: And that we would supply the Examiner
14 with a hard copy of the plan for the record.
15 MS. ROBESON: That's fine. Thank you for doing
16 that. And this will be Exhibit --
17 MR. CHEN: 106?
18 MS. ROBESON: Yes.
19 (Exhibit No. 106 was marked for
20 identification.)
21 MR. HARRIS: Madam Examiner --
22 MS. ROBESON: Yes?
23 MR. HARRIS: -- I'm going to object to the exhibit
24 at this time. There's been no foundation laid for it. I
25 personally see no relevance of it and there's been no

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1 testimony for it. So I don't see how it can be admitted as
2 an exhibit.

3 MS. ROBESON: I think there was testimony from Mr.
4 Noonan that --

5 MR. HARRIS: I do not believe so.

6 MS. ROBESON: I --

7 MR. HARRIS: If so --

8 MS. ROBESON: I --

9 MR. HARRIS: -- I don't recall it.

10 MS. ROBESON: Well, he testified that he got the
11 plan from the website of the town of Leesburg.

12 MR. HARRIS: Correct. He said nothing about the
13 contents of the plan. There's been no foundation laid for
14 its relevance here.

15 MR. CHEN: Excuse me. I think --
16 (Discussion off the record.)

17 MR. CHEN: Madam Examiner, Exhibit No. 99 is the
18 excerpt that Mr. Noonan had that we had offered at the last
19 hearing and he had, and in light of what Mr. Harris had just
20 said, you have, I'll direct his attention to it.
21 (Discussion off the record.)

22 MR. CHEN: Okay. Go to page 8-1, which I believe
23 is the excerpt and I think this is what precipitated the
24 necessity of the request for the entire master plan.

25 MR. NOONAN: Okay.

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1 MR. HARRIS: May I intervene here? Before we get
2 into Mr. Noonan testifying, there are some preliminary
3 matters that I thought this was just going to be a
4 preliminary matter, but it sounds as if he's going to be
5 asking Mr. Noonan --

6 MS. ROBESON: Well --

7 MR. HARRIS: -- to testify.

8 MS. ROBESON: I, just to resolve that preliminary
9 matter, I do believe that there was testimony, there has
10 been testimony comparing this to the Leesburg master, or to
11 the fact that this generates office development and I
12 believe that this outlet center generates office development
13 and I believe Mr. Noonan raised the issue that this
14 comparing what occurred at Leesburg. So I'm going to let it
15 in for the weight it deserves so we can move on without
16 getting into -- yes?

17 MR. HARRIS: That's fine. Just for the record, my
18 notes indicate Exhibit 99, I wrote down, "No questions asked
19 about it."

20 MS. ROBESON: Well, unfortunately, we do not have
21 the transcript.

22 MR. HARRIS: Okay. Well, then I --

23 MS. ROBESON: Yes, Mr. Chen, you can address this.

24 MR. CHEN: I'm prepared to do it Mr. Harris's way.
25 To clean this up, we can do it after the preliminary

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1 matters, that's fine by me. So if he's got other
2 preliminary matters, we can take them and then we're back
3 with Noonan as our witness and I'll clean this up.

4 MS. ROBESON: All right. I don't want to put form
5 over substance. I understand what you're saying, Mr.
6 Harris. What are your other preliminary matters?

7 MR. HARRIS: Yes, ma'am. Thank you. I am fearful
8 that despite best efforts we will not finish today. I'd
9 like to have an understanding, if we can come to it now,
10 when we will next get together.

11 MS. ROBESON: Well, I did get a notice from our
12 building official that there will be no water in, or
13 electricity in this building on Saturday the 28th, and I
14 think Mr. Bogorad couldn't be here that day anyway. So that
15 date is out. So if you -- Mr. Chen, I think you are the
16 driving force on some of these scheduling issues.

17 MR. CHEN: Yes. Madam Examiner, I have
18 depositions every day through August 4th, I mean October 4th
19 and I'm glad to show you my calendar. It is virtually every
20 day.

21 MS. ROBESON: Mr. Harris.

22 MR. HARRIS: Virtually every day. Which days do
23 you not?

24 MR. CHEN: Every day.

25 MR. HARRIS: Virtually or every day?

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1 MR. CHEN: No, excuse me, every day. I'm out of
2 town on Friday the 20th. I've got tickets for something
3 that I had since April, so I'm out of town, but other than
4 that every day has got a deposition.

5 MR. HARRIS: Every day in September has a
6 deposition you're saying?

7 MR. CHEN: Yes.

8 MR. HARRIS: Okay. Except for the 20th, you're
9 out of town the 20th?

10 MR. CHEN: Yes.

11 MR. HARRIS: Out of town the 21st?

12 MR. CHEN: Yes, and the 22nd.

13 MR. HARRIS: And then you come back the 23rd, but
14 have depositions?

15 MR. CHEN: Yes, starting at 10:00 that's going to
16 go all day.

17 MR. HARRIS: Is there any chance one of those
18 depositions could be moved?

19 MR. CHEN: No. We're under a time deadline set by
20 the circuit court and, quite frankly, we've tried. There's
21 even been issues because the deadline with the circuit court
22 on discovery is September 30th and the court has allowed us
23 to trip over into early October.

24 MR. HARRIS: What's the deadline now?

25 MR. CHEN: We're doing depositions through October

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1 4th.
2 MR. HARRIS: So after October 4, you're wide open?
3 MR. CHEN: I'm very good, yes. The week of the
4 7th I'm wide open.
5 MR. HARRIS: Can we say October 7 then?
6 MR. CHEN: Works for me.
7 MS. ROBESON: If you could, I don't -- usually we
8 have our calendar up here, but it's not up here. So I'm
9 going to go -- I need to go off the record for five minutes,
10 I'm sorry for additional delay, and get a copy of our
11 calendar so I know what dates we've committed to. Okay.
12 We're off the record.
13 (Recess.)
14 (Discussion off the record.)
15 MR. HARRIS: For what it's worth, Madam Examiner,
16 we did plan, do plan to call Mr. Bogorad as a rebuttal
17 witness. Mr. Chen is not available through the 4th I
18 understand. That would make Saturday the 5th or Monday the
19 7th the first available dates after the 4th. Mr. Bogorad is
20 not available either of those dates, but it is possible that
21 we could put him on today so that if we are able to get him
22 on today, I would propose either Saturday the 5th or Monday
23 the 7th.
24 MS. ROBESON: Well, I guess the thing is, Mr.
25 Bogorad, we haven't finished --

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1 MR. HARRIS: Correct.
2 MS. ROBESON: -- the opposition case, so he won't
3 be able to address the points that the opposition is going
4 to make, which I don't know what they are, well, we've heard
5 Mr., one expert, but we have another expert coming. Now I
6 can suggest this. When would Mr. Bogorad be available on
7 the 8th?
8 MR. HARRIS: Not, the first day he would be
9 available, if not today, is the 10th. But, again, I know
10 they have one more expert witness and they have cross-
11 examination of both Mr. Noonan and that expert witness.
12 MR. KLINE: If I might make the -- I'm assuming by
13 that time we will have gotten to Mr. Ferguson, so you'd be
14 looking at other dates. He will be leaving town late the
15 week of August the 1st. He'll be out of town.
16 MR. HARRIS: August?
17 MR. KLINE: I'm sorry, October. So he will not be
18 returning, he would not be available until the 8th himself.
19 And if you think that's the day you would want him, I can't
20 make him available until the 8th.
21 MR. HARRIS: Okay. Well --
22 MS. ROBESON: I'm sorry, when was Mr. Bogorad --
23 is he out the whole week of the 7th?
24 MR. HARRIS: Until Thursday the 10th, he's back.
25 MS. ROBESON: Well, what about Thursday the 10th?

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1 I would like to have some order and I would like Mr. Bogorad
2 to be able to address any questions that I have after I've
3 heard all the experts because it is an important, I think,
4 that the impact among the town center is a major issue in
5 this case. And I would like Mr. Bogorad to have the benefit
6 of all the expert testimony.
7 MR. HARRIS: I appreciate that and certainly that
8 would be our intention. That still could be possible today,
9 but so what I'm saying is --
10 MS. ROBESON: Well, we don't have Mr. Ferguson
11 today, do we?
12 MR. HARRIS: Yes, we do.
13 MS. ROBESON: Oh, that's Mr. Ferguson? Oh.
14 MR. KLINE: He is available, yes.
15 MS. ROBESON: Well, then I'm going to reserve and
16 see how far we get because I anticipate extensive cross-
17 examination of Mr. Noonan and, but I -- it's very important
18 to me, I think Mr. Bogorad's testimony is critical to this
19 case and it's very important to me that he be available to
20 address all the issues.
21 MR. HARRIS: Yes, ma'am. So if I understand it
22 correctly, the option on the table to be resolved later
23 today, if you will, is either the 5th or the 7th if Mr.
24 Bogorad finishes today, or the 10th if he doesn't?
25 MR. KLINE: Well, it depends on whether Mr.

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1 Ferguson --
2 MR. HARRIS: If Ferguson finishes today. I see no
3 reason Ferguson won't get on today.
4 MR. KLINE: Well, can I ask this --
5 MS. ROBESON: Well, that's speculation at this
6 point. So --
7 MR. KLINE: Yes, if I can review the bidding for a
8 second because I had the impression we would, you would also
9 be calling your storm water management witness.
10 MR. HARRIS: Yes.
11 MR. KLINE: Very good. Okay.
12 MR. HARRIS: Yes.
13 MS. ROBESON: So is the 10th, now the 10th is a
14 Planning Board day, so if you --
15 MR. HARRIS: I've got somebody filling in for me.
16 Today is a Planning Board day and I simply had somebody fill
17 in for me.
18 MS. ROBESON: Okay. So I am going -- we'll look
19 at the 7th and be optimistic, but I'm also going to reserve
20 the 10th because that is a sure thing and it's always nice.
21 There are few sure things in this world.
22 MR. HARRIS: Jody, I'm sorry, excuse me, what
23 dates are Mr. Ferguson out?
24 MR. KLINE: You're leaving town on what?
25 MR. FERGUSON: I'm leaving town on the afternoon

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1 of Thursday the 3rd and will be back in the afternoon of
2 Monday the 7th.
3 MR. HARRIS: Oh, okay.
4 MR. KLINE: So after the 8th he would be
5 available.
6 MR. HARRIS: Okay. Fine. Thank you.
7 MS. ROBESON: So we have, well, then we have the
8 8th or the 10th, correct?
9 MR. HARRIS: Mr. Bogorad could not do the 8th.
10 MS. ROBESON: Oh, that's right. That's right.
11 All right. So we will keep those dates in mind. As far as
12 Exhibit -- oh, are there any other preliminary matters?
13 MR. CHEN: One moment.
14 MR. KLINE: Well, I'm, yes, I guess since Mr.
15 Harris wisely is sort of thinking ahead, I would also like
16 to think ahead about closing arguments and I would like you
17 to consider telling us how much time you will allow us
18 because we'll have to divvy things up and I mean I realize
19 I'm available clearly when you want to be, but presumably
20 Mr. Harris would like to try and take the last day and make
21 it the last day. So I guess I want to know how much time
22 are you going to allow us for the closing in light of this?
23 MS. ROBESON: Okay.
24 MR. KLINE: If you can just tell us now, I --
25 MS. ROBESON: That's good. I will think about

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1 that. Let me do this. If we're going to -- if -- I think
2 there's enough writing in the record right now that I'm not
3 going to need written closing arguments. My concern is,
4 what I'd like to do is set up another back-up date just in
5 case because it takes a lot of time at these hearings to get
6 a date with everybody's schedule. So we may have a day just
7 for oral arguments where you don't have to bring your
8 witnesses and it will be a short -- you know, I'm not
9 anticipating giving everybody, you know, an hour and a half.
10 But just out of an abundance of caution so we can conclude
11 this case, and you don't have to do it now, but if you could
12 work out at one of the breaks a back-up date, our calendar
13 is on the website or I have a calendar here. I'd just like
14 one date reserved just to be able to clean up any issues
15 and -- go ahead, Mr. Chen.
16 MR. CHEN: You've got literally right now
17 everybody in front of you, including all the witnesses. And
18 my suggestion for efficiency, let's do it right this minute.
19 We've got the 10th and a whole back-up date behind that.
20 MS. ROBESON: All right.
21 MR. CHEN: And I'm pleased to report that not only
22 am I good the week of the 7th, I'm pretty good the following
23 week also, the 14th.
24 MS. ROBESON: Wow.
25 MR. KLINE: Let me start the bidding with this

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1 proposal. The day after whatever --
2 MR. CHEN: Yes.
3 MR. KLINE: -- is the last day of witnesses.
4 MR. CHEN: That works.
5 MS. ROBESON: Well --
6 MR. KLINE: So the --
7 MS. ROBESON: -- I am, I am out on the 11th.
8 MR. KLINE: Okay. So --
9 MS. ROBESON: So I will be back the 14th.
10 MR. KLINE: So it could be the 9th or --
11 MS. ROBESON: It could be the 14th.
12 MR. KLINE: Are the County buildings open that
13 day? That is a holiday.
14 MR. HARRIS: The 14th is Columbus Day.
15 MR. KLINE: That is a holiday.
16 MS. ROBESON: Oh, that's not on my calendar.
17 MR. CHEN: The 15th?
18 MS. ROBESON: The 15th, yes.
19 MR. HARRIS: 15th, okay. That's if required.
20 MR. KLINE: Since it only relates to the
21 attorneys, that's --
22 MS. ROBESON: Now --
23 MR. KLINE: -- just the three of us?
24 MS. ROBESON: -- to avoid, to avoid having you
25 spend a lot of money waiting around for me to get through

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1 traffic, I'm going to set these next hearings at 9:30. And
2 I do apologize. Well, I don't know why I'm, well, never
3 mind. We're not going there.
4 MR. CHEN: Yes.
5 MR. HARRIS: Okay. So --
6 MS. ROBESON: The two -- so I have a potential
7 date of the 7th. If we finish on the 7th, we could do, we
8 could use the 10th as the oral argument or hearing.
9 MR. HARRIS: Fine.
10 (Discussion off the record.)
11 MS. ROBESON: And then if not, we have 9:30 on the
12 15th.
13 MR. CHEN: That is 9:30 on the 7th, 9:30 on the
14 10th and 9:30 on the --
15 MS. ROBESON: Correct.
16 MR. CHEN: -- 15th? I get very bad the week of
17 the 21st.
18 MS. ROBESON: Well, there is --
19 MR. KLINE: We should get done. We've got three
20 days.
21 MS. ROBESON: We are all going to be really crabby
22 on the week of the 21st so, no, we, I, I do think it's
23 realistic with at least those three dates in reserve that we
24 are able to finish.
25 MR. HARRIS: Okay.

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1 MS. ROBESON: Any other preliminary? Yes, sir?
 2 MR. HARRIS: Yes. One other one. Exhibit 94, Mr.
 3 Chen, I believe offered it, I, that was the memorandum that
 4 you offered?
 5 MR. CHEN: Yes.
 6 MR. HARRIS: I forget how it's identified. I
 7 indicated at the time that it was five pages, single-spaced
 8 and I did not have an opportunity to read it then and that I
 9 was reserving an objection to it subject to my review. I
 10 didn't even get a copy of it until later that same day.
 11 I have reviewed it and I do want to object to its
 12 introduction here. I don't know where it even came from, so
 13 somebody needs to authenticate what it is. Again, there was
 14 no testimony with respect to it, so no foundation has been
 15 offered as to its relevance at all. And to be honest with
 16 you, as I look at it, even if it is authentic, I believe
 17 it's completely irrelevant here to any of the issues.
 18 MS. ROBESON: All right. Well, I'm going to allow
 19 Mr. Chen to address that on redirect because he still has
 20 redirect.
 21 MR. CHEN: Just respond, just to respond to that,
 22 so the record is clear, Exhibit 94 is a document authored by
 23 Mr. Harris. It was obtained from the records of the Park
 24 and Planning Commission.
 25 MR. HARRIS: But you can't --

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1 MS. ROBESON: Okay. Well, then --
 2 MR. HARRIS: -- you can't testify, Mr. Chen, if
 3 you --
 4 MS. ROBESON: Just a second. Just a second. If
 5 it's a public record, I mean if you need to get a true test
 6 copy or, you know, some certified copy, it can come in.
 7 MR. HARRIS: I'm not asking for that. I just want
 8 to know where it came from that somebody can authenticate
 9 that they got it from where they got it.
 10 MS. ROBESON: Well, Mr. Chen, do you have a
 11 witness that -- did you get it or did --
 12 MR. CHEN: I provided it.
 13 MS. ROBESON: You provided it?
 14 MR. CHEN: I would have to go find out where to --
 15 MS. ROBESON: Oh.
 16 MR. CHEN: It came from the Park and Planning
 17 Commission records.
 18 MR. HARRIS: Well, did it or did it not?
 19 MS. ROBESON: Well --
 20 MR. HARRIS: He doesn't seem to know.
 21 MS. ROBESON: Well, then I'm going to reserve and
 22 one of you can, you know, authenticate where it came from.
 23 MR. HARRIS: All right.
 24 MS. ROBESON: All right. Anything else? How
 25 about Exhibit -- well, Mr. Chen, I'm going to let you

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1 address Exhibit 106, which is the town of Leesburg master
 2 plan, on redirect if that's -- well, actually if Mr. Harris
 3 is going to ask questions on it, we should probably take
 4 care of that now. So why don't you ask Mr. Noonan about the
 5 foundation for that exhibit?
 6 MR. CHEN: Okay. This --
 7 MR. HARRIS: I'm sorry, which one is this, ma'am?
 8 106, this new one, or -- oh, the master plan?
 9 MS. ROBESON: Yes.
 10 MR. CHEN: I'm sorry. Beg your pardon. Okay.
 11 MS. ROBESON: Go ahead, Mr. Chen.
 12 MR. CHEN: Thank you very much.
 13 DIRECT EXAMINATION
 14 BY MR. CHEN:
 15 Q Mr. Noonan, 106 is the Leesburg master plan?
 16 A Correct.
 17 Q This is the master plan that you were referring to
 18 last time when you were testifying?
 19 A That's correct.
 20 Q Go to page 8-1.
 21 MS. ROBESON: Now that's --
 22 THE WITNESS: I've got it.
 23 MS. ROBESON: -- one part of the excerpt that's in
 24 our exhibit, correct?
 25 MR. CHEN: Yes, it is in --

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1 MS. ROBESON: In the full master plan as well?
 2 MR. CHEN: Yes.
 3 MS. ROBESON: Okay.
 4 (Discussion off the record.)
 5 MR. HARRIS: This has been identified as 106 then,
 6 the full one?
 7 MR. CHEN: Yes.
 8 MS. ROBESON: It's been marked as 106.
 9 MR. CHEN: Correct.
 10 MS. ROBESON: It's not admitted yet.
 11 MR. CHEN: Correct.
 12 MS. ROBESON: Okay. Continue, Mr. Chen.
 13 BY MR. CHEN:
 14 Q The master plan for Leesburg does address the
 15 issue of office, retail attracting office, is that right,
 16 sir?
 17 MR. HARRIS: Objection.
 18 MS. ROBESON: It's leading.
 19 MR. HARRIS: It's a leading question.
 20 BY MR. CHEN:
 21 Q Directing your -- does the Leesburg master plan
 22 contain any information relative to office space, office
 23 use, rather, being attracted by retail use?
 24 A It has a conclusion in the goal statement in the
 25 Chapter 8 for economic development to raise that issue.

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1 Q Would you go to that section please and read it?

2 A The references would be on the second paragraph

3 under the --

4 MR. HARRIS: I'm sorry, which page?

5 THE WITNESS: Page 8-1.

6 MR. HARRIS: Thank you.

7 THE WITNESS: The opening, the second paragraph,

8 the first sentence there begins with,

9 "Tourism and regional retail do not provide

10 the high wage jobs that come with corporate

11 offices and emerging technologies such as high

12 technology, bio-technology and telecommunications

13 which are important to the area's economic

14 competitiveness and to residents' quality of

15 life."

16 MS. ROBESON: Okay. Does that -- now that does

17 seem to me relevant, Mr. Harris. Does that address -- you

18 may disagree with the statement or you may be able to

19 qualify the statement, but as purely as to relevance, I do

20 think that it's difficult for me to say why that, see why

21 that wouldn't be relevant.

22 MR. HARRIS: Number one, it doesn't say what he

23 just, the question was. It does not say that retail doesn't

24 support other jobs. What it says is tourism and retail do

25 not provide high wage jobs.

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1 MS. ROBESON: Well --

2 MR. HARRIS: It doesn't say anything to do about

3 their impact on attracting high wage jobs.

4 MS. ROBESON: Yes, but relevance is anything that

5 tends to prove one side. It's a low threshold and I think

6 that it does -- you can, you know, critique it on cross-

7 examination --

8 MR. HARRIS: All right.

9 MS. ROBESON: -- but I will let it in. So I'm

10 going to mark 106 as the full version of the -- is it town

11 of Leesburg master plan?

12 (Exhibit No. 106 was marked for

13 identification.)

14 MS. ROBESON: And -- thank you. That's exactly

15 what I was going to ask for. I guess it's the Leesburg,

16 Virginia town plan to be -- all right. Now with that, we

17 are on cross-examination, I believe. Oh, yes.

18 MR. CHEN: There was one area left open and that

19 dealt with the photographs that are Exhibit 101(a) through

20 (n). If you recall, Mr. Robins had raised the issue about

21 the photographs and having somebody available to testify.

22 MS. ROBESON: Yes, he did.

23 MR. CHEN: And the photographs were, when they

24 were taken and what --

25 MS. ROBESON: And is this the -- yes, okay.

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1 MR. CHEN: If I may, is our next exhibit number

2 107?

3 MS. ROBESON: Yes.

4 MR. CHEN: Mr. Harris --

5 MR. HARRIS: You did, yes, thank you.

6 MR. CHEN: Madam Examiner, I'm giving you, handing

7 you a 3-page document that is marked 107.

8 MS. ROBESON: Okay.

9 MR. CHEN: I apologize. I didn't have my copy.

10 Madam Examiner, if you go to Exhibit 100 --

11 MS. ROBESON: Okay.

12 MR. CHEN: -- okay. And if you'll see Exhibit 101

13 are the photographs --

14 MS. ROBESON: Yes.

15 MR. CHEN: -- that were before us when we

16 concluded on direct examination of Mr. Noonan --

17 MS. ROBESON: Yes.

18 MR. CHEN: -- okay.

19 BY MR. CHEN:

20 Q Mr. Noonan, showing you Exhibit 107, can you

21 identify what is this exhibit?

22 A This is an aerial photograph with some, with

23 locations of the photographs taken for Exhibit 101, the

24 locations where each of the photographs were taken are

25 marked there and they're individually identified.

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1 MS. ROBESON: Are they marked with the green

2 stars?

3 THE WITNESS: Yes, with a number right next to it

4 which indicates whether it's --

5 MS. ROBESON: I see.

6 THE WITNESS: -- Photograph A or through G, or H,

7 I believe.

8 MS. ROBESON: All right.

9 THE WITNESS: Quite a few more actually.

10 MR. CHEN: Okay. So that --

11 THE WITNESS: And that's Leesburg outlet mall in

12 Leesburg, Virginia.

13 MS. ROBESON: Now Leesburg outlet mall is outlined

14 in red?

15 THE WITNESS: That's correct.

16 MS. ROBESON: Okay.

17 BY MR. CHEN:

18 Q Now this is the same aerial photograph that's

19 Exhibit 100 without the indication of the location of the

20 photographs, is that correct?

21 A That's correct. We just added the -- the starred

22 locations and the identifiers for the photographs.

23 Q Okay. And paper clipped to Exhibit 107 is a typed

24 narrative?

25 A Uh-huh. Yes.

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1 Q What is that, sir?

2 A That's just a quick summary of what each of the

3 photographs purports to show. There's also, we indicated

4 the date the photographs were taken, which was August 6,

5 2013, anywhere between 10:00 a.m. and 1:00 p.m.

6 MR. CHEN: Okay. Now, Madam Examiner, my next

7 question is as to each of the photographs taken, do they

8 accurately purport to depict what they show? And in that

9 regard I need to shift to another witness.

10 MS. ROBESON: Right.

11 MR. HARRIS: We have no objection to the claim

12 that they accurately reflect what --

13 MS. ROBESON: You'll concede to that?

14 MR. HARRIS: -- what they purport to show with the

15 exception of the conclusions that draw from each of those

16 photographs. And those conclusions appear to Mr. Noonan's.

17 MR. CHEN: Okay.

18 MS. ROBESON: Okay. Well, what I'm going to do is

19 mark 107. I'm going to mark the photograph 107(a) and I'm

20 going to mark the narrative 107(b).

21 (Exhibit No. 107(a) and 107(b) were

22 marked for identification.)

23 MS. ROBESON: And then 107 in general is going to

24 be locations and descriptions of photographs in Exhibit 100.

25 (Exhibit No. 107 was marked for

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1 identification.)

2 MS. ROBESON: A will be the aerial photograph

3 marked to show locations of photos. And B will be narrative

4 description of photographs. I'm going to let B in. I note

5 your objection. I'm going to let B in for the weight it

6 deserves and you are able to cross-examine on that.

7 MR. CHEN: With that, Madam Examiner, I believe

8 then we've satisfied the requirements raised by Mr. Robins

9 relative to the photographs.

10 MS. ROBESON: Yes. Thank you. And I don't need

11 to excuse her because she was never offered as a witness,

12 so --

13 MR. CHEN: Right.

14 MS. ROBESON: All right. Go ahead.

15 MR. CHEN: And that would conclude the

16 examination.

17 MS. ROBESON: That's fine. Cross-examination, Mr.

18 Harris.

19 CROSS-EXAMINATION

20 BY MR. HARRIS:

21 Q Mr. Noonan, first of all, I assume you've met with

22 and/or had phone calls with representatives of the Peterson

23 Companies, including perhaps Steve Green, Taylor Chess, Jim

24 Soltesz and Jody Kline?

25 A I had meetings with Jody Kline and, I believe, Mr.

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1 Chess. He wasn't asking about you. He knows I met with

2 you.

3 MR. CHEN: Right.

4 BY MR. HARRIS:

5 Q Yes. You met with Jody Kline and Taylor Chess?

6 A I believe, yes, I believe those --

7 Q I think Taylor --

8 A -- Jody Kline I'm certain of.

9 Q Okay. Taylor Chess, I think, is the president of

10 the retail division of Pulte, of Peterson Companies? Yes?

11 A Yes.

12 Q I'm sorry. Okay. I just, sometimes you can't

13 hear.

14 MS. ROBESON: If you know.

15 MR. HARRIS: Yes.

16 MS. ROBESON: I mean if you know. It's --

17 THE WITNESS: I venture it's about five people at

18 these meetings, but I believe that's --

19 MS. ROBESON: So you're not sure?

20 THE WITNESS: No, I'm not sure, absolutely sure.

21 BY MR. HARRIS:

22 Q And the meetings you discussed and/or phone calls,

23 did that include discussions of the Peterson project?

24 A Not really. I mean we focused on this case

25 primarily. I mean there were conversations, but I am not,

Page 29

1 you know, really -- have a lot of detail about the Peterson

2 project.

3 Q Do you know what is, what they have proposed?

4 A Yes, I do generally know what they've proposed.

5 Q Okay. And in those discussions, then I assume you

6 discussed with the Peterson Company your testimony on behalf

7 of Mr. Cobb in opposition to this development plan

8 amendment?

9 A Yes.

10 Q And is it your understanding that they are, they,

11 the Peterson Companies are interested in your opposition to

12 this DPA?

13 A Yes.

14 Q And did you discuss with them the strategy for

15 your testimony and the combined opposition to this

16 application?

17 MR. KLINE: Objection.

18 MS. ROBESON: Basis?

19 MR. KLINE: It would be his discussion with Mr.

20 Chen or, I guess I'm not sure we've ever had a conversation

21 on the strategy, but the strategy would not be subject to

22 basically the cross-examination questions.

23 MS. ROBESON: Well, he doesn't have to reveal the

24 strategy, he just can testify that he had the discussion.

25 MR. CHEN: Well, I object to the use of the word

Page 30

1 strategy.

2 MR. KLINE: Yes.

3 MR. CHEN: I don't know what that means.

4 MS. ROBESON: I see.

5 MR. KLINE: That's what --

6 MR. CHEN: That's my hang-up.

7 MR. HARRIS: Okay. I can rephrase the question.

8 BY MR. HARRIS:

9 Q Did you discuss with Mr. Kline and/or Mr. Chess

10 your testimony in opposition to this development plan

11 amendment?

12 A Yes.

13 Q And did that discussion include how your

14 opposition might dovetail with any opposition that the

15 Peterson Company itself advanced?

16 A I suppose it did. I will have to say yes. I

17 don't know that they discussed their strategy with me. We

18 were discussing the direction of my testimony related to the

19 consistency with the master plan. That's the conversations

20 I was involved in.

21 Q Okay. And would you say, did you have more than

22 10 such conversations?

23 MR. KLINE: Objection.

24 MS. ROBESON: Yes, relevance?

25 MR. HARRIS: I'll move on.

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1 BY MR. HARRIS:

2 Q Mr. Noonan, do you know whether your fees are

3 being paid for or reimbursed in any way by the Peterson

4 Companies?

5 MR. KLINE: Objection.

6 MR. CHEN: Objection.

7 BY MR. HARRIS:

8 Q Mr. Noonan, do you have a position as to the

9 Peterson project? Do you support it?

10 MR. KLINE: Objection. It's not a matter that's

11 before this Hearing Examiner.

12 MR. CHEN: What's the relevance of --

13 MR. KLINE: This is an application for development

14 plan amendment for Cabin Branch and this is, as I said,

15 becoming a dueling shopping center and I think that that's

16 gone way beyond what's necessary to --

17 MS. ROBESON: All right. Let me let Mr. --

18 MR. HARRIS: It goes significantly to his

19 credibility here and the, you know, the basis for his

20 extensive testimony in opposition here.

21 MR. CHEN: May I just be heard on this too?

22 MS. ROBESON: Yes.

23 MR. CHEN: The question is his, as I understood

24 it, his position. I don't think that's a proper question

25 put to someone who has been offered and accepted as an

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1 expert. If Mr. Harris wants to ask him have you been

2 retailed to provide your professional services relative to

3 the Peterson project, I cannot object to that. I think

4 that's fair game and I think that does go to credibility.

5 MS. ROBESON: Yes, I agree and I, so I am going to

6 sustain that objection because I don't care -- he's here to

7 offer his professional opinion. I don't care whether he

8 personally supports the project or I don't think it's

9 relevant I guess whether he personally supports the project

10 or not.

11 BY MR. HARRIS:

12 Q Do you believe the Peterson project is consistent

13 with the 1994 Clarksburg master plan?

14 MR. KLINE: Repeat the objection. Again, we're

15 dealing with property that's not subject, before the Hearing

16 Examiner.

17 MR. HARRIS: The witness had extensive testimony

18 interpreting this master plan and I certainly have the right

19 to understand what his understanding of the master plan is.

20 MR. CHEN: I --

21 MR. HARRIS: Obviously, I understand that they

22 don't want him to say anything about this because they've

23 got virtually the identical project being proposed on the

24 opposite side of the street and they've been talking out of

25 both sides of their mouths from the beginning of this.

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1 MS. ROBESON: Okay. You don't have to

2 characterize it like that. I am well aware of the dynamics

3 of some of the opposition. He's Mr. Cobb's witness. So I'm

4 not sure -- go ahead, Mr. Chen.

5 MR. CHEN: Again, my problem is with the wording

6 of the question. When you say do you believe, certainly Mr.

7 Noonan has testified about the Clarksburg master plan and

8 certainly, and asked questions about the compliance with the

9 DPA with the goals and objectives of the Clarksburg master

10 plan. A fair question is have you done the same type of

11 analysis and formulated professional opinions relative to

12 the Peterson project? I think that's a fair question.

13 It --

14 MS. ROBESON: All right.

15 MR. CHEN: But it's not do you believe, it's, you

16 know, have you formed an opinion based upon your review of

17 the master plan?

18 MS. ROBESON: So I agree it would be have you had

19 the opportunity to form an opinion.

20 BY MR. HARRIS:

21 Q Have you had the opportunity to review the

22 Peterson project in terms of its consistency with the 1994

23 Clarksburg master plan?

24 A No, in fact, I have not done any analysis of the

25 Peterson project, with their proposal other than to note

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1 that the location, that it does, it is physically located,
2 as I understand it, within the town center district. But
3 beyond that, I have not looked at the details of the
4 Peterson plan.
5 Q So if there were testimony that that project is
6 inconsistent with the master plan, you have nothing contrary
7 to offer?
8 A Again, I have not done an assessment of that plan,
9 so the, I can't tell you whether it's consistent or not
10 consistent with the master plan other than my understanding
11 of where the location and the kind of development that is
12 suggested, seems to be supported in terms of the location
13 for economic development and commercial development in the
14 master plan. But the details I don't know about.
15 Q So I don't think you answered the question. My
16 question was if there is testimony that that project is
17 inconsistent with the master plan, you have no other opinion
18 with respect to its consistency to rebut that?
19 A Not -- no, I do not.
20 Q Okay. If there -- do you know whether that
21 project will have an adverse impact on the town center?
22 MR. KLINE: Objection. The line of questioning
23 that deals with a property that is not subject to this
24 development plan amendment is beyond the scope of the
25 testimony and the questions being asked.

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1 MR. HARRIS: It is directly related to his
2 extensive testimony about his opinion of how an outlet
3 center on the west side of 270 would have an adverse impact
4 on the town center while at the --
5 MS. ROBESON: What is the question again?
6 MR. HARRIS: Do you have an opinion as to
7 whether --
8 MS. ROBESON: That, just tell me the question.
9 Don't ask him. Tell me the question.
10 MR. HARRIS: Okay. It was whether he had an
11 opinion as to whether the Peterson proposal for an outlet
12 center on the east side of 270 would have an adverse impact
13 on the town center.
14 MR. CHEN: That wording I don't have a problem
15 with.
16 MS. ROBESON: Yes. I'm okay with that --
17 MR. HARRIS: Okay.
18 MS. ROBESON: -- too. So I'm going to allow do
19 you have such an opinion?
20 THE WITNESS: Again, I haven't done an assessment
21 of the Peterson proposal. I mean all I can speak to is my
22 understanding of where it is located and it is located in
23 the town center. But whether the details of that proposal
24 are consistent with the master plan, I haven't done that
25 assessment.

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1 BY MR. HARRIS:
2 Q And the same question about the impact on roads,
3 you have not done an assessment of that?
4 A Are we talking about --
5 MS. ROBESON: The impact of what?
6 MR. HARRIS: I beg your pardon. Thank you.
7 BY MR. HARRIS:
8 Q The impact of the Peterson proposal on road
9 congestion.
10 A No, I have not.
11 Q And so if there were testimony that that had an
12 adverse impact, you have no evidence to the contrary?
13 A I have no evidence to the contrary.
14 Q And the same question with respect to the Peterson
15 project impact on environmental features, you've done no
16 assessment of that either?
17 A I have done no assessment of the Peterson project.
18 Q So if there -- there could, that could have an
19 adverse impact or not?
20 MS. ROBESON: Okay. He already answered that he
21 hadn't done the assessment --
22 MR. HARRIS: Okay.
23 MS. ROBESON: -- and I guess, I don't have the
24 transcript, it's my recollection that the focus of his
25 testimony was not the impact of the Peterson project, but

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1 the impact of this project on the town center.
2 MR. HARRIS: That is --
3 MS. ROBESON: So --
4 MR. HARRIS: That is correct.
5 MS. ROBESON: -- I think that these questions
6 would have been more appropriately addressed to Mr. Soltesz,
7 the, who was the engineer that --
8 MR. CHEN: Soltesz.
9 MR. HARRIS: Mr. Soltesz testified.
10 MS. ROBESON: Mr. Soltesz.
11 MR. HARRIS: I don't think he testified to that.
12 MS. ROBESON: Now if you want to continue on this
13 line, but he's already testified that he hasn't done the
14 analysis of all the issues in the, regarding the Peterson
15 property.
16 MR. HARRIS: That's fine. My simple point is
17 when, when an expert witness makes a conclusion about one
18 project that is in my mind virtually identical to another
19 project and concludes that the project A is going to have an
20 adverse impact on the town center, then that person must
21 inherently know whether another project will or not or else
22 they don't have enough foundation on which to make the first
23 conclusion.
24 MS. ROBESON: Well, I --
25 MR. CHEN: That I object to.

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1 MS. ROBESON: -- yes, I think -- just a second. I
2 don't agree with that -- I don't, well, Mr. Chen, state your
3 objection.
4 MR. CHEN: Okay. I, first of all, I object to
5 counsel testifying. But leaving that aside for the moment,
6 these are different components of a master planned area
7 where the issue before the District Council and the Examiner
8 in this proceeding involves the Cabin Branch community.
9 It's a different community than that town center so that --
10 and this witness expressed his opinion upon reviewing the
11 master plan and hearing the testimony that had been
12 presented by the applicant that in his opinion this
13 development in the Cabin Branch community would have a
14 deleterious impact on the town center component. That does
15 not mean he should have also evaluated a totally separate
16 project that I'm not sure the status of, I'll use the word
17 pending, that another project which I don't even know how
18 comparable it is to this project is pending over in the town
19 center. Why should he be doing that when he's focusing on
20 the impact of what's going to happen in this area?
21 MS. ROBESON: I tend to agree. If I recall his
22 testimony, his testimony was the impact of this project and
23 not the impact of the Peterson project. And he's already
24 testified that he hasn't had the opportunity to review that
25 and, you know, whether he supports -- where I think I see

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1 you going is that he's biased because he supports the
2 Peterson project and, you know, I'm not sure that's a fair
3 impeachment in this case.
4 MR. CHEN: But I would just --
5 MR. HARRIS: Ms. --
6 MR. CHEN: -- just for the record clarity --
7 MS. ROBESON: Not a fair impeachment, but a
8 relevant impeachment.
9 MR. CHEN: We don't even know the status of the
10 Peterson project. I've heard that there's a master plan
11 amendment pending. I've not heard that there's a
12 development plan or a development plan amendment pending --
13 I've heard nothing. The most that I've heard is that
14 there's a master plan proceeding pending so that to say to
15 this witness and to seek to impeach him on a project that
16 not only do we not know its components compared to the
17 components of the pending DPA, we don't even know what is
18 pending.
19 MS. ROBESON: Well, yes, Mr. Kline?
20 MR. KLINE: Well, I guess I would only add that
21 to, aside from the fact that it was a statement or rather a
22 question to include in the statement that the two retail
23 outlet centers may be identical, there's just no foundation
24 for that at all. So basically the statement seemed
25 appropriate, as were the entire Council comments.

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1 MS. ROBESON: Well, I'm going to sustain the
2 objection, Mr. Harris. I do understand, you know, what
3 you're attempting to do, but I don't think it's fair, or
4 it's within the scope of his testimony.
5 BY MR. HARRIS:
6 Q Mr. Noonan, you were here when your client, Mr.
7 Cobb, testified, weren't you?
8 A Yes, I was.
9 Q And did you hear him say that he supported the
10 Peterson project because it would potentially provide sewer
11 to his property in the historic district?
12 A I think there was a discussion of sewer service at
13 some point during the conversation, so I'd have to say yes.
14 MS. ROBESON: Okay. Let --
15 THE WITNESS: I don't know for certain that that
16 was --
17 MS. ROBESON: Just anticipating --
18 THE WITNESS: -- Mr. Cobb's testimony.
19 MS. ROBESON: I don't think this witness testified
20 that it was going to give -- this is cross --
21 MR. HARRIS: Wait. I was just asking him whether
22 he had heard Mr. Cobb's --
23 MS. ROBESON: All right.
24 MR. HARRIS: -- testimony to that effect and I
25 think he just answered reluctantly yes.

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1 MR. CHEN: No.
2 MS. ROBESON: No.
3 MR. HARRIS: He did say yes.
4 MS. ROBESON: We, I --
5 BY MR. HARRIS:
6 Q Did you not say yes, Mr. Noonan?
7 MS. ROBESON: No. Mr. Harris, stop.
8 MR. HARRIS: He did.
9 MS. ROBESON: Stop.
10 MR. HARRIS: I heard him.
11 MS. ROBESON: He didn't say reluctantly. That was
12 your --
13 BY MR. HARRIS:
14 Q Okay. Did you say yes?
15 MS. ROBESON: We know what he said. The record
16 speaks for itself.
17 MR. HARRIS: Okay.
18 MS. ROBESON: Now where are you going with this
19 because I'm trying to --
20 MR. HARRIS: I'm finished with that.
21 MS. ROBESON: -- tell you in many ways --
22 MR. HARRIS: I've got other questions. I've got
23 other questions.
24 MS. ROBESON: Okay.
25 MR. HARRIS: I think I've made my point.

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1 BY MR. HARRIS:
2 Q The Leesburg master plan, you pointed to one page
3 in there and what that page that you quoted said that, would
4 you agree with me, tourism and regional retail do not
5 provide the high wage jobs that come with corporate offices
6 and emerging technology such as high technology, bio-
7 technology and telecommunications which are important to the
8 area's economic competitiveness and to residents' quality of
9 life, isn't that what page 8-1 says?
10 A Yes.
11 Q Okay. And can you point to me any page in here
12 that says that retail development does not add to the
13 attractiveness of an area for employment use?
14 A No, I don't -- no.
15 Q And there's nothing in here that says retail has
16 an adverse impact on employment use?
17 A Certainly not, no.
18 Q In fact, doesn't this plan recommend a mix of uses
19 in the town?
20 A It does.
21 Q And didn't the town of Leesburg approve an outlet
22 center at Leesburg?
23 A Yes.
24 Q And would you assume that they found a benefit to
25 having that outlet center there?

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1 A Yes.
2 Q The photos that you produced, let's turn to
3 Exhibit 107, and the related --
4 A A and B.
5 MS. ROBESON: A and B.
6 BY MR. HARRIS:
7 Q Well, no, I meant the 101, whatever that was.
8 MS. ROBESON: Oh, 101?
9 MR. HARRIS: The photos themselves, beg your
10 pardon.
11 BY MR. HARRIS:
12 Q Wouldn't you agree with me that the design of the
13 Leesburg Corner Premium Outlets is different than the design
14 that's been shown on the concept plans here?
15 A Yes, I would agree.
16 Q And you would agree with me that that facility was
17 built at least 10 or 15 years ago?
18 A I believe, yes, I believe it was built in 1998.
19 Q And I assume you would agree with me that the site
20 there differs significantly from the site at Cabin Branch in
21 terms of, well, first of all, a lot of the development that
22 surrounds the Leesburg Corner predated the Leesburg Corner
23 outlet center, didn't it?
24 A Much of it did, yes.
25 Q Yes. And the Leesburg Corner Premium Outlets is

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1 not located within a mixed use planned development like
2 Cabin Branch is.
3 A That's true, it is not.
4 Q And, in fact, because of the sequential nature of
5 that property, there are a lot of fences and separate
6 entrances for properties around it rather than one combined,
7 integrated --
8 A Yeah, that's --
9 Q -- plan?
10 A Yes, I would say that is true.
11 Q And those fences and secure entrances that you
12 note in Exhibit 107, those would have a big impact on
13 walkability of that property?
14 A On walkability, certainly, yes.
15 Q And the location of U.S. 15 in between that and
16 the major housing sources to the west would also be a major
17 impediment to walkability there?
18 A Yes.
19 Q The Cabin Branch project, the proposed outlet
20 center, though, would be located within a planned community
21 of 1,886 homes?
22 A Is that a question? Yes.
23 Q Yes. Yes. I'm sorry.
24 A I would say yes. Yes. I'm sorry.
25 Q Mr. Noonan, you submitted a pre-hearing statement

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1 in this case and in that at page 3 --
2 MS. ROBESON: Do you have the exhibit number of
3 that?
4 MR. CHEN: I think that's 31.
5 MS. ROBESON: Thank you.
6 MR. HARRIS: Thank you.
7 BY MR. HARRIS:
8 Q Page 3, my notes say, somewhere in here. Let me
9 find this. Bear with me. Oh, wrong page. Bottom of page
10 3, the first bullet there, you say that the staff report,
11 that's the staff report in our DPA, argues that the master
12 plan should be set aside --
13 MR. CHEN: Excuse me, it says states, it doesn't
14 say argued.
15 MR. HARRIS: Pardon?
16 MR. CHEN: You just said argued. It doesn't --
17 my --
18 MS. ROBESON: Where are you? I --
19 MR. HARRIS: I'm reading --
20 MS. ROBESON: I'm not with you.
21 MR. HARRIS: I'm reading from --
22 MS. ROBESON: Oh, I see.
23 MR. HARRIS: -- the bullet.
24 MS. ROBESON: I see.
25 MR. HARRIS: It's in plain English.

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1 MS. ROBESON: No, no.
2 MR. HARRIS: "The staff report argues that the
3 master plan should be set aside."
4 MS. ROBESON: He, it does say argue.
5 MR. CHEN: Yes. I missed the page that said that.
6 MS. ROBESON: Okay. Go ahead, Mr. Harris.
7 BY MR. HARRIS:
8 Q Do you see that?
9 A Yes, I do.
10 Q Where in the staff report do they argue that the
11 master plan should be set aside?
12 A On the staff report? Now I'm having to find the
13 right page on the staff report.
14 Q Here.
15 A I'm sorry. Let's see.
16 Q May I call your attention to page 19, might that
17 be --
18 MS. ROBESON: Okay. Wait, wait, wait. I -- let
19 me just catch up with you, okay?
20 THE WITNESS: Okay.
21 MR. HARRIS: Page 19 at the top.
22 MS. ROBESON: I need the exhibit, I need the
23 exhibit number of the staff report.
24 MR. HARRIS: Oh.
25 MS. ROBESON: It's my recollection it's in the

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1 50's, but I'm having all my cases run together. It's 50,
2 Exhibit 50.
3 MR. HARRIS: Exhibit 50. Thank you, ma'am.
4 BY MR. HARRIS:
5 Q Exhibit 50, what page, page 19, I think I directed
6 you to?
7 A Yeah. I was actually -- I actually used a quote
8 from the bottom of the page, given that the fast pace --
9 Q What page, I'm sorry?
10 A 19. We're on the right page.
11 Q Okay.
12 A I'm sorry.
13 Q Okay.
14 A "Given the fast pace of development in the past
15 decade and the evolution of present day employment
16 centers with increasing distance, want us to take
17 into consideration the fact that the effectiveness
18 and applicability of the specific recommendations
19 of the nearly 20-year-old master plan may not be
20 relevant to current needs and demands."
21 That's what I was quoting.
22 Q Okay. Wouldn't you agree with me that that is
23 saying that the master plan should be interpreted flexibly?
24 A I think that's the intent of the statement, yes.
25 Q The, in fact, master plans are guidelines in

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1 Maryland, they're not straight jackets, is that correct?
2 A That's --
3 MS. ROBESON: Well, wait a minute.
4 THE WITNESS: That's open to --
5 MS. ROBESON: Does that call for a legal
6 conclusion?
7 MR. HARRIS: Okay.
8 BY MR. HARRIS:
9 Q In your experience as a planner, have you seen
10 projects that are approved that are not in strict compliance
11 with a master plan?
12 A Yes, so we have to say.
13 Q And does that happen more frequently as the master
14 plan is older?
15 MR. CHEN: Objection. Speculation. If you can
16 answer --
17 MS. ROBESON: I'll overrule that. I think it's --
18 THE WITNESS: I think it has --
19 MS. ROBESON: If you know. I mean --
20 THE WITNESS: No.
21 MS. ROBESON: -- the question is if you know.
22 THE WITNESS: I've done a lot of, but, no. I mean
23 without talking about a specific, I think very often it's
24 less in the case of the age of the master plan than it is in
25 those cases where the master plans actually have competing

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1 and sometimes even inconsistent policy statements. Then
2 what happens very often is there's a reasonable argument
3 that we're consistent with one phrase in the master plan,
4 but not in -- you know, in strict compliance with another
5 and in that sense it becomes more of a guide than a straight
6 jacket.
7 Q And you're familiar with the Terrapin Run case?
8 A Yes.
9 Q And didn't that case, didn't the Maryland court in
10 that case conclude that master plans are flexible and not,
11 you know, rigid documents?
12 MS. ROBESON: I'm going to stop you --
13 MR. CHEN: Objection.
14 MS. ROBESON: -- on that because it does call for
15 a legal conclusion and he's not here as --
16 MS. ROBESON: He said he's familiar with the case
17 and he worked for the Maryland --
18 MS. ROBESON: But he's not a lawyer.
19 MR. HARRIS: He worked for the Maryland Department
20 of Planning that was intimately involved in that case.
21 MS. ROBESON: Yes, and that case has been
22 overruled. So, you know --
23 MR. HARRIS: Most --
24 MS. ROBESON: -- I don't know what to tell you.
25 MR. HARRIS: We'll take that. I'd like to take

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1 that as the next line of questioning.
2 MS. ROBESON: I --
3 MR. HARRIS: Okay?
4 MR. CHEN: It calls for a legal conclusion.
5 MR. HARRIS: I just asked him if he knew whether
6 that case said that.
7 MS. ROBESON: And he said yes. So and your --
8 MR. HARRIS: And he did say yes.
9 MS. ROBESON: -- next question --
10 MR. HARRIS: Okay.
11 MS. ROBESON: -- what, no, your next question
12 was --
13 MR. HARRIS: Next question --
14 MS. ROBESON: -- isn't it true about what the case
15 said?
16 MR. HARRIS: Yes.
17 MS. ROBESON: And you can argue what the case
18 said --
19 MR. HARRIS: Okay.
20 MS. ROBESON: -- but he's a land planner.
21 BY MR. HARRIS:
22 Q Are you familiar with the Maryland Annotated Code,
23 State Finance and Procurement Article?
24 A Yes.
25 Q And didn't the state adopt legislation --

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1 MR. CHEN: Objection. Wait. Excuse me.
2 Objection. This goes beyond direct examination of this
3 witness.
4 MR. HARRIS: It does not.
5 MS. ROBESON: Where are going with this?
6 MR. HARRIS: I would proffer that Section 5-
7 7(b)(01) and (02) of the state, of the Maryland Annotated
8 Code, State Finance and Procurement Article, indicates that
9 in priority funding areas a requirement for master plan
10 consistency does not require consistency with the uses and
11 densities recommended in the master plan.
12 MS. ROBESON: But --
13 MR. HARRIS: I'm asking him if he's familiar with
14 that.
15 MR. CHEN: This is -- what's worse, it's not
16 really beyond the scope of direct examination, he's now
17 asking this witness to interpret a state statute.
18 MR. HARRIS: I just asked him if he was familiar
19 with it.
20 MS. ROBESON: And I'm going to sustain the
21 objection.
22 BY MR. HARRIS:
23 Q Mr. Noonan, is -- how many other cases have you
24 served as a planner in Montgomery County?
25 A I think I testified at the very beginning that I

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1 had not testified in Montgomery County --
2 Q And have you ever done any planning work --
3 A -- at hearings.
4 Q -- in Clarksburg?
5 A No.
6 Q And was the, this case the first time that you had
7 occasion to read the Clarksburg master plan?
8 A Yes, let's -- my recollection, I hadn't read it.
9 Q And, in fact, although your pre-hearing statement
10 indicated your conclusion that the staging recommendations
11 in the master plan precluded retail from proceeding before
12 the town center, you've since corrected that when you
13 learned about the 2011 amendment, is that correct?
14 A That's true, yes.
15 Q I believe your testimony was that the discussions
16 in the plan with respect to retail focused on neighborhood
17 retail, is that correct?
18 A That's correct.
19 Q And there, I think you also said that there's
20 nothing in the plan that makes any comment or recommendation
21 with respect to specialty retail?
22 A That's correct.
23 Q But you did recognize that the technical appendix,
24 Exhibit 60(b) maybe --
25 A Uh-huh.

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1 Q -- page 12, does note that there is a difference
2 between comparison retail and neighborhood retail?
3 A It actually -- yes, it does.
4 Q And the demand calculations that the staff had
5 done at that time concerns neighborhood retail only?
6 A That's correct.
7 Q And there is nothing in the master plan that says
8 a property owner cannot construct specialty retail so long
9 as the zoning allows it?
10 A The -- I believe the master plan had specific
11 recommendations for why they recommended the use of the MXP
12 zone in this area and that did not include the addition of
13 additional square footage for commercial space. It had
14 specific recommendations on a couple of pages, page 101, and
15 again, I believe, on page 67. The specific purposes for
16 which they felt that the MXP zone should be applied in the
17 Cabin Branch area and those did not include additional
18 commercial retail space.
19 Q Okay. But my question was is there anything in
20 the master plan that says specialty retail uses cannot be
21 constructed on a property where the zoning allows that use?
22 MR. CHEN: Objection. Well, you're saying
23 specialty retail?
24 MR. HARRIS: Correct.
25 MR. CHEN: Okay.

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1 THE WITNESS: I'm sorry, could you repeat the
2 question?
3 BY MR. HARRIS:
4 Q Is there anything in the 1994 Clarksburg master
5 plan that prohibits a property owner from constructing
6 specialty retail on a property where the zoning for that
7 property would allow it?
8 A I don't think, believe there's specific language
9 prohibiting that. I think you have to, again, read the
10 purpose that the plan indicated, the purpose that the MXP
11 zone was going to apply to. And then you also have to look
12 at parallel recommendations in the different planning areas
13 in the master plan. For example, in the mixed use zone and
14 other areas, the town center area, it does mention
15 additional 300,000, I might be getting my math wrong here,
16 300,000 square feet of commercial space in the town center
17 zone. Similar language cannot be found in the Cabin Branch
18 neighborhood. So --
19 Q Okay. It, is it your opinion that the -- I think
20 you're referring to page 46 of the master plan that's
21 Exhibit 60(a)?
22 A Yes, that's what I was referring to.
23 Q And what you're saying is that where it talks
24 about commercial uses, you're saying that that term could
25 include specialty retail use?

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1 A Yeah, my general reading of that is yes.
2 Q Specialty retail use is a commercial use?
3 A I would believe so.
4 Q Okay. I'm going to show you a copy of a portion
5 of the MXP zone Sections 59-C-7.5 and I'll let you read it,
6 but --
7 A Okay.
8 Q -- would you agree with me that the uses that are
9 permitted in the zone and specifically Section 59-C-7.52
10 allows residential uses, it allows commercial uses and it
11 allows industrial uses?
12 A Yes.
13 MR. CHEN: I'm sorry.
14 MR. HARRIS: Okay.
15 MR. CHEN: Did that -- pardon me.
16 MR. HARRIS: And would you --
17 MS. ROBESON: Just a second.
18 MR. CHEN: I object to the question. The law
19 speaks for itself. I mean I don't understand the object of
20 getting a witness to repeat verbatim what's contained in the
21 zoning ordinance by, especially handing him the zoning
22 ordinance. If he wants to ask what is your understanding as
23 to what is permitted as to the uses in the MXP zone, I have
24 no problem with that type of question. But to give a
25 witness a copy of the zoning ordinance and ask him to read

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1 verbatim out of the ordinance I think is, at the very least,
2 an inappropriate form of the question.
3 MR. HARRIS: He's testified extensively about --
4 MS. ROBESON: Well, why don't you --
5 MR. HARRIS: -- in fact, just moments ago --
6 MS. ROBESON: -- I --
7 MR. HARRIS: -- that his opinion that we could not
8 do specialty retail in the MXP zone here.
9 MR. CHEN: I don't think that was his testimony at
10 all.
11 MS. ROBESON: I don't think that was his
12 testimony. His testimony was that it's not consistent with
13 the master plan.
14 MR. HARRIS: Okay.
15 MS. ROBESON: But if you want to ask him if you
16 feel that you need to and you want to ask him what his
17 interpretation of commercial is based on his experience, you
18 can do that.
19 MR. CHEN: I thought he --
20 MR. HARRIS: I think he just said that commercial
21 would include specialty retail.
22 MS. ROBESON: Right. But I do, I did not hear him
23 say in his testimony that it was prohibited by MXP. I
24 heard him say that --
25 MR. HARRIS: Okay.

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1 MS. ROBESON: -- but continue.
2 BY MR. HARRIS:
3 Q And so if there is testimony in this case that the
4 commercial land use permitted in the MXP zone, Section 59-
5 C-7.52(b) says that commercial includes all permitted and
6 special -- all permitted --
7 MR. CHEN: I'm sorry.
8 MR. HARRIS: -- permitted and special exception
9 uses allowed in the C-2 zone and that the C-2 zone allows
10 specialty retail, you have nothing to indicate anything to
11 the contrary, do you?
12 THE WITNESS: I have no doubt that the MXP zone,
13 the commercial and retail uses and specialty retail uses are
14 one of the many uses that would be permitted generally in an
15 MXP zone. That wasn't the point I made. You know, I --
16 the master plan makes fairly specific suggestions,
17 suggestion statements about what the purpose of applying the
18 MXP zone in the Cabin Branch area should be and that did
19 not include adding additional commercial retail space when
20 it was very well within their ability to say that and they
21 did not say it and I guess that was the point I was making.
22 BY MR. HARRIS:
23 Q They also, however, did not say you could not do
24 it, did they?
25 A No, they did not make any blanket, negative

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1 BY MR. HARRIS:
2 Q You're aware that stage 3 has been open for
3 development and can proceed?
4 A Yes.
5 Q And so your statement about encouraging early
6 development of the town center doesn't preclude development
7 at Cabin Branch at this time?
8 A Absolutely not, does not preclude development at
9 Cabin Branch.
10 Q Are you aware of anything in the MXPDP zone that
11 requires a proposed use to be consistent with the master
12 plan?
13 A Yes.
14 Q Can you -- I'll hand you a copy of the MXPDP zone
15 and ask you if you could point to that?
16 A Sure. I believe there's a statement here if I can
17 locate it. It talks about -- okay.
18 MS. ROBESON: Well, all right, go ahead.
19 THE WITNESS: Do you want me to continue reading
20 it?
21 MS. ROBESON: Yes.
22 THE WITNESS: Okay.
23 MR. CHEN: Madam Examiner, I think I know where
24 you're going with that, but I'm not going to object to the
25 question.

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1 MS. ROBESON: All right. I can find it.
2 THE WITNESS: Yes.
3 MR. HARRIS: Can you?
4 MS. ROBESON: So if we need to sit here while he
5 finds --
6 MR. HARRIS: I think it, I think it says
7 compatible.
8 MS. ROBESON: No. In the objectives and purpose
9 it says it is intended that this zoning category be utilized
10 to implement existing public plans and pertinent County
11 policies in a manner and to a degree more closely compatible
12 with said County plans and polices than may be possible
13 under other zoning categories.
14 MR. HARRIS: Correct. I heard the word
15 compatible.
16 MS. ROBESON: It's the same --
17 MR. HARRIS: I heard the word compatible, not
18 consistent. And, in fact, the word compatible is --
19 MS. ROBESON: Well, that's legal argument.
20 MR. HARRIS: -- used throughout the zone.
21 MS. ROBESON: I'm --
22 MR. HARRIS: I'm just --
23 MS. ROBESON: I'm just trying to speed the hearing
24 up.
25 MR. HARRIS: Okay. All right. I'll move on.

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1 In --
2 MS. ROBESON: Because whether he says it or not,
3 that's the one that, you know, that's what I'm going to
4 apply.
5 MR. HARRIS: I expect you will.
6 MR. CHEN: As well as the other one.
7 MS. ROBESON: What other -- well, okay. This is
8 legal argument.
9 MR. HARRIS: Yes. Yes.
10 MS. ROBESON: We're not going to get in there, but
11 it's language similar to the PD zone.
12 MR. CHEN: And also the development plan section.
13 MS. ROBESON: Okay. Well, we -- see, so --
14 BY MR. HARRIS:
15 Q With respect to the location of outlet centers,
16 they're not typically located within a town center, are
17 they?
18 MR. CHEN: Objection. If you know.
19 MS. ROBESON: Well, I've got to let him answer.
20 MR. HARRIS: Obviously.
21 THE WITNESS: Was I instructed to answer the
22 question?
23 MS. ROBESON: Yes.
24 THE WITNESS: I'm sorry.
25 MS. ROBESON: Yes, you are.

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1 THE WITNESS: Definitely, no, I would say no.
2 BY MR. HARRIS:
3 Q Okay. And would you agree with me that Potomac
4 Mills, Hagerstown, Leesburg, Rehobeth outlets, none of those
5 is located within a town center?
6 A That's correct, they're not.
7 Q And would you agree with me that the town centers
8 in Leesburg, Hagerstown and in Rehobeth all have survived
9 well despite the location of outlet centers outside of the
10 town centers?
11 A Absolutely, but you're talking about established
12 communities in many of those places. To compare Leesburg, a
13 good example, which has a, which has been there for 100 and
14 some years as a viable municipality, town with an
15 established downtown, to Clarksburg where the master plan is
16 trying to do something, build something new in the area, you
17 know, that speaks, to me that speaks to why the master plan
18 talks about staging and desiring for development in the town
19 center before the neighborhoods that, you know -- and quite
20 honestly, there's been discussions in the planning field for
21 many years about commercial development in peripheral areas
22 negatively impacting the businesses in the downtown areas
23 and it's only reasonably in the last 10 to 15 years that
24 many of these town centers started to recover economically.
25 So I think the authors of the master plan for

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1 Clarksburg were very concerned about that knowing that they
2 did not have a viable town center like either Leesburg or
3 even more closely Gaithersburg that could survive the
4 competition from this kind of a retail center in the
5 neighborhoods. And I think that's part of the purpose that
6 they expressed for setting that hierarchy and that staging
7 proposals.
8 Q There are no outlets or specialty retail within
9 the historic district in Clarksburg today, are there?
10 A No.
11 Q And there really is no room for construction of
12 that type of space within the historic district, is there?
13 MR. CHEN: Objection. There's been absolutely no
14 information about the size, the size needed for --
15 MS. ROBESON: He can answer if he knows.
16 THE WITNESS: In terms of the historic district, I
17 don't believe there is room for it. I mean I think that's
18 why the town center district is a larger geography than just
19 the historic district and there's a lot of attention being
20 paid to making sure that scale and other, and the density of
21 development surrounding the town center somehow supports and
22 is compatible with preserving the historic district. But
23 the historic district itself doesn't have that level of
24 commercial development currently.
25 BY MR. HARRIS:

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1 Q And none is planned there?
2 A I'm not absolutely certain about what -- again, I
3 think there are recommendations in here to preserve the
4 historic district and can develop around it to make it a
5 component of the town center.
6 Q Okay. With respect to the town center project, I
7 think one of the witnesses explained that the town center
8 consisted of different components. You're familiar with the
9 town center mixed use project?
10 A Which -- east of --
11 Q East of 355 between Stringtown Road and, north of
12 Stringtown Road and south of Maryland Route 121?
13 A Yes.
14 Q Okay. And you're familiar with a plan for
15 neighborhood retail there?
16 A Yes.
17 MS. ROBESON: Just a second. Do you have an
18 objection, Mr. Chen?
19 MR. CHEN: I'll let it go for now.
20 MS. ROBESON: Okay.
21 BY MR. HARRIS:
22 Q And there is no specialty or outlet retail planned
23 in that location of Clarksburg, is there?
24 A In the neighborhood retail center?
25 Q Correct.

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1 A My understanding is that there's not.
2 Q And the with the development of that neighborhood
3 retail center, there is no other ground within that town
4 center mixed project for construction of an outlet center,
5 is there?
6 MR. CHEN: Objection. Again --
7 MS. ROBESON: I don't believe that that was within
8 the scope of his -- is that your objection --
9 MR. CHEN: Yes.
10 MS. ROBESON: -- Mr. Chen? I don't think that --
11 MR. HARRIS: He testified extensively about page
12 46 and 47 of the master plan saying that there could be more
13 commercial space there which he was interpreting to be, that
14 could be specialty retail and I'm just trying to figure out
15 where he thinks that might go.
16 MR. CHEN: I'll withdraw the objection.
17 MS. ROBESON: Yes. If --
18 MR. KLINE: Then I'll raise an objection.
19 MS. ROBESON: All right.
20 MR. KLINE: And that is I believe the question was
21 specialty retail and then in the context of the question was
22 where a regional outlet mall can go within the town center.
23 MR. HARRIS: Okay. I'll rephrase --
24 MR. KLINE: And I think the point --
25 MR. HARRIS: -- the question.

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1 MR. KLINE: Okay. Thank you.
2 MS. ROBESON: If you have done the analysis.
3 BY MR. HARRIS:
4 Q Do you know of any location within the town center
5 mixed use project where an outlet retail center could be
6 built?
7 MS. ROBESON: Wait, I'm sorry. I don't
8 understand. What are you talking about when you say the
9 town center mixed use project?
10 MR. HARRIS: That was what I tried to define, east
11 of 355 --
12 MS. ROBESON: I know. But I don't know --
13 MR. HARRIS: -- north --
14 MS. ROBESON: Go ahead.
15 MR. HARRIS: The Newlands project, the Terrabrook
16 project, it is a mixed use project of some 700 dwelling
17 units --
18 MS. ROBESON: Okay.
19 MR. HARRIS: -- I think.
20 MS. ROBESON: All right.
21 MR. HARRIS: And a retail center that Dave
22 Flanagan and Elm Street are proposing there. It's north of
23 Stringtown Road, okay?
24 MS. ROBESON: Okay. You're testifying now.
25 MR. HARRIS: No, okay, well, you asked me what I

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1 was referring to.
2 MS. ROBESON: I did.
3 MR. HARRIS: Okay.
4 MS. ROBESON: I did and, Mr. Noonan --
5 THE WITNESS: Yes.
6 MS. ROBESON: -- do you know of this project?
7 THE WITNESS: I know of the retail center
8 proposal.
9 MS. ROBESON: Are you familiar with the other
10 portion of it?
11 THE WITNESS: I don't have any specific knowledge
12 of what's proposed.
13 MS. ROBESON: And your question is?
14 BY MR. HARRIS:
15 Q Okay. So are you aware --
16 MS. ROBESON: No, ask me your question.
17 MR. HARRIS: I'm sorry. Whether he knows if there
18 is any available ground within that town center mixed use
19 project on which an outlet center could be built.
20 MR. CHEN: Is this for the Newlands area for that?
21 MR. HARRIS: That's what I've defined now twice.
22 MR. CHEN: Well, excuse me --
23 MS. ROBESON: Well, wait a minute. You're way --
24 you guys know way more about -- and so I need it explained
25 to me. So are you saying --

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1 MR. HARRIS: I can --
2 MS. ROBESON: -- within 121 Stringtown Road and
3 is there a third boundary or a fourth boundary?
4 MR. HARRIS: 355 on the east and --
5 MS. ROBESON: On the east or west?
6 MR. HARRIS: On west, I beg your pardon, thank you
7 for correcting me, on the west, and then on the east it is,
8 what do they call that, Snowden Farm Parkway.
9 MS. ROBESON: Okay.
10 MR. HARRIS: And I think --
11 MS. ROBESON: I'm going to let him answer if he --
12 yes, Mr. Kline has an objection.
13 MR. KLINE: My objection is not to the question as
14 phrased, but I think where it's, what it's trying to imply
15 and that is can you have a retail outlet center within the
16 remaining land in the town center?
17 MS. ROBESON: Well, when you say town center --
18 MR. KLINE: Yes.
19 MR. CHEN: What is the town center?
20 MR. HARRIS: The town center mixed use project.
21 MS. ROBESON: Okay. So you're not talking about
22 the town center district?
23 MR. HARRIS: That's correct. This --
24 unfortunately, this is confusing --
25 MR. KLINE: I withdraw my objection.

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1 MR. HARRIS: Okay. Thank you.
2 MS. ROBESON: I just want to make the record
3 clear --
4 MR. HARRIS: I understand.
5 MS. ROBESON: -- when we go up and sometimes these
6 references to particular names or projects, not everyone
7 will know what they are, that's all.
8 MR. HARRIS: The term --
9 MS. ROBESON: I understand.
10 MR. HARRIS: -- the term town center is used three
11 different ways in Clarksburg. One is with respect to the
12 town center district reflected in the master plan, one is
13 with respect to the town center mixed use project previously
14 known as the Newlands project that the, the Terrabrook
15 project, before that the Klebanoff project.
16 MS. ROBESON: The one --
17 MR. HARRIS: The one that I just described the
18 boundaries of.
19 MS. ROBESON: Yes.
20 MR. KLINE: Which is the neighborhood retail
21 community.
22 MR. HARRIS: Right. And then the third use,
23 definition of town center frequently is the town center
24 neighborhood retail space that Dave Flanagan and Elm Street
25 wants to propose.

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1 MS. ROBESON: All right. So with that, you know,
2 it is testimony, I know, but I'm desperate for -- yes?
3 MR. CHEN: I object because I think this goes
4 beyond direct examination. I mean this is -- and I
5 appreciate Mr. Harris's identification of what the
6 terminology is because, frankly, I was confused at one point
7 about it. I now understand that he is talking about
8 apparently another project on the east side of 270 that is
9 beyond direct examination. But --
10 MS. ROBESON: I'm going to let him answer because
11 there was testimony about the 300,000 square foot number in
12 the master plan. I'm going to take it for the weight it
13 deserves because, for a lot of reasons, but go ahead.
14 MR. HARRIS: So back to the question. Within
15 that --
16 MS. ROBESON: Back to the question.
17 MR. HARRIS: -- boundary area that I mentioned,
18 which I've referred to as the town center mixed use project
19 east of 355 --
20 MR. CHEN: East of 355?
21 MS. ROBESON: West.
22 MR. HARRIS: East of --
23 MS. ROBESON: East.
24 MR. HARRIS: -- 355.
25 MS. ROBESON: Right.

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1 MR. CHEN: This side?
2 MR. HARRIS: Yes.
3 MS. ROBESON: He's right.
4 MR. HARRIS: Correct. And you're looking at it.
5 MR. CHEN: I'm looking at it.
6 MR. HARRIS: You're looking at a diagram of page,
7 on page 45 --
8 MS. ROBESON: 45.
9 MR. HARRIS: -- of the master plan --
10 MS. ROBESON: Right.
11 MR. HARRIS: -- which is an artist -- would you
12 agree with me that's an artist's, you know, you know, sort
13 of --
14 MS. ROBESON: Well --
15 MR. HARRIS: -- graph of that area?
16 MS. ROBESON: -- it says it's an illustrative --
17 MR. HARRIS: Okay. Fine.
18 MS. ROBESON: -- sketch --
19 MR. HARRIS: Okay.
20 MS. ROBESON: -- so he doesn't have to clarify
21 that.
22 BY MR. HARRIS:
23 Q Within that area shown on Exhibit 40, page 45 of
24 the master plan, are you aware of any land that would be
25 sufficient size to build an outlet center?

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1 MS. ROBESON: If you know.
2 THE WITNESS: I don't know what the land
3 requirements are for an outlet center. What I was, what I
4 was looking at when I testified about this illustration
5 earlier and the illustration in, submitted by the
6 development for the development plan amendment for the Cabin
7 Branch area was that this whole area had a, demonstrated a
8 mix of use that would be typical, would be desired in the
9 town center. That's pretty much what it says here.
10 Now there's also, to the other side of the
11 historic district, which is centered on Maryland 355, is a
12 transit center and a lot of, you would assume, and I did
13 assume when I read the master plan, that that is the
14 location where you would have much of the additional retail
15 or commercial community activity space separate from what
16 more of the neighborhood-oriented retail center on the other
17 side of the historic district. That seems to be the vision
18 that the master plan is suggesting. Whether or not there is
19 sufficient land there for an outlet center, I couldn't speak
20 to.
21 MS. ROBESON: Well, the question is in that area
22 shown on Figure 20 on page 45 of the master plan, if you
23 know.
24 THE WITNESS: But that to me doesn't give me the
25 visual impact of what I view as an outlet center. However,

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1 there could be some very high end and specialty retail or
2 commercial spaces in that location at a much higher density
3 than what I, my vision of an outlet center is. Now, you
4 know, there's always been confusion to my mind in this
5 discussion all along as to, you know, what is being proposed
6 in Cabin Branch. Is it an outlet center? Is it high end
7 specialty retail? Are those mutually exclusive? You know,
8 those kind of issues are, kind of go to the core of some of
9 these. Again, I can't speak to what an outlet center, you
10 know, which in my mind is a much larger provision for
11 external parking and things that are shown in this town
12 center illustrative sketch.
13 BY MR. HARRIS:
14 Q But, Mr. Noonan, I think you just said that you
15 don't know whether this development plan amendment is
16 proposing an outlet center or some other type of specialty
17 retail, is that, wasn't that your testimony?
18 A I think the language in the development plan
19 amendment and those things is, confuses the issue about what
20 is proposed to you. When I saw your proposal, I saw high
21 end, specialty retail kind of centers that consisted with
22 your own development plan amendment justification statement
23 would have set, set the Cabin Branch area forth as a unique
24 experience, an area that would serve as a center for the
25 Clarksburg area and that's where I thought the inconsistency

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1 was.
2 Now I think an outlet center in terms of my vision
3 for that which is more of what's happening with Leesburg and
4 knowing that's a 20-year-old design, is inconsistent with
5 the Cabin Branch neighborhood proposal for a variety of
6 other reasons in that it doesn't provide the high-end
7 employment in support of the I-270 corridor. It doesn't, it
8 doesn't provide the, you know, the neighborhood environment
9 and recent for a neighborhood scale retail. It's much more
10 high-density and larger scale than that. So it's
11 inconsistent, an outlet center is inconsistent with a
12 variety of areas. You know, whether an outlet center is
13 ever going to be a part of the town center approach is
14 something I really can't speak to, but it seems to me that
15 when you provide high-end, specialty retail and a community
16 focus, not just for Cabin Branch, but for the whole
17 Clarksburg area in the Cabin Branch area, that that
18 conflicts with what the master plan envisions for the town
19 center. And I think that was the core of what I was --
20 MR. HARRIS: Madam Examiner, out of politeness to
21 Mr. Noonan, I let him go on extensively there. It was not
22 responsive to the question at all. My question was whether
23 he knew whether there was outlet retail planned at Cabin
24 Branch or not and then what he did was he reiterated all of
25 his testimony. If we're going to get through this hearing,

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1 he's going to have to answer the questions and not return
2 to, you know, his stump speech.
3 MS. ROBESON: Well, I think that he was expressing
4 that he's unsure of exactly what type of retail is being
5 proposed. Now I'm aware of your testimony that -- I think
6 he was reflecting that an outlet is not an outlet is not an
7 outlet which is what, I think, Mr. Bogorad testified, that
8 this is a new breed of premium retail. And then I think
9 that's what he was reflecting, struggling with in his
10 answer.
11 MR. HARRIS: Okay.
12 BY MR. HARRIS:
13 Q And, in fact, your confusion about what kind of
14 retail, your lack of understanding about what the retail
15 would be is reflected in page 3 of your pre-hearing
16 statement, Exhibit 31, isn't it, where you say, "The
17 specialty retail likely to be located here would include
18 retailers like Kohls, Target and Dick's Sporting Goods.
19 Have you heard any testimony here in the five or six days of
20 hearings that that is the type of retail proposed here?
21 A Not specifically, no.
22 MS. ROBESON: So you aren't going to have a
23 Dick's?
24 BY MR. HARRIS:
25 Q At page 1 of your pre-hearing statement, Exhibit

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1 31, let me find this. Bear with me a minute. I can't find
2 it. Move on. Did you hear Mr. Bogorad's testimony when he
3 spoke?
4 A Yes.
5 Q And did you hear his opinion that outlets, outlet
6 retail does not adversely impact neighborhood retail?
7 A Yes.
8 Q And did you -- was part of his reasoning that the
9 two are, I'll call it apples and oranges, very different
10 types of retail?
11 A Yes.
12 Q And that they draw from different population
13 bases, neighborhood retail drawing from the local
14 neighborhood and outlet retail drawing from a much larger,
15 regional area?
16 A Yes.
17 Q And do you have any different opinion about that?
18 A No.
19 Q Are you aware that there is a strong desire to
20 have a grocery in the town center retail area?
21 A Up in the neighborhood where we had a retail area,
22 yes.
23 Q The neighborhood retail we were speaking of a few
24 minutes ago --
25 A Yes.

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1 Q -- east of 355?
2 A Yes.
3 Q And would you agree with me that the support for,
4 or the ability to build a grocery store depends upon demand
5 for that?
6 A Certainly, yes.
7 Q No one would build a grocery store if there were
8 not going to be customers to use it?
9 A Yes.
10 Q Do you have any formula or calculation by which
11 you personally could conclude the population base or number
12 of households that would support a grocery store?
13 MR. KLINE: Objection. I believe that goes beyond
14 the original examination. I don't recall him testifying on
15 that subject.
16 MR. HARRIS: He testified extensively about the
17 importance of grocery and, you know, both in the town center
18 and in Cabin Branch. It's directly relevant.
19 MS. ROBESON: I don't know if that's a fair
20 characterization, but I don't have the transcript, but I'm
21 going to let him answer because his testimony did deal with
22 the impact of this development on the town center.
23 MR. KLINE: Well, then --
24 MS. ROBESON: So I'll --
25 MR. KLINE: -- may I alter my objection? And my

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1 objection would be it is not his obligation to do an
2 economic analysis to determine that the master plan
3 recommendation was valid and that's what the question
4 presumes is have you gone out and done a study to say that
5 there is still a need for a grocery store in Cabin Branch?
6 And that's not his --
7 MS. ROBESON: To the extent, you know, if you had
8 the ability to form an expert opinion on it, expert in the
9 sense of your qualifications, can you answer the question?
10 THE WITNESS: No. I don't have a formula.
11 MS. ROBESON: So when you're saying it needs
12 demand, you're speaking as a lay person?
13 THE WITNESS: I'm speaking as a lay person, but I
14 also read the policies in the comprehensive plan and
15 specifically the -- it says part of -- and specifically with
16 regard to the 2011 amendments, which removed the staging
17 provision that we mentioned earlier, I mean the purpose of
18 that amendment was to allow for neighborhood retail space to
19 start moving forward in the neighborhoods separate from the
20 earlier provisions for the, I think permitting or actual
21 development of a certain amount of square foot in the town,
22 footage for neighborhood retail in the town center. The
23 discussion there was to allow retail development to proceed
24 without delay in the neighborhoods and particularly to allow
25 development of retail, including a grocery store, in the

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1 neighborhood. And that was more of what I was speaking to
2 in terms of what was proposed in the Cabin Branch area.
3 MS. ROBESON: Okay. In light of that, do you want
4 to rephrase your question or --
5 MR. HARRIS: I think he's already answered the
6 question, that he's not aware of any basis for calculating
7 the demand for a grocery store. Am I fairly summarizing
8 your comments?
9 THE WITNESS: I'm sure there is one, but I know
10 what it is.
11 MR. HARRIS: Yes. Okay.
12 BY MR. HARRIS:
13 Q But you are aware that Mr. Flanagan and Elm Street
14 are very anxious, excuse me, anxious to build a grocery
15 store in the town center mixed use project when they are
16 able to do so?
17 MR. KLINE: Objection. Could you use Mr.
18 Flanagan's letter please?
19 MR. HARRIS: I'm sorry. Elm Street, Third Try
20 Company, that is Third Try, LLC, I think it's called --
21 MR. CHEN: Right.
22 MR. HARRIS: -- appropriately?
23 THE WITNESS: I have heard that testimony, so --
24 MR. HARRIS: Okay.
25 THE WITNESS: -- I'm aware of it.

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1 MS. ROBESON: Is it, wait, wait, wait.
2 THE WITNESS: I'm sorry.
3 MS. ROBESON: Are you being serious that it's
4 called Third Try, LLC?
5 MR. HARRIS: It is called Third Try, LLC.
6 MS. ROBESON: So when you're talking about Third
7 Try, LLC, that is a company formed by Elm Street whose
8 letter is an exhibit in this file?
9 MR. HARRIS: That's correct.
10 MS. ROBESON: All right.
11 MR. HARRIS: So, yes, so I -- when you've been
12 around Clarksburg as long as I --
13 MS. ROBESON: Clearly.
14 MR. HARRIS: -- these things are sort of known,
15 but --
16 MS. ROBESON: Yes, I --
17 MR. HARRIS: -- you know. Okay.
18 BY MR. HARRIS:
19 Q So you're aware that the community would like him
20 to build a grocery store there and he's willing to do it so
21 long as the demand will support it?
22 MR. CHEN: Objection to the terminology community.
23 I mean --
24 MS. ROBESON: Yes.
25 MR. CHEN: -- if you want to state in the

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1 letter --
2 MR. HARRIS: Okay.
3 MR. CHEN: -- give him the letter.
4 MR. KLINE: Yes, just read from the letter.
5 MR. HARRIS: Yes. Okay. Which letter --
6 MR. KLINE: Yes, you just quote from Mr. Flanagan.
7 MS. ROBESON: Wait. Wait. Does he need to read
8 from the letter? Can you just --
9 MR. KLINE: No, no.
10 MS. ROBESON: -- ask --
11 BY MR. HARRIS:
12 Q You're familiar with Mr. Flanagan's letter?
13 A I've heard that testimony.
14 Q Yes.
15 A I'm familiar with it.
16 Q Okay. Fine.
17 MS. ROBESON: Okay.
18 BY MR. HARRIS:
19 Q And would you agree with me that since the 1994
20 master plan was adopted, there have been a lot of changes
21 with respect to grocery services regionally and, in fact, in
22 the Clarksburg/Germantown area.
23 MR. CHEN: Objection. This is going back to,
24 again, the economic aspect of grocery stores. It's outside
25 its area of land planning and land use of grocery stores.

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1 He has already testified he does not have an economics
2 background or a formula for when a grocery store should be
3 appropriate for a location and I think this question is
4 another effort to get into that area and this witness has
5 candidly said he does not have any experience nor expertise.
6 MR. HARRIS: I'll accept that. Would you agree
7 with me, Mr. Noonan, that if there is not demand for a
8 grocery store, you would not expect someone to invest the
9 money to build one?
10 MR. CHEN: Objection. It's totally irrelevant.
11 MS. ROBESON: We've already ruled on that issue
12 and you have -- I'm not sure where this detail is going. He
13 testified to what the master plan envisioned. Is this
14 cross-examining him on the master plan is not going to be
15 able to happen? Is that where you're going with this?
16 MR. HARRIS: That is part of it. The essence of
17 his testimony as I heard it was in his belief Cabin Branch
18 should be held to doing 120,000 square feet of neighborhood
19 retail at a single location. And I'm trying to question the
20 credibility of that statement or the support for it because
21 of any number of circumstances.
22 MS. ROBESON: Well, he is -- I mean you have the
23 rebuttal to bring your witness on to say it isn't going to
24 happen if that's --
25 MR. HARRIS: We will. I'm just trying to see if

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1 he knows anything to the contrary.
2 MS. ROBESON: Well, you've already elicited --
3 MR. HARRIS: Okay.
4 MS. ROBESON: -- that he's not an expert in the
5 financial market strategies for grocery stores.
6 MR. HARRIS: Okay. We can move on.
7 BY MR. HARRIS:
8 Q Would you agree with me, Mr. Noonan, that the
9 pattern and location of neighborhood retail has changed over
10 the past 20 years? For example, I think you might have said
11 the video stores, I think you started off with that as a
12 neighborhood retail use and then said, oh, never mind, they
13 really don't exist any more. So would you agree with me
14 that that's one neighborhood retail use that doesn't exist,
15 let's simply the question?
16 A I would think not. I mean I, the video store
17 reference was in, was in the list of uses in the technical
18 amended and clearly that's not a use.
19 Q And would you agree with me as well that in the
20 past the proliferation of Home Depot and Lowe's has resulted
21 in, you know, a relatively rare occurrence of a hardware
22 store in a neighborhood retail center?
23 MR. CHEN: Objection. Again --
24 MS. ROBESON: If you know.
25 THE WITNESS: From general observation, not as an

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1 expert, I think that's clear. Yeah.
2 MR. HARRIS: And would you agree with me as well
3 that with online banking, particularly with the younger
4 generation --
5 MS. ROBESON: Okay. I understand where you're
6 going with this. I don't think he's the witness to ask and
7 I don't want to preclude you from making a point, but he's
8 already said he's not an expert.
9 MR. HARRIS: Okay.
10 MS. ROBESON: You're asking what particular uses
11 are involved in neighborhood retail, I guess, with the
12 ultimate perhaps conclusion that you don't need as much
13 neighborhood retail. That's where I see you going, is that
14 correct?
15 MS. ROBESON: You got the point perfectly.
16 MS. ROBESON: And I don't think that he is the
17 witness. You have a far better witness back in the back row
18 there, Mr. Bogorad.
19 MR. HARRIS: And thank you. Thank you. We can
20 move along then.
21 BY MR. HARRIS:
22 Q Would you agree with me that Exhibit 60(c), the
23 technical appendix, done in connection with the master plan
24 had a forecast at least at that time of the amount of
25 neighborhood retail space for various areas?

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1 A Yes.
2 Q And west of I-270, does it suggest that the
3 potential demand for neighborhood retail space would be
4 75,000 square feet?
5 A That's the number on the chart, or on the table,
6 yes.
7 Q And would you agree with me that potential, that
8 changes over the past 20 years and those over the coming
9 decades could affect that demand?
10 MR. CHEN: Again, I've got to object. This is not
11 land -- this question doesn't go to land planning or master
12 planning compliance.
13 MS. ROBESON: It is in the master plan. It's in
14 the technical appendix. So I'm going to let him answer.
15 THE WITNESS: Could you rephrase?
16 BY MR. HARRIS:
17 Q Yes, I've got to remember it. The -- wouldn't you
18 agree with me that changes in retail demand and patters
19 could affect the demand estimates that were done prior to
20 the 1994 master plan nearly 20 years ago?
21 MR. CHEN: Suddenly.
22 MS. ROBESON: If you know.
23 MR. HARRIS: Yes.
24 THE WITNESS: I know the retail demands were
25 changing.

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1 BY MR. HARRIS:
2 Q If the evidence in this case were to show that the
3 developer does not plan to do a full-size grocery store in
4 the Cabin Branch area, would you agree with me that that
5 would reduce the forecasted demand for neighborhood retail
6 by say 50 or 60,000 square feet?
7 MR. CHEN: Objection.
8 MS. ROBESON: Well, what's the basis of your
9 objection?
10 MR. CHEN: This is not land planning. This is not
11 compliance with the master plan. This is -- I think this
12 goes back to this area that, maybe the Examiner disagrees
13 with, but I think this goes to market analysis and
14 justifications based upon what developers are willing to do
15 and I don't believe that is within the area that this
16 witness testified about.
17 MS. ROBESON: I do think it's a fair -- I'm trying
18 to remember his testimony -- it may be a fair question from
19 a land planning standpoint if he knows --
20 MR. HARRIS: If he knows.
21 MS. ROBESON: -- to ask him what the size of a
22 full-service grocery store is.
23 MR. HARRIS: Well, we can start with that.
24 BY MR. HARRIS:
25 Q Do you know the average size of a full-service

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1 grocery store?
2 A I don't have a specific number. I've heard
3 numbers maybe from 60 to 100,000 square feet.
4 Q Okay. And so your reading of the master plan is
5 that it recommends 120,000 square feet of neighborhood
6 retail, is that correct?
7 A That's correct.
8 Q And that assumed a grocery store, is that correct?
9 A That's correct.
10 Q And so it would be simple arithmetic that if you
11 were not doing a grocery store, the demand would be the
12 difference?
13 A I guess on a --
14 MR. CHEN: Objection to the use of the word
15 demand.
16 MS. ROBESON: I sustain. Can you rephrase it
17 without demand because he's not --
18 MR. HARRIS: That the likely retail there that
19 could be supported would be reduced by that amount.
20 MS. ROBESON: Do you want to note an objection?
21 MR. CHEN: Well, I think this question could
22 simply say if you reduce that number that you are saying is
23 the amount of a retail grocery store, does that therefore
24 leave a different number for what the master plan demands
25 for this area?

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1 MR. HARRIS: I accept Mr. Chen's question.
2 MR. CHEN: I actually can do the math, I'm just
3 not quite sure what I'm getting into.
4 THE WITNESS: Obviously, if you reduce 120,000 by
5 60 to 100, you've reduced it --
6 MS. ROBESON: Yes.
7 THE WITNESS: -- the total square footage.
8 BY MR. HARRIS:
9 Q Would you agree with me that building neighborhood
10 retail in the Cabin Branch would compete with neighborhood
11 retail that might be built in the town center district?
12 MS. ROBESON: Yes?
13 MR. CHEN: I don't know where we're going.
14 MS. ROBESON: Mr. Harris, he -- that was Mr.
15 Bogorad's testimony. He has not purported to -- he just
16 said what the master plan needs.
17 MR. HARRIS: His testimony included his opinion
18 that building specialty retail was going to harm the town
19 center, implying that he has some understanding of the
20 economic implications of these things. Personally, I don't
21 think he does but, you know, I'm trying to understand, you
22 know, the extent of his knowledge on these things. If he
23 says he doesn't know, then that's fine, but it probably then
24 means he doesn't know what the impact of --
25 MS. ROBESON: Well, I thought his --

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1 MR. HARRIS: -- specialty retail would be.
2 MS. ROBESON: I thought his testimony wasn't just
3 to the retail, but to this creation of a place or --
4 MR. HARRIS: We, I will get there too.
5 MS. ROBESON: Okay. I'm going to overrule Mr.
6 Chen's objection. I think --
7 MR. CHEN: I didn't object. I said, you asked me,
8 I said I'm going to let it go.
9 MS. ROBESON: Well, then why am I like, I --
10 MR. CHEN: It's just out of habit.
11 MS. ROBESON: I know. All right.
12 MR. HARRIS: Okay.
13 MR. CHEN: Seriously, I said --
14 MS. ROBESON: My bad.
15 MR. KLINE: He withdrew his objection.
16 MS. ROBESON: Okay. All right. I'm sorry. Go
17 ahead, Mr. Harris.
18 BY MR. HARRIS:
19 Q I believe the question was wouldn't the
20 construction of neighborhood retail in Cabin Branch, let's
21 assume first with a grocery store, compete with the ability
22 to construct neighborhood retail in the town center?
23 A Again, I don't believe it would and I, I do
24 reference all of my comments about these square footages and
25 things back to the master plan because the master plan did

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1 an analysis, you know. And even if they started there, the
2 square footage of 75,000 square feet for neighborhood retail
3 and the tech will amend it, you know, what they put in the
4 plan was a recommendation for 120,000 square feet. But they
5 also put in recommendations for similar square footage, I
6 could find the table, at New Cut Road, it's got another new
7 name, and neighborhood retail in the town center. So I
8 believe they did the analysis to determine that there was no
9 inherent competition between neighborhood retail development
10 at the appropriate time when the residential development
11 occurred at Cabin Branch and the town center. So I would
12 answer back not back to what the authors of the master plan
13 said on this issue and that they don't feel that that's a
14 direct competition.
15 Q Okay. And you're aware that Mr. Flanagan has a
16 different opinion --
17 A Absolutely.
18 Q -- that he believes constructing that kind of
19 retail here would prevent construction of the town center
20 retail?
21 A I heard that testimony.
22 Q And you have nothing to contradict that with other
23 than the staff's estimate in 1994?
24 A Well, you know, I can't contradict Mr. Flanagan's
25 opinion. He's got an opinion what he needs in terms of

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1 competitiveness. My understanding of the purpose of
2 neighborhood retail in the master plan was to provide a
3 small community center with enough retail and a walkable
4 area accessible to the residents of the various
5 neighborhoods, including the residential portions of Cabin
6 Branch, New Cut Road and the town center area.
7 Q The, with respect to the inter-relationship
8 between specialty or outlet retail and employment uses, I
9 think you heard Mr. Bogorad testify about the symbiotic
10 relationship or I think he might have used the word
11 catalytic effect of the retail on the attraction of
12 employment. Do you have any data to suggest a contrary
13 conclusion?
14 A Do I have data in the, for the Clarksburg area?
15 No, I don't have separate data.
16 Q Have you ever done a study of the inter-
17 relationship between outlet retail and a mixed use
18 employment center?
19 A No.
20 Q And would you agree with me that if a 484,000
21 square, if 484,000 square feet of retail is built at Cabin
22 Branch, that would still leave close to 2 million square
23 feet for other employment uses under the approved
24 development plan that includes 2,420,000 square feet of non-
25 residential use?

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1 A Yes, I do that math too, yes.
2 Q Okay. You're aware that the planning staff and
3 the Planning Board both concluded that this development plan
4 amendment is consistent with the master plan
5 recommendations, are you aware of that?
6 A Yes.
7 Q And you disagree with them?
8 A Yes.
9 Q Okay. And you disagree then with council member,
10 former County Council member Knapp who testified in support
11 here?
12 A I was here and I don't remember that testimony,
13 but --
14 Q Okay.
15 A Okay. Yes.
16 MS. ROBESON: Well, if you know. Did you hear his
17 testimony?
18 THE WITNESS: I was there. I don't recall that
19 specific --
20 MS. ROBESON: Okay.
21 THE WITNESS: -- testimony.
22 MR. HARRIS: I don't think I have any more
23 questions.
24 MS. ROBESON: Well, you know what I neglected to
25 do, so you may --

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1 MR. HARRIS: Oh.
2 MS. ROBESON: -- have more questions? I neglected
3 to allow Mr. Kline to ask questions before you got your
4 chance.
5 MR. HARRIS: Oh, he did. He asked them last week.
6 MR. KLINE: I did.
7 MS. ROBESON: Oh, okay.
8 MR. HARRIS: Or early this week.
9 MS. ROBESON: All right.
10 MR. KLINE: I'd be glad to ask more.
11 MS. ROBESON: No, no, no, no, no, no. We will do
12 redirect based solely on Mr. Harris's questions. Mr. Kline.
13 MR. KLINE: Do you want to do it now?
14 MS. ROBESON: Yes.
15 MR. KLINE: Yes. Sure.
16 MR. CHEN: Can we take a 5-minute break?
17 MS. ROBESON: Yes. In fact, I was --
18 MR. KLINE: Yes, that would help.
19 MS. ROBESON: -- just thinking --
20 MR. KLINE: That would help me.
21 MS. ROBESON: -- maybe I would be more on the ball
22 if we took a 5-minute break. So, yes, we'll go off the
23 record for five minutes.
24 (Recess.)
25 MS. ROBESON: All right. We're back on the

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1 record. I believe we have redirect, Mr. Chen, or who --
2 MR. CHEN: You were, Mr. Kline you had called,
3 yes.
4 MS. ROBESON: Thank you.
5 MR. CHEN: Sure.
6 MS. ROBESON: I really rely on those transcripts,
7 so clearly -- because I like to focus on what people are
8 saying during the hearing. Go ahead, Mr. Kline.
9 REDIRECT EXAMINATION
10 BY MR. KLINE:
11 Q Mr. Noonan, what I'm trying to do is go in the
12 same chronological order as you brought up your comments.
13 When we were talking about the Leesburg Premium Outlet
14 Center, Mr. Harris, I asked you a question about features
15 that were in the field that sort of impeded walkability from
16 any surrounding uses to the facility, in fact, I'm sorry,
17 between --
18 MS. ROBESON: We're talking about Leesburg --
19 MR. KLINE: Yes.
20 MS. ROBESON: -- Exhibit 107 and 101?
21 MR. KLINE: Yes.
22 MS. ROBESON: Okay.
23 MR. KLINE: Yes, ma'am, Leesburg. Do you recall
24 that question about the features that impeded walkability?
25 THE WITNESS: Yes.

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1 BY MR. KLINE:
2 Q In your professional opinion as a planner, how
3 does a regional outlet center serve the needs of the
4 residents of Leesburg surrounding the outlet center?
5 A Are we talking about walkability now or a
6 broader --
7 Q Let's skip the walkability until later. Right now
8 what service does it provide to those residents?
9 MR. HARRIS: Objection. I don't think I asked him
10 at all about that.
11 MS. ROBESON: You asked him about the walkability.
12 MR. HARRIS: Yes, correct.
13 MS. ROBESON: I'm going to let it -- I'm going to
14 let you answer it and --
15 THE WITNESS: Okay.
16 MS. ROBESON: Because I think the -- I do think
17 it's relevant because the point you were making is
18 distinguishing Leesburg from this community. So I'm going
19 to let him do it and take it for the weight it deserves.
20 MR. HARRIS: Beyond that, during some unsuccessful
21 efforts to cross-examine him, it was determined that he
22 wasn't an expert on this kind of retail and so, you know, I
23 don't know how he can be offering his opinion on how a
24 regional retail center serves local residents or doesn't
25 serve them.

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1 MS. ROBESON: Well, he acknowledged there's a
2 difference between comparative retail and neighborhood
3 service retail. So --
4 MR. CHEN: And he was examined by that by Mr.
5 Harris.
6 MR. HARRIS: I did not ask him how the regional
7 service center, the regional retail center would serve the
8 residents.
9 MR. KLINE: My -- the reason I asked the question
10 was the implication of that question was that people could
11 walk easily to the center.
12 MS. ROBESON: Yes, I'm going to let him answer.
13 MR. HARRIS: I did ask about that.
14 MS. ROBESON: And you can object. I thought he
15 did ask about that, but do you want to, do you need to
16 rephrase your question?
17 BY MR. KLINE:
18 Q My question was how does a regional outlet center
19 serve the needs of the residents that surround the center?
20 A Again, you're only talking about Leesburg?
21 MS. ROBESON: Yes, he was talking about the
22 Leesburg outlet center.
23 THE WITNESS: I mean Leesburg clearly serves a
24 market that's more regional in nature. It's not a
25 neighborhood retail center. It's not oriented towards a

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1 surrounding, residential concentration of residents. I
2 don't believe it has some of the neighborhood retail
3 functions that are envisioned in the technical report. So
4 its function is to serve a more regional economic market and
5 not local residents.
6 BY MR. KLINE:
7 Q And then your, so your answer, would your answer
8 be the same with regard to serving the needs of the
9 employees that might be located in the surrounding area?
10 A Well, the employees in the surrounding area would
11 obviously have to make a decision, get in their automobiles
12 and drive to that location. So I would think if, you know,
13 it's, they're as likely to go there as they are to any other
14 kind of area of retail outlet for the services they're
15 looking for at lunchtime or other times, but it's not, it's
16 not associated with the office and development, or
17 residential development around it.
18 Q And why would they get in their car and drive
19 there? What are they going to purchase when they arrive
20 there?
21 A Well, it's an outlet center. I assume they're
22 going to go for things they don't normally need on a daily
23 basis, but they need on a more episodic basis like, you
24 know, you might buy a suit jacket or something. But on the
25 other hand if there are restaurants in the retail center, in

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1 the outlet center, they could possibly go there for that
2 purpose as well.
3 Q When you made your site visit, did you notice or
4 did you see any office buildings with high technology
5 offices surrounding the regional outlet center at Leesburg?
6 A Again, if you go to our list of photographs, a
7 list of photographs, there were some area, there was some
8 office development that could be considered either high tech
9 or high employment. I'm differentiating between the kind of
10 office development you would find in any typical suburban
11 shopping center or government office centers. I mean there
12 were in one photograph in particular, there was a consultant
13 phone that you're familiar with and there is also some high-
14 tech development. In Exhibit 101(j), for example, there's
15 some office development there that could be viewed as more
16 high-tech in nature, a medical firm and other concerns.
17 Q What was the predominant type of office use that
18 you found surrounding the Leesburg Center?
19 A Most of it was government-related or oriented
20 towards the general Leesburg area. It wasn't high-tech card
21 or employment kind of thing, it was more office related to,
22 you know, attorneys, dentist functions, if that's an office
23 function, those kind of things.
24 Q Were you able to conclude by your observations the
25 features that impeded walkability were a detriment --

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1 MR. HARRIS: Objection.
2 MR. KLINE: -- to moving, detriment --
3 MS. ROBESON: Basis?
4 MR. HARRIS: Leading question. Were you able to
5 conclude that?
6 MR. KLINE: Give an opinion.
7 MR. HARRIS: Did you have a conclusion as to the
8 effect.
9 MS. ROBESON: Okay.
10 MR. KLINE: I'll finish the sentence and we'll use
11 Mr. --
12 MR. HARRIS: Okay. Okay.
13 BY MR. KLINE:
14 Q Did the features that you observed that impede
15 walkability have an effect that you can observe as to an
16 ability to attract high technology office users to this
17 location?
18 A I don't know that you could speak to exactly
19 whether or not the retail outlet could attract office in
20 that perspective, but certainly if a high-tech office
21 development occurred around it, they couldn't walk directly
22 to this location. There are no sidewalks. There are
23 fences. There are obstructions you very often see in a
24 suburban location for walkability.
25 Again, as was pointed out, this wasn't planned as

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1 a mixed use development. This was a standalone development.
2 It has all the negatives from a walkability perspective that
3 has. So if the outlet were to attract office development
4 around it, it wouldn't have that mixed use component or feel
5 to it.
6 Q Drawing your attention to page 46 of the
7 Clarksburg master plan which we have been to other times
8 today, it's correct, is it not, as stated in the beginning
9 of paragraph 4 that commercial uses in the town center can
10 be as much as 300,000 square feet? That's what is proposed?
11 A That's in addition to the 153,000 square feet of
12 neighborhood retail, yes.
13 Q So you make a distinction between the two types of
14 retail?
15 A They make that distinction here, yes.
16 Q Okay. And that 300,000 square feet of retail
17 that's not neighborhood-oriented could attract specialty
18 stores, could it not?
19 A I would assume.
20 Q Is that what you would assume to see in a town
21 center?
22 MR. HARRIS: Objection.
23 MR. CHEN: You opened the door.
24 MR. HARRIS: His testimony before was that he
25 didn't know about those things. I don't think he's gotten

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1 that much smarter in the last half an hour.
2 MS. ROBESON: Your question was?
3 MR. KLINE: Would the square footage in the town
4 center that is not suggested to be 150,000 square feet of
5 neighborhood retail appeal to specialty retail users?
6 MS. ROBESON: That is going -- I'm going to
7 sustain that objection.
8 BY MR. KLINE:
9 Q There was questions asked about grocery stores in
10 the town, I'm sorry, in the Cabin Branch neighborhood. Is
11 there anything in the record other than Mr. Flanagan's
12 letter that says there is no need for a grocery store in the
13 Cabin Branch neighborhood?
14 A I don't know what's in the record.
15 Q Right. Let me rephrase that. Is there anything
16 that you have heard or read that is to indicate that there
17 is no need for a grocery store in the town center, I'm
18 sorry, Cabin Branch?
19 A I would again go back and defer to the, what the
20 master plan says. And as it was revised in 2011, that there
21 was, there was a desire still of the authors of the master
22 plan for a grocery store in the Cabin Branch area.
23 Q You referenced the 2011 amendment --
24 A Yes.
25 Q -- the limited amendment.

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1 A The limited amendment.
2 Q Would you agree that focuses on the question of
3 retail, neighborhood-oriented retail use?
4 A Yes, it does.
5 Q In the Cabin Branch and New Cut neighborhoods?
6 MR. HARRIS: Objection.
7 MS. ROBESON: Basis?
8 MR. HARRIS: First of all, it's a leading
9 question. Secondly, as my colleague three seats over will
10 tell me, the document speaks for itself and I don't think
11 that's --
12 MS. ROBESON: You cannot -- well --
13 MR. HARRIS: I don't think that's what it says
14 personally.
15 MS. ROBESON: He can ask what his interpretation
16 is --
17 MR. HARRIS: That's fine.
18 MS. ROBESON: -- of the 2011 amendment vis-a-vis --
19 THE WITNESS: Okay. Am I to answer the question?
20 I'm sorry.
21 MS. ROBESON: Yes. Yes.
22 THE WITNESS: I'm pausing because I want to be
23 sure.
24 MS. ROBESON: I could tell. I apologize. Go
25 ahead.

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1 MR. KLINE: Maybe I can try and find something
2 here to --
3 THE WITNESS: Well --
4 MR. KLINE: Go ahead please.
5 THE WITNESS: Well, again, the purpose of the
6 directive was to assure that a certain amount of retail,
7 neighborhood retail development could go forward in the
8 neighborhoods in particular. And in order to do that, they
9 had to address some of the staging provisions that were in
10 the original master plan, so that's the purpose of the
11 limited amendment was to assure that those retail uses moved
12 forward in the neighborhoods, the neighborhood retail uses.
13 BY MR. KLINE:
14 Q Wouldn't the 2011 limited master plan amendment
15 have provided an opportunity --
16 MR. HARRIS: Objection.
17 MS. ROBESON: Basis?
18 MR. HARRIS: Again, a leading question.
19 MS. ROBESON: Mr. Kline, I know technically that
20 this may or may not be cross-examination, but I do think we
21 have agreed that when it's not your witness you --
22 MR. KLINE: Okay.
23 BY MR. KLINE:
24 Q Did an opportunity present itself at the time of
25 the 2011 limited master plan amendment to reassess the

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1 retail needs in the neighborhoods?
2 MR. HARRIS: Objection. That was not part of his,
3 my cross-examination of him. It goes beyond any of that.
4 MS. ROBESON: Well, where are you leading with
5 this, Mr. Kline? You must be trying to --
6 MR. HARRIS: In fact, I don't think I asked
7 anything about the 2011 amendment.
8 MS. ROBESON: Well, it could be --
9 MR. HARRIS: But I know I didn't ask that.
10 MS. ROBESON: -- to another point. So where,
11 what's your point?
12 MR. KLINE: Yes. Well, the question that was
13 asked was a technical appendix dealing with how much square
14 footage did the technical appendix recommend and I'm just
15 trying to have the witness state whether or not in 2011 he
16 decided, gee, maybe there isn't a need and we should rethink
17 that at this point in time.
18 MS. ROBESON: Well, you can ask, you know, whether
19 the 2011 made any changes to the assumptions in the master
20 plan.
21 MR. KLINE: That's probably a better phraseology
22 than mine, so could you answer the question?
23 MS. ROBESON: And the assumptions in the, I guess
24 it's the technical appendix, correct?
25 MR. KLINE: Mr. Noonan --

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1 MS. ROBESON: Do you under --
2 THE WITNESS: I'm ready to answer.
3 MS. ROBESON: Yes.
4 THE WITNESS: Okay.
5 MS. ROBESON: Go.
6 THE WITNESS: Go. The limited amendment did not
7 make any changes to the underlying square footage and sort
8 of assumptions that appeared in the master plan. And,
9 again, the master, the master plan clearly lays out on, let
10 me find the right page number, the square footage for
11 neighborhood retail uses in each of the different areas.
12 MS. ROBESON: Right. We've been through those.
13 THE WITNESS: We can find it if we needed to.
14 MS. ROBESON: Yes.
15 BY MR. KLINE:
16 Q Then as of 2011, the Montgomery County Council
17 confirmed --
18 MR. HARRIS: Objection.
19 MR. KLINE: Confirmed how much retail square
20 footage --
21 MR. HARRIS: Objection.
22 MR. KLINE: -- should be found in the Cabin Branch
23 neighborhood.
24 MS. ROBESON: Basis?
25 MR. HARRIS: Again, a leading question. Secondly,

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1 way beyond the scope of the cross-examination. I didn't
2 examine him about what happened in 2011. And, thirdly, we
3 had testimony the other day about this. He had ample
4 opportunity to, from Mr. Unterberg, before Mr. Noonan, he
5 had ample opportunity to question Mr. Noonan on direct about
6 this. Mr. Unterberg testified that --
7 MS. ROBESON: Well --
8 MR. HARRIS: -- this master plan amendment was
9 extremely limited --
10 MS. ROBESON: Okay.
11 MR. HARRIS: -- and was driven by Elm Street.
12 MS. ROBESON: As to your leading objection, I will
13 sustain that. As to your beyond the scope objection, I
14 think it is within the scope because he is addressing some
15 of the issues that you raised on cross.
16 MR. KLINE: Well, the question was --
17 MS. ROBESON: So please try to, you know, in a way
18 that you can ask him as to his interpretation because that's
19 what he's for, as an --
20 MR. KLINE: The question asked of Mr. Noonan by
21 the applicant's counsel that triggered my line of
22 questioning was will future technical changes in retailing
23 may reduce the need for neighborhood retail and so I wanted
24 to ask him what did the result of this 2011 limited master
25 plan amendment do with regard to the recommendations in the

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1 1994 master plan?
2 THE WITNESS: This, the limited amendment did not
3 change the underlying assumptions in terms of square footage
4 or purposes of, for neighborhood retail in the various
5 neighborhoods --
6 MS. ROBESON: Okay.
7 THE WITNESS: -- and the master plan.
8 MS. ROBESON: I let that in because it related to
9 the master plan, but I think we excluded Mr. Noonan's
10 testimony on market demands and whether market demands were
11 changing.
12 MR. KLINE: I just --
13 MS. ROBESON: Okay?
14 MR. KLINE: Yes. I just mentioned what the
15 question was, what I thought --
16 MS. ROBESON: No, I understand.
17 THE WITNESS: And, again, I did not answer any, I
18 did not make a statement about market demand.
19 MS. ROBESON: Yes.
20 THE WITNESS: I just merely said that the limited
21 amendment did not change the underlying assumptions --
22 MS. ROBESON: Right.
23 THE WITNESS: -- for the neighborhood retail
24 space.
25 MS. ROBESON: That's why I'm letting it in, but I

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1 am reminding him that, Mr. Kline, that that testimony as far
2 as market demand isn't part of the record.
3 BY MR. KLINE:
4 Q Maybe the best way to just start, the question
5 that was asked triggers my question to you. You were asked
6 will building neighborhood retail in Cabin Branch conflict
7 with neighborhood retail in the town center and your answer
8 to that was, if you could remind me?
9 A I believe I answered that I did not believe that
10 it did compete because the technical amendment in the master
11 plan envisioned a certain amount of neighborhood retail
12 space in all of the areas in which they had neighborhood,
13 residential development to support those neighborhoods.
14 MR. HARRIS: Objection. I thought his testimony,
15 and I was cut off, was that he didn't know the competitive
16 impact. All he was talking to --
17 MS. ROBESON: Yes, I --
18 MR. HARRIS: -- was what the master plan
19 recommended.
20 MS. ROBESON: And that's what he answered.
21 MR. HARRIS: Okay.
22 MS. ROBESON: But I do agree with you.
23 BY MR. KLINE:
24 Q You were asked questions about the MXPDP zone.
25 A Yes.

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1 Q So in your opinion what controls, for purposes of
2 this case, the master plan that says 120,000 square feet, up
3 to 120,000 square feet of neighborhood retail in Cabin
4 Branch or the MXPDP zone that says you could have up to 20
5 percent of the commercial space, of any commercial space?
6 MR. HARRIS: Objection again. I apologize, but
7 again I was cut off from asking him about those kinds of
8 things because they called for a legal conclusion.
9 MS. ROBESON: Sustained. Sustained.
10 MR. KLINE: No further questions of Mr. Noonan.
11 MS. ROBESON: Okay. Mr. Chen?
12 MR. CHEN: Thank you.
13 REDIRECT EXAMINATION
14 BY MR. CHEN:
15 Q Mr. Noonan, do you recollect the series of
16 questions that Mr. Harris asked you about the retail square
17 footage and comparing what was in the master plan and the
18 notion of commercial use vis-a-vis retail use?
19 A Yes.
20 Q Okay. And you answered those questions, right?
21 A I hope I did.
22 Q Were any of those questions --
23 MS. ROBESON: You were talking anyway.
24 MR. CHEN: Right. Yes.
25 MS. ROBESON: Now go ahead.

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1 BY MR. CHEN:
2 Q Do any of those questions change your opinion that
3 you expressed at the last hearing about the master plan's
4 requirements for retail use in the Cabin Branch community?
5 A No, they do not.
6 Q Why?
7 A Well, again, the master plan speaks to the amount
8 of neighborhood retail uses necessary to support the
9 neighborhood as a center. So it's talking about serving the
10 residents of a neighborhood and a neighborhood community.
11 It's not talking about -- the master plan itself does not
12 speak to the Cabin Branch neighborhood as a center for
13 retail other than the neighborhood-oriented retail space.
14 Q And do you recall the questions that were posited
15 to you about the grocery store?
16 A Yes.
17 Q Okay. Do any of those questions alter your
18 opinion that you expressed at the last hearing relative to
19 the provisions in the master plan for a grocery store in the
20 Cabin Branch community?
21 A No, again, I believe the master plan is pretty
22 clear that they view a grocery store and neighborhood retail
23 as essential for the livability of those neighborhood
24 communities.
25 Q Is there anything inconsistent about providing for

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1 a grocery store the size that you've mentioned this morning
2 with the amount of retail that is provided for and the
3 numeric limit provided for in the master plan?
4 A We're talking about the neighborhood retail and
5 numeric limit?
6 Q Yes.
7 A There is nothing inconsistent.
8 Q Why is that? Could you explain that to the
9 Examiner?
10 A Well, again, the neighborhood grocery store,
11 whatever side, is viewed in the master plan as one of the
12 key components of neighborhood retail to serve the residents
13 of that neighborhood. It's not viewed as something that is
14 of a competitive nature between neighborhoods. Each one is
15 a standalone, is -- in accordance to the technical amendment
16 at least, has square footage as suggested there that relate
17 to the number of residents that are going to be living in
18 that neighborhood. So the competitive issue is not one of
19 can there only be one. The master plan views that there
20 should be some, those kind of services of whatever the
21 appropriate size in each of the neighborhoods where
22 residential development is to occur.
23 Q Okay. And Mr. Harris asked if you agreed with the
24 testimony and opinion of Mr. Bogorad --
25 MS. ROBESON: Bogorad.

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1 MR. CHEN: Bogorad, excuse me, I apologize.
2 MR. BOGORAD: No problem. Very few people get it
3 right.
4 MR. CHEN: I'll do it again. So I'll just let you
5 know, it's not intentional. I sincerely apologize.
6 MR. BOGORAD: No, no.
7 MR. CHEN: Thank you.
8 BY MR. CHEN:
9 Q You, Mr. Harris asked you about that opinion and I
10 believe your answer was that you agreed that outlet retail
11 will not adversely impact neighborhood retail, is that
12 correct?
13 A Yes.
14 Q Okay. Now do you also agree that in this specific
15 case, in this specific case, do you agree that the outlet
16 retail --
17 MR. HARRIS: Objection.
18 MR. CHEN: Let me get the question out.
19 MR. HARRIS: Do you agree is a leading question.
20 MR. CHEN: That's okay.
21 MS. ROBESON: Well, you're on, you're on redirect.
22 MR. CHEN: Well, okay, I can change it.
23 BY MR. CHEN:
24 Q Do you have an opinion in this particular case as
25 to whether the proposed outlet retail will or will not have

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1 an adverse impact on the neighborhood retail proposed in the
2 town center? Right now the answer, it's only a yes or a no
3 answer.
4 A I believe it will have --
5 MR. HARRIS: Objection.
6 BY MR. CHEN:
7 Q Just a yes or no, sir.
8 A Yes.
9 MR. HARRIS: Objection.
10 MS. ROBESON: You can't direct him what to say.
11 MR. CHEN: I didn't tell him what to say. I said
12 it's only a yes or no answer at this point. I asked if he
13 had an opinion. I didn't ask him for the opinion yet.
14 MS. ROBESON: Okay. Just a second.
15 MR. HARRIS: Excuse me.
16 MS. ROBESON: Everybody stop talking. Okay. I'm
17 going to -- you can't direct what -- you were trying to say
18 it's not leading, but you also can't limit him from having,
19 if he wishes to offer more. So can you --
20 MR. HARRIS: I have a different objection.
21 MS. ROBESON: And that is?
22 MR. HARRIS: That is he testified when I asked him
23 that he was not qualified and did not know the impact of one
24 kind of retail on the other. Again, I don't think --
25 MS. ROBESON: I don't think --

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1 MR. HARRIS: -- I don't think his knowledge has
2 changed.
3 MS. ROBESON: Okay. Mr. Chen, I didn't think
4 that's what you were asking, but can you --
5 MR. CHEN: You're right. You're right.
6 MS. ROBESON: Well, can you clarify the question
7 again? Can you --
8 BY MR. CHEN:
9 Q Okay. The question I have was did, does he have
10 an opinion as to whether or not the outlet, the proposed
11 outlet retail in this case would have an adverse impact on
12 the neighborhood retail proposed in the town center? And I
13 was asking only for a yes or no answer to that.
14 MR. HARRIS: Whether --
15 MS. ROBESON: Okay. Let him --
16 MR. HARRIS: Okay.
17 MS. ROBESON: -- let him answer yes or no.
18 MR. HARRIS: No, but, no. My objection stands.
19 I'm sorry. He said he didn't --
20 MS. ROBESON: Okay. I understand --
21 MR. HARRIS: -- know about those kind of things,
22 so I don't think he, you know, I'll go back to my line of
23 questioning then on that if I may?
24 MS. ROBESON: Mr. Harris, stop.
25 MR. HARRIS: Okay.

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1 MS. ROBESON: Do you have an opinion unrelated to
2 market demand as to whether the retail development in Cabin
3 Branch will compete with the town center?
4 THE WITNESS: Yes.
5 MS. ROBESON: Okay.
6 BY MR. CHEN:
7 Q What is your opinion?
8 A The retail development of the outlet center can,
9 does very well compete with the potential for retail and
10 development in the town center for the -- I think the clear
11 reason that the, that there's a staging issue and a desire
12 to make sure that the town center concept moves forward and
13 this is a competing center to that -- I'm trying to phrase
14 this the appropriate way -- this will set up a competing
15 center to that that will make it less likely that the town
16 center will succeed in its vision as being the center for
17 activity in the Clarksburg area.
18 Q Did you finish?
19 A Yes.
20 Q Okay. Now Mr. Harris asked you about the zones
21 permitted, excuse me, the uses permitted in the MXPDP zone,
22 do you recall that?
23 A Yes.
24 Q Okay. Notwithstanding what is authorized in the
25 MXPDP zone, what does the master plan propose?

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1 MR. HARRIS: That question has been asked and
2 answered --
3 MR. CHEN: Okay.
4 MR. HARRIS: -- about a --
5 MR. CHEN: I'll take that.
6 MR. HARRIS: -- dozen times.
7 MR. CHEN: Okay. I'll take that. I can live with
8 that position.
9 BY MR. CHEN:
10 Q Page 19 of the staff report, let's go to that.
11 Are you there?
12 A Yes.
13 MR. CHEN: Madam Examiner, do you have it?
14 THE WITNESS: I am just looking for my --
15 MR. CHEN: It's Exhibit 50, I believe.
16 MS. ROBESON: Yes, I had an extra copy, but I'll
17 go to Exhibit 50. All right. I'm there.
18 BY MR. CHEN:
19 Q Okay. Page 19. Let's go to the bottom paragraph,
20 sir.
21 A Got it. We're there.
22 Q Okay. Read in for the record please the full
23 bottom paragraph where it starts, given the fast pace.
24 A "Given the fast pace of development in the past
25 decade and the evolution of present day employment

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1 centers with increasing diversity and scale
2 character and mix of uses, one has to take into
3 consideration the fact that the effectiveness in
4 the applicant building, the specific
5 recommendations from the nearly 20-year-old master
6 plan may not be relevant to current needs and
7 demands of the area, but within considerable
8 effort stay within the vision of the master plan
9 and with sensitivity to the present needs of Cabin
10 Branch neighborhood for transformation from its
11 rural farming nature into a vibrant, mixed use
12 community, the proposed DPA provides a good
13 opportunity for development of successful
14 employment center."
15 Q Do you agree with that paragraph in the staff
16 report as that is a basis upon which to recommend favorable
17 approval of the DPA?
18 A No, I do not.
19 Q Why not?
20 A Well, it has a couple of problems. First is that
21 the vision of the master plan is still in place and there's
22 no, there's no justification at this point in the absence of
23 an amendment to the master plan that the visions of the
24 authors and the community has changed is what should happen
25 in the Clarksburg area. In addition to that, it reaffirms

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1 the intent of the master plan. It says that you have to
2 provide considerable effort, stay within the vision of the
3 master plan and with sensitivity to the present needs of the
4 Cabin Branch neighborhood. The other thing that's said here
5 that's inconsistent is that it actually sets up and
6 discusses and starts to discuss the Cabin Branch area as a
7 center in competition for the town center area.
8 Q Why is that a problem?
9 A Well, that's a problem because that goes to the
10 core of the vision of the master plan which this paragraph
11 says we're supposed to make an effort to stay within.
12 MS. ROBESON: May I --
13 THE WITNESS: The English --
14 MS. ROBESON: -- just ask you to clarify in --
15 where do you see that it's competing as the core, with the
16 core or the focal point of the town center? Where does it,
17 where does that --
18 THE WITNESS: I --
19 MS. ROBESON: -- set that up in your opinion?
20 THE WITNESS: If we refer back to an earlier page
21 here, I can probably find it better in my earlier analysis,
22 okay, excuse me while I find the right page for this.
23 MS. ROBESON: That's fine. Take your time.
24 THE WITNESS: Okay. The staff in this makes a
25 general statement --

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1 MR. HARRIS: Excuse me. What page are you on?
 2 THE WITNESS: I'm actually on my --
 3 MR. HARRIS: Oh, your statement?
 4 THE WITNESS: My statement. I'm sorry.
 5 MR. KLINE: Can you give us -- you mentioned
 6 staff. Can you give us a page in the staff report?
 7 THE WITNESS: Okay. I would have to go back and
 8 look for it there. I'm sorry. My apologies. I'm having to
 9 struggle finding the right page in here. Oh, page 9,
 10 location design, the proposed specialty retail is located to
 11 create a sense of place. It gives identity and vitality to
 12 the Cabin Branch community. It will serve as a catalyst for
 13 employment-based development and further converts into the
 14 development of future, high-tech, high-quality projects in
 15 the area. The specialty retail, although regional in how it
 16 may be perceived, is located and designed to function as
 17 local serving retail and other connections to the Cabin
 18 Branch area. The specialty, on page 10, then it goes on to
 19 say,
 20 "Specialty will serve Clarksburg and the
 21 surrounding areas and is a catalyst for the future
 22 of development areas."
 23 So --
 24 MS. ROBESON: I see. Okay. I also notice on page
 25 12 it has employment and place making and I think that's one

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1 of the staff report and I think that's one of the, the place
 2 making features. Is there anywhere else?
 3 THE WITNESS: Well, I think one of the things you
 4 need to look at is when you pull a statement out of context
 5 in the conference plan, the master plan, you kind of change
 6 the meeting. For example, on page 13 of the staff report
 7 that talks about the town scale of development, it refers to
 8 page 16 of the master plan, they talk there about the
 9 development plan amendment has 2.4 million square feet in
 10 scale as recommended in the Clarksburg master plan and it
 11 talks about a step down in height, that the page they're
 12 referring to, in fact, 16 in the master plan, page 16, has
 13 general policies for the town scale of development that
 14 talks more about, strives to maintain an identity for
 15 Clarksburg separate from Germantown or Damascus includes the
 16 balance of a need for a high-density or transit need for the
 17 protected areas and environmental resources.
 18 MS. ROBESON: I see what you're saying.
 19 THE WITNESS: Those kind of policies are actually,
 20 policies relate directly and are repeated in the town center
 21 district plan and not in the Cabin Branch area. So it's a
 22 question of, the narrow question of just density step downs
 23 from, between I-270 and then --
 24 MS. ROBESON: Oh.
 25 THE WITNESS: -- the residential rural areas is

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1 another area that it inflects.
 2 MS. ROBESON: Okay. Go ahead, Mr. Chen.
 3 MR. CHEN: Thank you very much.
 4 BY MR. CHEN:
 5 Q Also, Mr. Harris asked you a question about the
 6 design of the Leesburg outlets and the design proposed by
 7 the DPA, do you recall that?
 8 A Yes.
 9 Q Okay. I'd like to ask you how the design of the
 10 DPA compares with the town center as contemplated by the
 11 master plan?
 12 A Okay. I think we testified that earlier, if you
 13 look at the illustrative sketch that was discussed a little
 14 earlier on page 45 of the master plan which is Figure 20,
 15 you know, it has the north and west end, which is the top of
 16 the page; the residential area with the neighborhood retail
 17 center. Then in the middle it has the historic district
 18 along Maryland 355 and then below that a higher density,
 19 more mixed use area that would be around the transit center
 20 as envisioned in the master plan.
 21 But if you look at the organization of features
 22 and some of the civic spaces here, that's repeated in the
 23 development plan amendment proposal in their illustrations
 24 for the north area. Remember, we've pointed it out several
 25 times? I think there's one over here.

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1 MR. CHEN: Is that exhibit -- Madam Examiner, I
 2 think you, is it 15 or 45?
 3 MS. ROBESON: It's a slide within 45.
 4 MR. CHEN: Thank you. Do you recall --
 5 MS. ROBESON: Yes, I do.
 6 MR. CHEN: All right. I think it's got its own
 7 number --
 8 MS. ROBESON: I know which one.
 9 THE WITNESS: -- that one slide.
 10 MR. CHEN: Thank you.
 11 BY MR. CHEN:
 12 Q Go ahead.
 13 A Well, at any rate, if you look at the scale of the
 14 features in that and some of the civic uses that are shown
 15 in that North District, those things are shown as well in
 16 the illustrative sketch in the sense that, so you're getting
 17 a sense that the development proposed in the North District
 18 here, and it's in the specialty retail area, is it the kind
 19 of scale and has many of the community features that are
 20 envisioned for the town center itself and not in the
 21 neighborhoods.
 22 BY MR. CHEN:
 23 Q Indeed, when looking at that North District, it
 24 proposes an amphitheater, is that right?
 25 A Yes, at the lower bottom of the page there's an

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1 amphitheater.
2 Q And going back to Figure 20 on page 45 of the
3 master plan, there's an amphitheater proposed there too, is
4 that right?
5 A That's --
6 MR. HARRIS: Objection.
7 THE WITNESS: -- correct.
8 MR. CHEN: Okay. All right.
9 MS. ROBESON: Basis?
10 MR. HARRIS: A leading question.
11 MR. CHEN: Well, is --
12 MS. ROBESON: Oh.
13 MR. CHEN: Oh, excuse me, I apologize.
14 BY MR. CHEN:
15 Q Directing your attention to Figure No. 20 on page
16 45 of the master plan, is an amphitheater indicated on the
17 figure?
18 A There appears to be at the lower, towards the
19 lower left corner down in this area.
20 MR. CHEN: Thank you. No further questions.
21 BY MR. HARRIS:
22 Q You were asked several questions --
23 MS. ROBESON: Wait.
24 MR. CHEN: Whoa.
25 MS. ROBESON: I don't think he's finished.

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1 MR. HARRIS: Oh, I thought he said no further
2 questions?
3 MS. ROBESON: He --
4 MR. HARRIS: I misunderstood. I apologize.
5 MR. CHEN: I get last shot at my own witness,
6 not --
7 MS. ROBESON: No, I understand. He misunderstood
8 what --
9 MR. HARRIS: I thought, did he say no further
10 questions?
11 MR. CHEN: Yes.
12 MR. HARRIS: He did say no further questions.
13 MS. ROBESON: But I hadn't closed off the
14 testimony because I was making sure --
15 MR. HARRIS: I see.
16 MS. ROBESON: You're very good in anticipating
17 what comes next. So are there no further questions?
18 MR. CHEN: No further questions.
19 MS. ROBESON: Okay. And I'm going to let you -- I
20 don't have further questions, so you are -- this is your
21 time to go and recross. I'm sorry, this is - you're raising
22 issues that are important to me, so that's why I want to
23 make sure they're covered in the record. Go ahead, Mr.
24 Harris.
25 RECROSS EXAMINATION

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1 BY MR. HARRIS:
2 Q I think you would agree with me that the, and did
3 agree with me before, that the siting of the Leesburg center
4 and its surrounding circumstances are very different than
5 what we have at Cabin Branch?
6 MR. CHEN: Objection. Leading with do you agree.
7 MS. ROBESON: Well, he can lead because he's
8 cross-examining.
9 MR. CHEN: Okay.
10 MS. ROBESON: It's confusing because --
11 MR. CHEN: I'm just thinking what's good for the
12 goose is good for the gander, but I defer to the Examiner.
13 MS. ROBESON: Well, no, I'm going to let him ask
14 leading questions in this case. Go ahead, Mr. Harris.
15 THE WITNESS: Yes, I agree, the design is
16 different.
17 BY MR. HARRIS:
18 Q You testified about the purpose of the 2011
19 amendment and I think you said that it was to assure that
20 certain neighborhood retail could proceed, was that your
21 testimony?
22 A Yes, I think I read the statements. The overall
23 purpose was to make sure the neighborhood retail could
24 proceed and they did that by removing some of the staging
25 provisions.

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1 Q And would you -- did you hear Mr. Unterberg
2 testify the other day?
3 A Yes.
4 MR. CHEN: I'm going to object on anything
5 Unterberg. It's beyond redirect.
6 MR. HARRIS: No, it's directly on this point.
7 MS. ROBESON: Well, what's the topic?
8 BY MR. HARRIS:
9 Q Didn't Mr. Unterberg testify that the 2011
10 amendment was generated by Elm Street Development in
11 connection with the Clarksburg Village Center with its sole
12 purpose being to facilitate that project being able to go
13 forward in lieu of the prior staging prohibition that the
14 town center had to go forward first?
15 MS. ROBESON: Okay. Mr. Noonan, don't answer yet
16 because I have an objection on the table. Mr. Chen, your
17 objection?
18 MR. CHEN: A couple grounds. It goes beyond
19 redirect, number one. Number two, it goes beyond what this
20 witness has testified about the 2011 amendment. He said
21 this is the amendment and he didn't go beyond it. He said
22 this is it, this is clear from the -- in fact, he even
23 referred to the language in the amendment when he testified.
24 MS. ROBESON: I think it was within the scope of
25 Mr. Kline's redirect. So if you can answer, well, I'm going

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1 to let you answer.
2 THE WITNESS: The only thing I can answer to is
3 the stated purpose in the limited amendment itself and the
4 Council directive to the Planning Department as to why this
5 amendment was moving forward. It, honestly, doesn't mention
6 a specific developer. But I'll -- it does mention the need
7 to have retail development in the village centers to
8 proceed. That's really the underlying purpose.
9 MS. ROBESON: Okay, Mr. Harris.
10 BY MR. HARRIS:
11 Q So the only knowledge you have is what you're
12 reading in that document, Exhibit --
13 A Yes.
14 Q -- 86, is that correct?
15 A Yes. I don't know the history, you know, other
16 than what I've heard in testimony.
17 Q Okay. You, in response to Mr. Chen's question,
18 you said that you believed outlet retail at Cabin Branch
19 would compete with the neighborhood retail at the town
20 center, was that your testimony?
21 MR. CHEN: A non-market --
22 MS. ROBESON: No. I'm going to disagree with you.
23 I don't think he said from a market perspective that the
24 retail would compete. I think he -- I said other than
25 market demands, other than market demands, why would this

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1 development compete with generally division for the town
2 center?
3 MR. HARRIS: The question I wrote down, does he
4 have an opinion if outlet will compete with the impact on,
5 compete with an impact of town center? Answer: "Yes." He
6 opines that the outlet does compete with the town center.
7 MR. CHEN: I --
8 MR. HARRIS: No, if that's, if that's not his
9 testimony, that's fine, but --
10 MS. ROBESON: Well, that's not what I --
11 MR. HARRIS: -- that's what I wrote down.
12 MS. ROBESON: -- heard --
13 MR. HARRIS: Is that your testimony?
14 MS. ROBESON: -- because he's already -- well,
15 wait a minute, wait a minute. He has already testified that
16 he didn't think the two retail uses would compete and that's
17 not what I asked him.
18 MR. CHEN: My recollection is, quite frankly, Mr.
19 Harris, you objected to my question. When we got into it,
20 the Examiner corrected me and formulated the question as you
21 stated it, which I --
22 MS. ROBESON: That's correct.
23 MR. CHEN: -- am limited --
24 MS. ROBESON: So my question to him was in what
25 ways other than market demand, and I know that he's already

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1 agreed with you that the two types of retail will not
2 compete.
3 MR. HARRIS: Okay. Just for the, for what it's
4 worth, this was five questions before your question, the one
5 to which I'm referring. It was a question by Mr. Chen, not
6 by you.
7 MS. ROBESON: Well, okay. Then --
8 MR. HARRIS: But that's fine.
9 MS. ROBESON: Mr. -- I'll ask it, okay?
10 MR. HARRIS: Okay.
11 MS. ROBESON: Are the two types of retail, the
12 neighborhood retail called for in the town center and the
13 outlet retail, are they going to compete with each other?
14 THE WITNESS: You mean as a general proposition?
15 MS. ROBESON: Okay. We need to move on. I don't
16 know what a general proposition means. Oh, I do know what
17 you're saying. Okay. You're saying as opposed to in this
18 particular location?
19 THE WITNESS: And I'm not trying to get Mr. Noonan
20 into Mr. Bogorad's --
21 MS. ROBESON: Well, I think we --
22 THE WITNESS: -- area.
23 MS. ROBESON: Well, I think we are getting him
24 into -- what do you want to cross-examine him on? Is he
25 saying that the two do not --

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1 MR. HARRIS: I am fine if he saying the two do not
2 compete. I'm trying to determine whether that is what he
3 said, which is really the same question you --
4 MS. ROBESON: Well, I'm --
5 MR. HARRIS: -- asked.
6 MS. ROBESON: -- going to let him answer. You --
7 ask the question again.
8 BY MR. HARRIS:
9 Q Sorry. Mr. Noonan, do you believe that outlet
10 retail will compete with neighborhood retail in the town
11 center?
12 MR. CHEN: In this case?
13 MS. ROBESON: At this location. He said the town
14 center.
15 MR. HARRIS: At this location.
16 THE WITNESS: I -- I thought, maybe I misheard the
17 question before. I thought I was being asked whether the
18 outlet retail was going to compete with the other commercial
19 uses in the town center. I don't know that it competes with
20 the neighborhood retail that's oriented towards the
21 residential development. I would say to that, no.
22 BY MR. HARRIS:
23 Q Okay. And there is no other retail than the
24 historic district retail and the planned neighborhood retail
25 in the town center with which it would compete, is there

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1 today?
2 A Today, existing today? No.
3 Q And you referred to page 46 as, and concluded that
4 that suggested that there should be some kind of major
5 retail somewhere else in the town center. I, honestly, I
6 don't see that on that page and I'm wondering how you
7 reached that conclusion?
8 A Well, again, I go back --
9 Q Page 45, I beg your pardon. I misspoke about the
10 page number.
11 A Yes, 45, but if --
12 Q 45, yes.
13 A Right.
14 MR. CHEN: 45 is a figure.
15 MR. HARRIS: Yes.
16 THE WITNESS: It is a figure. But if you turn to
17 the next page, it talks about an additional 300,000 square
18 feet of proposed, commercial uses in the town center and
19 that's what --
20 MS. ROBESON: You're saying the town center
21 district --
22 THE WITNESS: Town center district.
23 MS. ROBESON: -- and not that limited area in the
24 figure in the illustration --
25 THE WITNESS: Right.

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1 MS. ROBESON: -- is that what you're saying?
2 THE WITNESS: I was asked about a design
3 comparison between the town center --
4 MS. ROBESON: That's correct.
5 THE WITNESS: -- illustration and the north
6 center. That's a different question to my mind as to
7 exactly where this 300,000 --
8 MS. ROBESON: Yes.
9 THE WITNESS: -- square feet of commercial uses
10 would exist in the town center.
11 BY MR. HARRIS:
12 Q And that 300,000 square feet could be located
13 throughout the town center, is that correct?
14 A Presumably.
15 MS. ROBESON: If you know?
16 THE WITNESS: I don't know where it would be
17 specifically in the town center.
18 BY MR. HARRIS:
19 Q And commercial uses could include office uses?
20 A It could, yes.
21 Q And, in fact, doesn't the second to the last
22 bullet limit the retail uses to 150,000?
23 A Again, that's in the, that's for the neighborhood
24 retail uses, the 153,000 involved.
25 Q And at the top of page 47, doesn't it say that the

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1 balance of proposed retail and office uses is proposed to be
2 located throughout the town center district and consists of
3 infill retail within the historic district?
4 A Yes, it does say that.
5 MR. HARRIS: I have no further questions. Thank
6 you.
7 MS. ROBESON: All right. Mr. Noonan, you may be
8 excused. Oh.
9 THE WITNESS: Thank you.
10 MS. ROBESON: You want re-redirect?
11 MR. CHEN: My understanding of the Rules of
12 Procedure is that the party calling the witness always gets
13 the last question, but it's not a cross-examination.
14 MS. ROBESON: I don't think it goes -- my
15 recollection is it doesn't go that far down the scale of
16 recross, redirect, recross, redirect.
17 MR. CHEN: Well, I'll abide by the ruling, but --
18 MS. ROBESON: I will allow you -- how many
19 questions do you have?
20 MR. CHEN: Well, I think --
21 MS. ROBESON: Because at some point it's got to be
22 cut off and --
23 MR. CHEN: Okay. We'll cut it off now. I'll ask
24 Mr. Kline his questions, but, please, I would just ask the
25 Examiner for future procedures, I think --

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1 MS. ROBESON: Well, let's do this. I will double-
2 check the rules. I really don't -- I do know there's a
3 provision for --
4 MR. CHEN: I also agree with the Examiner that
5 this has got to come to an end. I mean --
6 MS. ROBESON: Yes.
7 MR. KLINE: But I do believe there could be a
8 couple questions that could probably nail down something in
9 which I think there's confusion about, what is the amount of
10 retail, of what kind in the town center. I think there's
11 definitely -- we're talking past each other on that subject.
12 MS. ROBESON: Well, I think the confusion comes in
13 the nomenclature town center. It seems to me the master
14 plan says 300,000 feet elsewhere in the town center district
15 because that's what they're addressing. So if that's what
16 the clarification is, I can ask him -- the question that,
17 okay. On this issue I'll let you, I don't want to, rather
18 than me assuming what you wanted to ask, I'll let you have
19 redirect and then I'm going to go check the rules. And if
20 you feel like you need re-re-redirect, but I am 99 percent
21 sure the rules do not go down this level in redirect. But
22 you may have redirect if you want to clarify that issue or
23 whatever issue you wanted to clarify.
24 MR. CHEN: Well, I appreciate that, Madam
25 Examiner, and certainly Mr. Kline can clarify that. But

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1 outside the context of a pending case, you know, you'll
 2 probably hear from me.
 3 MS. ROBESON: Oh, I see what you're saying.
 4 You're saying, well, no, it should be here if you feel that
 5 due process requires --
 6 MR. CHEN: I --
 7 MS. ROBESON: -- redirect.
 8 MR. CHEN: I'm not going to raise that issue and
 9 I'm not but, quite candidly, and I think that the party
 10 calling the witness always gets the last bite at the apple,
 11 but I'll defer to the Examiner. And for the record, I'm not
 12 raising any objection or due process issue.
 13 MS. ROBESON: All right. Well, I am not aware of
 14 any rule specifying that and I also know in some cases that
 15 we have ended it on recross. So you and I will have a
 16 discussion after this case is over because I do respect your
 17 experience as a Hearing Examiner.
 18 MR. KLINE: Madam Hearing Examiner, we have three
 19 precise questions I think I can, if not clear it up, I can
 20 at least figure out where we disagree with the applicant.
 21 MS. ROBESON: All right.
 22 BY MR. KLINE:
 23 Q Mr. Noonan, could I draw your attention to page 46
 24 of the 1994 master plan?
 25 A Okay.

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1 Q What is your understanding of the amount of
 2 neighborhood-oriented retail that is recommended to be
 3 located in the town center district?
 4 A 153,000 square feet.
 5 Q And what is your understanding of how much
 6 additional retail square footage is recommended in the town
 7 center district?
 8 A My understanding is it goes up to 300,000 square
 9 feet of additional commercial uses, including retail.
 10 Q Paragraph 4 begins with the term, in terms of
 11 commercial uses, and the next line talks about Planning
 12 Board retail studies.
 13 A Right.
 14 Q Do you understand commercial uses in that context
 15 to mean retail --
 16 A You mean retail?
 17 Q -- studies?
 18 A I did, yes, I did.
 19 MR. KLINE: All right. No further questions.
 20 MS. ROBESON: Okay. I'm going to give Mr. Harris
 21 re-re-re --
 22 MR. CHEN: Another question?
 23 MR. KLINE: Yes, no.
 24 MS. ROBESON: No, no. That negates the meeting.
 25 MR. HARRIS: I'm fine. I think he answered before

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1 that the commercial can be office use. Now he says it would
 2 be retail, so he doesn't seem to know.
 3 MS. ROBESON: Well, I'm not even accepting that as
 4 argument which you can make --
 5 MR. HARRIS: I think the record will stand --
 6 MS. ROBESON: The record will speak for itself.
 7 We are going to take an hour for lunch. We'll be back at
 8 1:20 with Mr. Kline's expert, Mr. -- Mr. Chen, let me,
 9 before we quit, you do not have any other witnesses,
 10 correct?
 11 MR. CHEN: That's correct, ma'am.
 12 MS. ROBESON: Okay.
 13 MR. KLINE: My understanding, I thought, was we
 14 were bringing in the environmental experts to supplement Mr.
 15 Unterberg, the, on the subject --
 16 MS. ROBESON: Testimony about the storm water --
 17 MR. KLINE: Right.
 18 MS. ROBESON: -- management?
 19 MR. CHEN: In fact, if you recall, Mr. Noonan --
 20 MS. ROBESON: That's correct. Mr. Harris, do you
 21 have your environmental witnesses here?
 22 MR. HARRIS: Well, we do, but we were anticipating
 23 that after their witnesses. Neither of their witnesses has
 24 anything to do with that issue.
 25 MS. ROBESON: No. I think that, I think that to

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1 be fair to them, because I don't know what you're going to
 2 say, we're going to have your witnesses and your case-in-
 3 chief be concluded and then they will be able to present
 4 their experts.
 5 MR. HARRIS: Fine.
 6 MS. ROBESON: All right?
 7 MR. HARRIS: Fine.
 8 MS. ROBESON: So with that, 12:20, 1:20 we'll be
 9 back.
 10 (Recess.)
 11 MS. ROBESON: Are the parties ready?
 12 MR. HARRIS: Yes, ma'am.
 13 MS. ROBESON: Mr. Harris, go get your witness.
 14 MR. HARRIS: I think I was asked to call a witness
 15 on storm water management and --
 16 MS. ROBESON: And I think -- I thought you were
 17 going to call one on the forest conservation plan as well?
 18 No?
 19 MR. HARRIS: Mr. Unterberg testified pretty
 20 ostensibly --
 21 MS. ROBESON: Oh, that's --
 22 MR. HARRIS: -- about that.
 23 MS. ROBESON: That's correct. Okay.
 24 MR. HARRIS: The --
 25 MS. ROBESON: You're right.

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1 MR. HARRIS: No, and so -- you can come up here.
2 We're calling Mr. Phil, Phillip, is it, Hughes from Rogers
3 and I will, as I mentioned at the last hearing, Frank
4 Bossong is really --
5 MS. ROBESON: Right.
6 MR. HARRIS: -- has been the engineer of record on
7 this and he's out of town still, so we'll have Mr. Hughes
8 speak today. I think he can address the issues perfectly
9 well, but if not, we'll just have to bring in --
10 MS. ROBESON: You're reserving the right to --
11 MR. HARRIS: Yes. Yes.
12 MS. ROBESON: -- to call Mr. Bossong?
13 MR. HARRIS: Yes, ma'am.
14 MS. ROBESON: Okay.
15 MR. HARRIS: Thank you.
16 MS. ROBESON: I understand. Okay. Please raise
17 your right hand.
18 MR. HARRIS: No, you're fine there.
19 MS. ROBESON: Please raise your right hand.
20 (Witness sworn.)
21 DIRECT EXAMINATION
22 BY MR. HARRIS:
23 Q Would you state your name and business address for
24 the record?
25 A Phillip Raymond Hughes, III, and it's 1947 Century

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1 Boulevard, Suite 200, Germantown, Maryland.
2 MR. HARRIS: And, ma'am, I have a statement of
3 qualifications of resume here that I would like to have
4 identified as an exhibit.
5 MS. ROBESON: Okay.
6 MR. HARRIS: I gave copies to the other counsel.
7 MS. ROBESON: These are 108, which will be Hughes
8 resume.
9 (Exhibit No. 108 was marked for
10 identification.)
11 BY MR. HARRIS:
12 Q Mr. Hughes, can you identify this document for us?
13 A Yes, that's my resume.
14 Q Okay. And can you tell us what college degree you
15 have?
16 A I have a bachelor's of science degree in civil
17 engineering from Old Dominion University.
18 Q And what professional licenses do you hold?
19 A I'm a registered professional engineer in both
20 Maryland and Virginia.
21 Q And do you have experience in the design of
22 underground utility systems and storm water management
23 facilities?
24 A Yes, extensive.
25 Q And does that include familiarity with the current

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1 Maryland storm water management regulations?
2 A Yes, it does. I have testified in front of MDP
3 regarding some of these and had numerous conversations with
4 local organizations regarding them.
5 Q And have, do you serve on any committees within
6 Montgomery County having to do with storm water management
7 issues?
8 A Oh, yeah, I'm on the Montgomery County New
9 Products Committee which reviews any storm water management
10 product that is proposed for use in Montgomery County, so
11 any facility that's getting used in the County goes through
12 that committee. I am also on the Best Management Practice
13 Committee which is working with Montgomery County and the
14 design guidelines for all ESD facilities to be used within
15 the County, how they're designed and all the specifications
16 regarding that.
17 Q And how long have you been with Rogers Consulting?
18 A Ten years, six months.
19 Q And what is your position there?
20 A I'm a senior team engineer and a senior associate.
21 Q And what does your work consist of at Rogers?
22 A Storm water management, storm drain, water/sewer
23 design and the like.
24 Q Did you work before that anywhere else?
25 A Yes. I worked for a number of years at Bohler

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1 Engineering and then before that at Glenn and Sadler down in
2 Norfolk, Virginia, and before that, Miller Stephenson for a
3 while.
4 Q And did the work you undertook with those other
5 organizations, was it similar to the work you now describe
6 with respect to Rogers Consulting?
7 A Yes, sir.
8 Q And have you been involved in any recent, major
9 projects in Montgomery County having to do with storm water
10 management issues?
11 A The Wegman's project, Watkins Mill, Shops at
12 Seneca Meadows, Cabin Branch, a number of other projects,
13 Rothbury Square and the list goes on and on, Brightwood
14 Crossing, Spectrum.
15 Q And other than the Montgomery County New Products
16 Committee and the Montgomery County Best Management
17 Practices Committee that you already identified, are you a
18 member of any other professional organizations or
19 committees?
20 A Well, the American Society of Professional
21 Engineers and I also am one member of a co-committee for
22 Montgomery County Oakwood Committee.
23 MR. HARRIS: Okay. The applicant would offer Mr.
24 Hughes as an expert in civil engineering and storm water
25 management.

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1 MS. ROBESON: All right. Any objection?
 2 MR. KLINE: I guess I do have a couple questions.
 3 (Discussion off the record.)
 4 VOIR DIRE EXAMINATION
 5 BY MR. KLINE:
 6 Q I guess the question really is leading up to
 7 ultimately have you qualified as an expert in civil
 8 engineering before the Hearing Examiner or the Board of
 9 Appeals or some other hearing body like this one?
 10 A No, I have not.
 11 Q In this County or in any county?
 12 A No.
 13 Q You have been doing storm water management since
 14 1999 then?
 15 A Before that as I was working while I was in
 16 college doing design work for an engineering firm down in
 17 Norfolk, so I've probably been doing this 17, 18 years now.
 18 Q Do you have anything to say?
 19 BY MR. CHEN:
 20 Q The notice from your resume, Exhibit No. 103, that
 21 under recent, major projects, the last one is entitled Cabin
 22 Branch, do you see that? It's on page 2. Is that the
 23 project that is before the District Council and the Hearing
 24 Examiner in this proceeding?
 25 A Yes.

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1 Q And from reading that you've done apparently the
 2 initial water and sewer design, along with the preliminary
 3 water quality plan and final ordered quality plan?
 4 A Yes, along with the construction design plans for
 5 all the approved phases except for what is on the lower told
 6 sections. We just did the final water quality plan for
 7 those, did not do the construction design plans.
 8 Q Okay.
 9 A So all of the Winchester phases.
 10 MS. ROBESON: So are there any, no objections to
 11 qualifying Mr. Hughes as a civil, expert in civil
 12 engineering and storm water management?
 13 MR. KLINE: No objection.
 14 MS. ROBESON: Okay. You are qualified. Now you
 15 have to redo your resume. Okay. Go ahead.
 16 MR. HARRIS: Okay. All right.
 17 BY MR. HARRIS:
 18 Q Mr. Hughes, are you familiar with the storm water
 19 management planning for the Cabin Branch project?
 20 A Yes.
 21 Q And do you know whether at the time of the
 22 development plan approval in 2003 whether a concept for
 23 storm water management was prepared at that time?
 24 A Yes, a preliminary water quality plan was
 25 prepared.

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1 Q And was that deemed appropriate for approval of
 2 the development plan at that time?
 3 A Yes.
 4 Q And following that, did you amend the -- did you
 5 do a preliminary water quality plan at that time?
 6 A Yes, the preliminary water quality plan was done
 7 and is approved.
 8 Q And was it later amended?
 9 A Briefly.
 10 Q Okay. In 2007, did you do a final water quality
 11 plan for the Cabin Branch project?
 12 A I did not, but one was done by LSA or Soltesz now
 13 for the site.
 14 Q The final water quality plan that was done in
 15 2007, did that provide for subsequent, detailed, final water
 16 quality plan updates with each site plan to be submitted at
 17 a later date?
 18 A Yes, and that's how all the site plans have been
 19 done going forward.
 20 Q And so do those updates, are they considered to be
 21 amendments to the final water quality plan?
 22 A I don't know if they're amendments, but they are
 23 just new, final water quality plans for those areas and they
 24 supersede that one.
 25 Q Are you aware of the size of the acreage that is

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1 within the MXPD zoned area for this property?
 2 A I believe we're looking at around 283 plus or
 3 minus acres total.
 4 Q Okay. Does that 283 plus or minus acres have an
 5 approved preliminary water quality plan?
 6 A Yes, the whole site has an approved preliminary
 7 water quality plan.
 8 Q And does that 283 acres have an approved final
 9 water quality plan?
 10 A Yes, under the infrastructure.
 11 Q And do you have an estimate of the proportion of
 12 that 283 acres that, well, is a portion of that area
 13 grandfathered under the pre-existing storm water management
 14 regulations as opposed to the 2007 regulations that require
 15 environmental site design?
 16 A Yeah, on ponds 1, 11 and 13 are all grandfathered
 17 and that's 80, 81 percent of that 283 acres.
 18 Q The -- does the remaining 19 percent have a
 19 preliminary water quality plan?
 20 A Yes.
 21 Q And does it also have an approved final water
 22 quality plan?
 23 A Yes.
 24 Q And do you have an expectation as to whether
 25 individual site plans within that remaining 19 percent area

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1 will have updates to the final water quality plan at the
2 time of site plan approval for those, for any development
3 there?
4 A Yes, they'll have to go back in for a final water
5 quality plan approval to go along with the site plan.
6 Q And any of those updates, will they incorporate
7 ESD facilities pursuant to the 2007 storm water management
8 legislation?
9 A The areas that have not been grandfathered will.
10 Q And can you give us an idea of what kind of
11 facilities those ESD updates are likely to include?
12 A You're looking at your standard micro-bio
13 filtration, landscape infiltration, possibly green roofs
14 depending on the usage and pervious pavement would also be
15 looked at at that time.
16 Q And have updates to the approved final water
17 quality plan been completed and approved in connection with
18 respective site plans at Cabin Branch that have been
19 approved in the last four years?
20 A Yes.
21 Q And do you have, can you site any of those that
22 have been updated?
23 A Of the plans we've gone back in would be, I mean
24 everything that we're not talking about now, I mean win one,
25 win two and I know that might not mean anything to you, but

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1 everything along, next to Clarksburg Road and all the
2 remaining Winchester housing developments. So you're
3 probably looking at about 90 percent of the site has been
4 done, has a new site plan, a new final water quality and
5 final storm water management construction plans.
6 Q And do you have an opinion as to whether the
7 approved development plan and this development plan
8 amendment comply with the provisions for water quality
9 protection under Chapter 19 of the County Code?
10 A In my opinion they do.
11 Q And do you anticipate the Planning Board updating
12 the final water quality plan as may be necessary at the time
13 of individual site plan approvals for any new projects?
14 MR. CHEN: You can't predict what they're going to
15 do.
16 MS. ROBESON: Well, he can give his expertise. He
17 can, you can opine on it.
18 THE WITNESS: Based on the previous approvals for
19 the remainder of the site that have all gone forward, new
20 final water quality plans have been done along with each
21 site plan and have gone through the Planning Board with no
22 questions.
23 MS. ROBESON: Well, I guess --
24 THE WITNESS: Is that the question?
25 MS. ROBESON: -- I see your -- well, let me

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1 rephrase it slightly. Do you see any problems meeting the
2 current regulations or do you see --
3 THE WITNESS: The 2007 guidelines for storm water?
4 MS. ROBESON: Yes.
5 THE WITNESS: No.
6 MR. HARRIS: That's all the questions I have.
7 MS. ROBESON: Okay. Mr. Kline.
8 CROSS-EXAMINATION
9 BY MR. KLINE:
10 Q I'm going to apologize in advance for my, what I
11 was going to say, this is actually going to be sort of a
12 preschool level because you kind of got dragged in because
13 it came up in forest conservation and I'm trying to --
14 A I know you were expecting Frank too, so --
15 Q He was wise enough to go out of town.
16 A I know.
17 Q I understand you're not here to tell us about
18 forest conservation, but I'm trying to understand the
19 relationship of all this. So -- and you actually already
20 educated me in one regard. When you've got a green field
21 property, tell me when you sit down in your office to design
22 how it's going to work, what do you start with? I presume
23 you start with a natural resources inventory?
24 A Yes and --
25 MS. ROBESON: Before you go there, can you just

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1 define for the record what a green field facility is?
2 THE WITNESS: Greenfield is basically open area
3 development. There's, it's not redevelopment. There really
4 was nothing there previously, so it's a blank slate --
5 MS. ROBESON: Right.
6 THE WITNESS: -- basically.
7 MS. ROBESON: Okay. Now can you answer the
8 question?
9 BY MR. KLINE:
10 Q And explain to us what the NRI tells us. What
11 information we get that then directs us to what the next
12 step should be.
13 A No, I don't do the NRI usually.
14 Q I understand. Generally.
15 A Somebody else in my office does, but you know it
16 outlines your stream valley buffer areas you can't go into,
17 wetlands, areas of possible erosion due to difficult soils
18 and steep slopes. That's the basic of what you're getting
19 out of that.
20 Q We're just identifying the areas of environment
21 sensitivity that we need to work with?
22 A Correct.
23 Q Okay. Then you sit down and I guess I thought you
24 did a water quality plan. From what you testified, you
25 actually start doing a storm water management plan?

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1 A You actually start with -- the first step is a
2 preliminary water quality plan and that's already been done.
3 Q Okay.
4 A And next you go on to the final water quality
5 plan.
6 Q Okay. Go just a little slower. But you do start
7 with a preliminary water quality plan?
8 A Correct.
9 Q Okay. Tell me what's in that? What does that
10 show and what does that tell us and what do you do with it?
11 A It's a very basic plan. It's basically a bubble
12 plan showing that there is the possibility to fit what you
13 need to fit in there for storm water management.
14 Q Okay.
15 A So you're just basically showing there's really
16 hardly any computations that go along with. Basically
17 you're showing MDE's guidelines on it. You're basically --
18 you can take your green space and divide it by what your
19 total filter area needs and just say, okay, well, we have
20 enough green space to meet it and here's where we're going
21 to put it. You know, there's -- it's really not an
22 extensive item. I know this one was a little more
23 extensive.
24 Q It has both a narrative and a graphic component?
25 A Yes.

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1 Q Does the graphic component show us where certain
2 features will be located and what their function will be?
3 A Generally, in general.
4 Q Elaborate on that.
5 A It's open to modification, but it's very early in
6 the design process. And to get those, the site plans do
7 change the layout of things.
8 Q We know that there was a water quality plan part
9 of the record in the original zoning case. So tell us what,
10 if you had an exhibit, what would it have shown during
11 that -- I'm not going to say today, but I'm saying back in
12 2003 when the property was original zoned?
13 A I designed it, so we used basically the design
14 that actually 2007 calls for today. I used a lot of, I hate
15 using underground facilities. It's just not the way that I
16 ever went with things. It's a lot of, I had a lot of micro-
17 bio-retention on there; sand filters, which I did love and
18 they don't let you use anymore, but they do a great job;
19 infiltration practices and they were all spread throughout
20 the site. So, you know, basically back in 2003, we were
21 doing it the way for this project that they're telling you
22 to do it now.
23 Q In, so when you, you said you have an approved
24 preliminary plan. So you generated a preliminary water
25 quality plan. Who do you submit it to and what happens

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1 then?
2 A DPS. I think Leo Galanko over there reviews and
3 approves all those.
4 Q Is that the Department of Permitting Services?
5 A Yes, yes, in Montgomery County.
6 Q And tell me what they do and what you get out of
7 that review.
8 A They review and approve it and you get a basic,
9 general guideline of where to start.
10 Q And their standards for approval of what, what are
11 they looking for?
12 A That you can fit what you need to fit within the
13 design area, you know, that it's feasible, you know, for
14 future engineering. They just want to know that it's even
15 feasible to do.
16 Q Okay.
17 A You know, once you prove to them that it's
18 feasible, then you move on to the next step.
19 Q And the next step is the storm water management
20 plan?
21 A Your final water quality plan.
22 Q Your final water quality plan? Okay. The same
23 thing, just more detail?
24 A Yes, you get into a little more detail. There's
25 some more computations involved to prove that, okay, what

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1 you showed me, you know, with modifications and everything
2 else, things move, things shift, things change, a lot can
3 happen between a preliminary and your final because then
4 you're going into your site plan, and that the more detailed
5 that it will work. And that's why your final water quality,
6 you know, dovetails and goes right into your construction
7 plans.
8 Q More specificity because you --
9 A Yes.
10 Q -- know more at that point in time?
11 A Uh-huh.
12 Q And when I say specificity, that would be features
13 that you'll employ?
14 A Correct.
15 Q And the location of those features?
16 A Correct.
17 Q Okay. All right. So then where does the storm
18 water management concept plan fit in?
19 A The preliminary?
20 Q Yes, okay.
21 A There isn't a concept. It's a preliminary, the
22 preliminary water quality plan? It is just your basic first
23 step just to prove that it's a possibility.
24 Q Maybe I didn't ask the question -- in the zoning
25 process, we're typically submitting conceptual storm water

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1 management plans. Do you have, have you done --
2 A That's what the preliminary is, just basically a
3 concept.
4 MS. ROBESON: Are you in the, is this in the
5 special --
6 THE WITNESS: Yes, it is.
7 MS. ROBESON: -- exception area?
8 THE WITNESS: And that's --
9 MS. ROBESON: So it doesn't have a preliminary
10 storm water, or it uses --
11 THE WITNESS: It does have a concept.
12 MS. ROBESON: -- the water quality plan as the --
13 THE WITNESS: Right. So you have your
14 preliminary, your final and your, I mean your final water
15 quality plan and then the constructions plans. So since
16 it's an SPA, it's a three-step process whereas what's you're
17 talking about is your normal development which is a two-
18 stage process. And MDE now calls for it to be a three-stage
19 process because Montgomery County's concept is so
20 comprehensive that, and they already require you to do your
21 NRI where a lot of the counties do not. So they group it
22 all into one and they'll let you do just the one concept.
23 BY MR. KLINE:
24 Q Well, again, I realize I may be a little slow
25 about this, but do we have a storm water management plan --

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1 A Yes.
2 Q -- associated with this project?
3 A Yes.
4 Q And it's more detailed or less detailed than the
5 water quality plans? What's the distinction?
6 A I think you're --
7 Q If I'm mistaken too, that's quite possible.
8 A -- you're mixing processes.
9 Q Yes.
10 A Because what you have is you have a preliminary
11 water quality plan for this project --
12 Q All right.
13 A -- okay and that's been done, it has been
14 approved.
15 Q I understand.
16 A Okay? Then your next step is to go into a final
17 water quality.
18 Q I understand.
19 A Now an infrastructure final water quality and
20 final site plan was done per Montgomery County Park and
21 Planning on this project.
22 MS. ROBESON: Was that just for the
23 infrastructure?
24 THE WITNESS: Yes, that was so they could go in
25 and basically build all the roads --

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1 MS. ROBESON: Build the roads.
2 THE WITNESS: -- if they had to.
3 MS. ROBESON: Right.
4 THE WITNESS: Montgomery County wanted them to
5 have that and that's not a normal step that you would do,
6 but it was something that the Park and Planning had asked
7 for. So that was done. So you have a site plan for the
8 whole site technically and you have a final water quality
9 plan for the whole site that conforms to, that started with
10 the preliminary water quality plan.
11 So now from there each site plan now, because the
12 land bays weren't done, has to come back in and do a final
13 water quality plan that shows how all that stuff works with
14 the land base. And then you go from your final water
15 quality to your construction plans after that. Once you get
16 your final water, your final water quality has to be
17 approved with your new site plan.
18 BY MR. KLINE:
19 Q And we have a copy of the final water quality plan
20 that's been approved in the record of the case?
21 A I don't know. I haven't been that involved with
22 this. I don't know what you guys have in the record.
23 Q Did you happen to bring it with you today, by
24 chance?
25 A No, I did not.

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1 Q All right.
2 MS. ROBESON: It's my recollection we do not have
3 the final water quality plan, although we do have the final
4 forest conservation plan.
5 BY MR. KLINE:
6 Q Okay. Well, then I guess that kind of leads me to
7 my next question then. Do you have an explanation for why
8 there is not a preliminary or final quality, water quality
9 plan included in the record of the case?
10 A There is a preliminary water quality plan included
11 in the record.
12 Q Included in the record in this --
13 A I thought you said there was one in the record, a
14 preliminary water quality plan?
15 MS. ROBESON: No, I said a preliminary, there's
16 a -- no.
17 THE WITNESS: No?
18 MS. ROBESON: Unless someone can, I'm reviewing
19 the exhibits now.
20 MR. HARRIS: The preliminary water quality plan is
21 in the record of the original development plan --
22 MS. ROBESON: Okay.
23 MR. HARRIS: -- covering the entire property.
24 MS. ROBESON: Which is 6, Exhibit 6?
25 MR. HARRIS: I don't know if it's a separate

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1 exhibit in this.
2 MS. ROBESON: Certified development plan for G-
3 806?
4 MR. HARRIS: I don't have that handy.
5 MS. ROBESON: Well, let me just see if I -- okay.
6 It must be a large --
7 THE WITNESS: It is.
8 MS. ROBESON: I think it's on the bottom. Could
9 someone take a look at Exhibit 12 too and see what that is?
10 MR. HARRIS: I don't think I have those exhibits
11 with me, Ms. Robeson, but I'll see.
12 MS. ROBESON: Okay. No, I meant the exhibit list.
13 MR. KLINE: That one --
14 MR. HARRIS: Oh, the exhibit list?
15 MR. KLINE: Yes.
16 MR. HARRIS: Oh, I'm sorry.
17 MS. ROBESON: Yes.
18 MR. HARRIS: Exhibit list. 12 is final forest
19 conservation plan.
20 MR. KLINE: And, again --
21 MS. ROBESON: Can we keep going?
22 MR. HARRIS: No, that was, it it was 12, that was
23 submitted a long time ago.
24 (Discussion off the record.)
25 MR. HARRIS: Certified development plan was

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1 Exhibit 6.
2 MS. ROBESON: Yes, that's what I'm looking for.
3 It's DPE.
4 MR. HARRIS: No, looking at the exhibit list, I'm
5 not sure there is one in the record in this case, but --
6 MS. ROBESON: Well, I can't find Exhibit 6.
7 MR. HARRIS: -- but I also, I don't see anything
8 in the regulations that require us to provide that. As I
9 look at 59-D, I don't see that as s requirement.
10 MR. KLINE: Well, I actually, unfortunately, I
11 have to disagree, but I'll see if we can find it first --
12 MR. HARRIS: Okay.
13 MR. KLINE: -- so I don't have to raise it if it's
14 not necessary.
15 MS. ROBESON: Well, I know we have -- let me look
16 at 6A and see if that sheds any light on it. Well, I must
17 have --
18 MR. CHEN: Madam Examiner --
19 MS. ROBESON: Yes?
20 MR. CHEN: -- is it possible that Exhibit 6 is
21 already on the easel?
22 MS. ROBESON: That's a possibility. For some
23 reason I have a huge number --
24 (Discussion off the record.)
25 MR. HARRIS: If this will help you, Mr. Kline,

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1 we've brought an exhibit list. I didn't think it would be
2 necessary. I would be happy to make this an exhibit and
3 have, that may answer your question. And I have smaller
4 copies of that. Let's see what I have. This is called,
5 it's identified as storm water management drainage area
6 exhibit.
7 MS. ROBESON: Okay. Let me just -- all right.
8 It's a gazillion copies.
9 MR. CHEN: This is Exhibit 6.
10 MS. ROBESON: Thank you.
11 MR. HARRIS: Oh that, I beg your pardon, Bill, I
12 looked at that and didn't think that was Exhibit 6.
13 MR. CHEN: It says Exhibit 6.
14 MS. ROBESON: Thank you, because it's not --
15 MR. HARRIS: There you go.
16 MS. ROBESON: -- in here. Okay. So --
17 MR. HARRIS: That is, that is the land use plan of
18 the development plan. It is not a --
19 MS. ROBESON: The full development plan?
20 MR. HARRIS: It is the full development plan.
21 It's not the, it's not a preliminary water quality plan.
22 MS. ROBESON: Okay. Do you have anywhere in our
23 record a preliminary water quality plan or a final water
24 quality plan? I'm just asking right now. I'm not saying
25 whether or not it's required. I'm just asking --

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1 MR. HARRIS: Do not in the sub-file for this DPA,
2 but we do in the original DPA that was submitted at that
3 time and deemed appropriate by the Hearing Examiner.
4 MS. ROBESON: As to preliminary?
5 MR. HARRIS: As to what was necessary to get a
6 development plan approved.
7 MS. ROBESON: Okay. So you don't have the final
8 one?
9 MR. HARRIS: No, a final was not --
10 MS. ROBESON: The infrastructure one?
11 MR. HARRIS: -- required.
12 MS. ROBESON: Okay. So it's in the original file,
13 but we have another exhibit here. What is this exhibit that
14 I'm making as -- are we at 109?
15 MR. HARRIS: It's on, that's 108.
16 MS. ROBESON: I think that was Mr. Hughes's
17 resume?
18 MR. HARRIS: Oh, it was. You are correct.
19 MS. ROBESON: So what do I call this exhibit that
20 I'm marking as 109?
21 MR. HARRIS: It's identified on its cover, or on
22 the bottom as storm water management drainage area.
23 MS. ROBESON: Drainage area? Okay. 109 will be
24 storm water management drainage area.
25 (Exhibit No. 109 was marked for

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1 identification.)

2 MS. ROBESON: Do you have this exhibit, Mr. Kline

3 and Mr. Chen?

4 MR. KLINE: Mr. Harris kindly provided us copies

5 of it.

6 MS. ROBESON: Okay. All right.

7 BY MR. KLINE:

8 Q Well, let me just make sure. So what we've

9 brought out is Exhibit 6. It doesn't have any information

10 on the face of it dealing with water quality plan approvals

11 or issues, correct?

12 A I don't know.

13 Q All right. So I just want to make sure there's no

14 water quality plan that was sort of attached to that?

15 A I don't believe so --

16 Q Okay.

17 A -- no.

18 Q Well, let me approach it this way. I'm providing

19 you with a copy of Section 59-D-1.3(i) of the County Zoning

20 Ordinance titled, Contents of the Development Plan. And

21 subparagraph (i), if you could just read that?

22 A "If the property proposed for development lies

23 within a special protection area, an applicant

24 must submit water quality inventories and plans

25 and secure required approvals in accordance with

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1 Article 5 of Chapter 19. The development plan

2 should demonstrate how any water quality

3 protection facilities proposed in the preliminary

4 water quality plan can be accommodated on the

5 property as part of the project."

6 Yes.

7 Q So that indicates that there should be a water

8 quality plan as part of the record today as we're going

9 through your testimony, correct?

10 A I have no idea. I mean --

11 Q What does it, what --

12 A If a property --

13 Q -- if they file it with the application?

14 A Uh-huh.

15 MR. HARRIS: So for a development plan --

16 THE WITNESS: "Submit water quality inventories

17 and plans and secure required approvals,"

18 does that require me to submit it today? I mean I'm not

19 really -- I really don't know a lot about zoning, so --

20 MS. ROBESON: I understand your point, but he's

21 not the attorney, so --

22 THE WITNESS: I don't know a lot about zoning.

23 MR. KLINE: Okay.

24 MS. ROBESON: But he does, you can do that some

25 way else besides cross.

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1 MR. KLINE: Well, if there isn't a water quality

2 plan within the file, it's kind of hard for me to cross with

3 the next question I want to ask him.

4 MS. ROBESON: Well, Mr. Harris, do you want to

5 comment on that?

6 MR. HARRIS: Again, this pertains to a development

7 plan. It doesn't pertain to a development plan amendment.

8 This was reviewed and approved 10 years ago and it's in the

9 file. It was submitted and the zoning hearing examiner at

10 the time found that that obligation had been met and Mr.

11 Hughes has indicated here that this development plan

12 amendment does not affect that.

13 MS. ROBESON: Well, Mr. Kline, can you --

14 MR. KLINE: Ma'am?

15 MS. ROBESON: -- point me to the section that you

16 are quoting?

17 MR. KLINE: Sure. If you're in the zoning

18 ordinance, it's at the bottom of page 59-D-12. It's Section

19 59-D-1.3(i) at the bottom of page D-12, subsection (i).

20 MS. ROBESON: Okay.

21 MR. KLINE: And the response to Mr. Harris's

22 comment, I guess I can't ask the witness of this, but

23 basically (i) says do this in conformance with Chapter 19

24 and Chapter 19 at 65-3(a) says that for any significant

25 amendment of the development plan, water quality plan, must

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1 undergo a review as provided in subsection (b) below,

2 meaning you must file it with the planning director or

3 preliminary water quality plan as part of a complete

4 application for a development plan and development plan.

5 And so the amendment does trigger under Chapter 19, Section

6 65, subparagraph (3), the same requirements as would have

7 been involved with a development plan. And I'm, got this

8 available. I'm glad to make -- I only brought one copy.

9 MS. ROBESON: Why don't you give -- I don't know

10 about --

11 MR. HARRIS: Sure. I have that. That says a

12 significant amendment.

13 MS. ROBESON: Well, I don't, so could I have the

14 copy? Sorry to interrupt. Mr. Kline --

15 MR. HARRIS: Jody.

16 MS. ROBESON: -- may I have a copy --

17 MR. KLINE: Yes.

18 MS. ROBESON: -- so I can read the section? I try

19 not to bring the zoning ordinance, or the code --

20 MR. KLINE: She wants the what, she wants --

21 MR. HARRIS: Chapter 19.

22 MS. ROBESON: The 19 cross-reference. I have

23 59-D.

24 MR. KLINE: Okay. This was just an excerpt from --

25 MR. CHEN: Yes.

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1 MR. HARRIS: What paragraph, Jody, did you say?
 2 MR. KLINE: What was that?
 3 MR. HARRIS: What paragraph in there?
 4 MR. KLINE: It was subparagraph (3).
 5 MR. HARRIS: Oh, yes.
 6 MS. ROBESON: Page 16?
 7 MR. KLINE: I don't think I even had a page.
 8 MS. ROBESON: Okay.
 9 MR. KLINE: It's section --
 10 MS. ROBESON: What section?
 11 MR. KLINE: It's 19-65(e) was what I was looking
 12 at and I think it's highlighted.
 13 MS. ROBESON: I only see -- oh, I see. I see.
 14 Sorry. All right. Well, it says a development approval,
 15 which involves any significant alteration to a water quality
 16 plan must undergo review as described in subsection (b).
 17 Okay.
 18 MR. HARRIS: And I think what Mr. Hughes has
 19 testified is, number one, that this is not a significant
 20 amendment. It stays within --
 21 MR. KLINE: Objection. I don't believe he
 22 testified to that at all.
 23 MS. ROBESON: Well --
 24 MR. HARRIS: Okay. Well, that --
 25 MS. ROBESON: Why don't --

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1 MR. HARRIS: That's my opinion --
 2 MR. KLINE: Yes.
 3 MR. HARRIS: -- and as a lawyer --
 4 MS. ROBESON: I know.
 5 MR. HARRIS: -- that's not a significant
 6 amendment. Beyond --
 7 MS. ROBESON: We're going to get to Mr. Hughes's
 8 opinion on it.
 9 MR. HARRIS: Beyond that, as Mr. Hughes did
 10 testify, the process that has been set up for this project
 11 is that as each detailed site plan goes forward, the final
 12 water quality plan that has already been approved for the
 13 entire site is updated to reflect the actual development,
 14 the specific buildings and parking facilities that are
 15 designed at that time, but are not designed now. It's
 16 impossible to provide that kind of information at a
 17 conceptual stage here when you don't know exactly what the
 18 building footprints are going to be or the parking areas.
 19 MS. ROBESON: Well, go ahead.
 20 MR. KLINE: What I understood from his testimony
 21 was that when in the final water quality plan, we get into
 22 more specificity. He talked about some of the features that
 23 would be involved. Therefore, I had the impression that, in
 24 fact, they could basically identify the location and nature
 25 of the facilities and actually be in the nature of a revised

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1 water quality plan that under the Section (i) I mentioned
 2 and Chapter 19 ought to be in the record.
 3 THE WITNESS: That will be revised under the final
 4 water quality plan. It says water quality plan, final water
 5 quality plan will be revised.
 6 MR. CHEN: Madam Examiner, may I just --
 7 MS. ROBESON: Yes?
 8 MR. CHEN: Chapter 19 has been implemented by
 9 Comcorp regulations. Comcorp Regulation 19.67.0101 entitled
 10 authority states, in accordance with the procedures
 11 authorized in Chapter 19, Article 5, which is a reference in
 12 the zoning ordinance entitled water quality review, special
 13 protection areas, Section 19-67, the following executive
 14 regulation applies to an application for approval of or
 15 significant amendment to a development plan, diagrammatic
 16 plan, schematic plan, project plan, a special exception or
 17 site plan in designated special protection areas, and then
 18 goes down on what the Comcorp requirements are.
 19 The point in referring the Examiner to this
 20 regulation is it dovetails with the zoning ordinance
 21 requirement in that a DPA, not a development plan
 22 application in its original instance, but even an amendment
 23 to a development plan, an approved, an amendment to an
 24 approved development plan must have this information and it
 25 must be provided with the application at the time of

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1 consideration of the amendment to the development plan.
 2 MR. HARRIS: You left out the word significant in
 3 there. It's not any amendment. It's a significant
 4 amendment. And Mr. Unterberg previously testified that this
 5 development that's under consideration here does not change
 6 the limits of disturbance that are within the existing
 7 forest conservation plan and the water quality plans such
 8 that this is not deemed to be a significant amendment.
 9 MR. KLINE: Objection. Never, Mr. Unterberg never
 10 used the word significant. I realize it's a debate, but he
 11 never opined on that. He opined --
 12 MR. HARRIS: I agree, he did not.
 13 MR. KLINE: He opined only on the forest
 14 conservation. Let me ask a series of questions. Maybe I
 15 can try and bring this to a head.
 16 BY MR. KLINE:
 17 Q Mr. Hughes, this is a final forest conservation
 18 plan that I think is probably, we marked again as 95 the
 19 other day and it's probably the same as some exhibit in the
 20 record which would be --
 21 MR. CHEN: I think it's 95.
 22 BY MR. KLINE:
 23 Q Well, what, we were given 95, but it was
 24 originally put into the record as No. 12, agreed?
 25 A Okay.

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1 Q And here's my point is. This forest conservation
2 plan, though it doesn't address storm water management
3 issues, it does show storm water management facilities such
4 as really the names of the ponds would be within the area of
5 the regional outlet center. That pond --
6 MS. ROBESON: Do we have the exhibit with the
7 ponds shown or was that the --
8 MR. KLINE: Yes, ma'am.
9 MR. HARRIS: That was just, that was just
10 identified and introduced.
11 MR. KLINE: Right. And they're shown on --
12 MS. ROBESON: Oh, okay.
13 MR. KLINE: -- 95 as well.
14 MS. ROBESON: Right. That's what I remember.
15 MR. HARRIS: This one is probably easier to view.
16 MS. ROBESON: But 95 has the pond numbers, I
17 think.
18 MR. HARRIS: This does as well.
19 MR. KLINE: So within --
20 MS. ROBESON: Did you put that -- can anyone put
21 that up because I can't see it? Is there an easel there?
22 MR. HARRIS: Yes, there is.
23 MS. ROBESON: You may want to clip that cross bar,
24 just, that has collapsed.
25 MR. KLINE: He's an engineer.

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1 MS. ROBESON: There is --
2 MR. KLINE: He'll figure it out.
3 MS. ROBESON: I'm just saying. I don't know how
4 it shows up on the tape, but okay. There you go.
5 MR. HARRIS: There must be a missing piece.
6 MS. ROBESON: Yes. Okay.
7 MR. KLINE: Well, I'm --
8 MS. ROBESON: Oh, yes. Okay. The green are the
9 ponds. Okay. And that is exhibit, is there a number on
10 that?
11 MR. CHEN: 109? I think the hand, yes. I think
12 that's an enlargement of 109.
13 MR. HARRIS: That's an enlargement of --
14 MS. ROBESON: Of the handout which is marked as --
15 MR. HARRIS: 109, yes, ma'am.
16 MS. ROBESON: -- 109. Okay.
17 MR. KLINE: Mr. Hughes --
18 MR. HARRIS: Did you mark these?
19 MS. ROBESON: Please write 109 large version.
20 Thank you, Mr. Harris. All right.
21 BY MR. KLINE:
22 Q Mr. Hughes, what storm water management ponds are
23 within the limits of what we call the regional outlet center
24 and the associated development that would occur, just sort
25 of the main focus of the development plan application?

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1 A One, 11, 12, 13 and 15, which I believe we already
2 stated.
3 Q Now could you do me a favor? I don't have my
4 glasses. Could you --
5 A To you want me to get up and point at them?
6 Q -- stand up there? Yes.
7 A You have one, 11, 12, 13 and 15.
8 Q And then what's that green dot in the middle?
9 A This is an existing farm pond.
10 Q Got you. Okay. I'm going to give you Exhibit 95
11 and could you find the pages in here --
12 A I have no idea.
13 Q -- which, well, that's the problem, I realize
14 you're not the forest conservation --
15 A Right.
16 Q -- guy, but can you find a page within that 50
17 pages that's, say, got pond 11 or pond 12 -- let's go with
18 11, that seems to be --
19 A 11?
20 Q -- in the core.
21 A I think it's eight and nine. Well, there's pond
22 11 right there.
23 Q Okay. And we'll let the Hearing Examiner kind of
24 settle in.
25 MS. ROBESON: So which page, which sheet?

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1 THE WITNESS: Sheet 9.
2 MR. KLINE: Are we okay, Ms. Robeson?
3 MS. ROBESON: Yes.
4 BY MR. KLINE:
5 Q Okay. Could you describe for us by telling us
6 what these colors and patterns are what is shown on page 9
7 of the --
8 A I would have to look at the key --
9 Q Sure.
10 A -- just like everyone else would have to do.
11 Q Sure.
12 A And, you know, I can't be all sure of that at this
13 size, but you've got some upland plantings, it looks like
14 some forest retention area, so there's some planted trees
15 marked and some other things.
16 Q Okay. What on page 9 would be classified as a
17 water quality plan feature or a storm water management
18 feature?
19 A The pond and the outfall.
20 Q Okay. And would you for the, so the Hearing
21 Examiner knows, what, describe on this where is the pond?
22 Is that on the right-hand side where these topo lines are
23 shown?
24 A I would say it's more towards the center right
25 below the road.

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1 Q Okay. So immediately to the right-hand side of
2 the road you're saying where I'm putting my hand --
3 A Yes.
4 Q -- that's --
5 A Yeah.
6 Q -- that's the pond itself? Okay.
7 MS. ROBESON: Well, I can't see where you're
8 putting your hand.
9 THE WITNESS: Would you want me to put my hand --
10 do you want me to show you?
11 MS. ROBESON: Well, just describe it so the record
12 knows where it is. Is there some marking there?
13 THE WITNESS: You'll see, it looks like two dashed
14 lines on the lower right-hand corner coming down next to the
15 shaded area.
16 MS. ROBESON: Yes.
17 THE WITNESS: If you follow those back up into the
18 development --
19 MS. ROBESON: Yes.
20 THE WITNESS: -- to the north, that is the pond,
21 that grading in there, and there's some dotted areas to the
22 left of that and that is the sand filter area.
23 MS. ROBESON: The patch lines?
24 THE WITNESS: Yes, if you follow the patch lines
25 up, that's your main containment cell. And then to the left

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1 of that --
2 MS. ROBESON: Now I'm not sure I know where you're
3 talking about.
4 MR. KLINE: Yes, it would be best to show her
5 because even I'm having trouble with it standing here.
6 MS. ROBESON: It looks topo-wise --
7 THE WITNESS: Yes.
8 MS. ROBESON: -- like it's in here.
9 THE WITNESS: This is your pond and then also this
10 is your dam that runs along here. And this is your sand
11 filter. So this is your water quality treatment.
12 MR. KLINE: So --
13 MS. ROBESON: Okay. So where --
14 THE WITNESS: And this is your larger volume
15 treatment.
16 MS. ROBESON: Where is the pond?
17 THE WITNESS: This is all --
18 MS. ROBESON: The pond?
19 THE WITNESS: -- all of it, yeah. Technically all
20 of this right here.
21 MS. ROBESON: Okay. So everything that is shown --
22 THE WITNESS: Between the roads and the stream
23 valleys is pretty much a pond.
24 MS. ROBESON: Okay. Well, where is the -- is
25 this --

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1 THE WITNESS: Road, road, stream valley.
2 MS. ROBESON: Okay.
3 MR. KLINE: Try to speak up so that the record --
4 THE WITNESS: Oh.
5 MS. ROBESON: All right. Well, I'm going to mark
6 it and then I, because, well, I'm going to have you mark it
7 and this is Exhibit 95, or whatever it is, 95. You're going
8 to mark in red -- well, let's do it, you can mark in red
9 where the pond is.
10 THE WITNESS: I would say this area. So like
11 that.
12 MS. ROBESON: Okay. So that's on 95, sheet 9?
13 THE WITNESS: Uh-huh.
14 MS. ROBESON: Okay. Is there any other area that
15 you want delineated?
16 MR. KLINE: Well, I guess if that's 11, then I
17 guess if you say 12 is -- you know, I'm raising more of
18 procedural issue, so I don't think I need to have it
19 reviewed on which one. Okay. How about doing it, this No.
20 11 then, is that 11 there?
21 THE WITNESS: That was 11.
22 BY MR. KLINE:
23 Q Okay. So can you show us where No. 12 is and No.
24 15 as well?
25 MS. ROBESON: And your procedural issue you're

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1 raising is that there is no preliminary forest conservation
2 plan, is that your procedural issue?
3 MR. KLINE: No, my question has got nothing to do
4 with preliminary forest conservation.
5 MS. ROBESON: I meant -- not that.
6 MR. HARRIS: Water quality plan.
7 MS. ROBESON: Water quality. So is that your
8 preliminary issue?
9 MR. KLINE: That's what I'm going to get to
10 eventually.
11 MS. ROBESON: Okay. I'd like him to outline it
12 because if anyone ever --
13 MR. KLINE: Yes, no, I agree.
14 MS. ROBESON: -- has any questions --
15 MR. KLINE: That's fine. No, you're right, we
16 should have all of it.
17 MS. ROBESON: So what's the next pond?
18 MR. KLINE: 12 and 15.
19 THE WITNESS: Right, that one.
20 MS. ROBESON: That's fine.
21 THE WITNESS: Just to give you a general idea of
22 where that is.
23 MS. ROBESON: That's fine. Okay. So what ponds
24 have you outlined on Exhibit 95?
25 THE WITNESS: 11, 12 and 15.

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1 MS. ROBESON: Okay. And 11 is on sheet 9?
2 THE WITNESS: Correct.
3 MS. ROBESON: Which sheet is 12 on?
4 THE WITNESS: I'm going to have to look back at
5 the key here. 12 would be on 15.
6 MS. ROBESON: Okay.
7 THE WITNESS: And 15 would be on 44.
8 MS. ROBESON: Okay. All right.
9 MR. KLINE: Mr. Hughes, actually did we mark your
10 copy? We should have marked your copy, right?
11 MS. ROBESON: Yes, he did mark my copy.
12 MR. KLINE: Your copy? All right.
13 BY MR. KLINE:
14 Q Mr. Hughes, understanding that the forest
15 conservation plan that I'm using --
16 A Uh-huh.
17 Q -- that you outlined stuff is a surrogate for the
18 water quality plan, but is it correct that water, the
19 facilities that are shown on the pages you outlined are
20 consistent with what will be shown in the water quality
21 plan?
22 A I don't understand what your question is here.
23 Q Okay. Sure. I mean the pond that you showed on,
24 outlined in red on each of those three locations, if I had a
25 water quality plan and I looked at it, I would find a pond

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1 in the same general location, in the same general set-up,
2 right?
3 A Yes.
4 Q All right.
5 A Yes.
6 Q So I mean for purposes of discussion these are
7 essentially the same as a --
8 A Uh-huh.
9 Q -- representation of what probably would be in the
10 water quality plan?
11 A I don't know if it's a representation because that
12 is not storm water --
13 Q I understand.
14 A -- and you would never build anything off of that,
15 so you would never look at those plans to find out what
16 storm water is. I would never use those to reference what
17 storm --
18 Q Okay.
19 A -- water was to find out how it pertained to the
20 site.
21 Q Okay. If I had the water quality plan here, what
22 would it show me relative to what you just showed us on
23 these plans?
24 A Which water quality plan are you referring to, the
25 preliminary or the final?

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1 Q The final.
2 A Now the final water quality plans were not, don't
3 look, pond 12 was not designed, but I believe it was in the
4 final water quality plan.
5 Q Does the exhibit show --
6 A Now there have been changes of things of that
7 nature to some of the other ponds, so I can't say that what
8 you're seeing in there for storm water would exactly match
9 what's on the final design plans.
10 Q I understand.
11 A What I can say with surety is that all the buffers
12 and everything that are shown on there are adhered to on the
13 storm water management plan.
14 Q I'll ask the question this way then. For each of
15 the three ponds you've mentioned, on the final water quality
16 plan there are three storm water management plans?
17 A Yes.
18 Q Okay. The area in blue, does any of it have any
19 site plan approval and, thus, is grandfathered in compliance
20 with the new regulations?
21 A They have site plan approval through the
22 infrastructure site plan and 11 and 13, well, are
23 grandfathered. Most of 13 is built. 11 is actually
24 constructed. So pond 11 is actually filled.
25 Q So 12 is not grandfathered?

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1 A 12 is not grandfathered.
2 MS. ROBESON: Which one is 12 on that sheet?
3 THE WITNESS: 12 is this one down here in the
4 corner which would be on sheet 15, I believe, of what you're
5 looking at.
6 MR. CHEN: You can see it on Exhibit 109.
7 MS. ROBESON: Yes. Yes.
8 THE WITNESS: So, and 15 is not grandfathered
9 either.
10 BY MR. KLINE:
11 Q Okay. When you implement the storm water
12 management solution to the plans, you will not build those
13 ponds as shown in the final storm water, final water quality
14 plan --
15 A If you --
16 Q -- correct?
17 A -- do things per the regulations right now and you
18 do ESD to the maximums that are practical and get your full
19 ESD, the ponds would go away and then probably most,
20 considered an improvement over what was designed and having
21 these larger ponds, spreading the development and the
22 recharge facilities and the storm water management
23 facilities throughout the site.
24 Q Would you not consider the elimination of the two
25 storm water management ponds to be replaced by even better

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1 facilities to be a significant change in the scope of the
2 water quality plan?
3 A That has not been DPS's position when we've
4 approved them.
5 Q Go ahead and explain that.
6 A We've approached them and they know that we do not
7 have them grandfathered and the discussions with them have
8 all been, and this is Mark, not, yes, Mark Etheridge and
9 Rick Brush, that they would go away and we would be required
10 to do ESD. Rick has been on page with us all the time when
11 we were requesting the rest of the waivers that we were not
12 doing these and that we would have to do ESD before our
13 final water quality plan. It never said any mention of
14 revising the preliminary water quality plan to accommodate
15 that and nor has it been required in the rest of the
16 development with anything else we've done.
17 Q Well, I understand. We're not talking about DPS
18 approved. We're talking about whether or not you meet the
19 zoning ordinance requirements.
20 A Well, I think that dovetails in directly with DPS
21 requirements because don't they have to follow the zoning
22 ordinance and the regulations?
23 Q No.
24 A They don't?
25 Q They would not be looking at this provision of the

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1 zoning ordinance.
2 A Wouldn't they?
3 Q They would be looking at Chapter 19.
4 A No, we have -- they do look at that and they will
5 not approve my plans without the site plan approval when I
6 do my final on the pond. They work directly with public --
7 MS. ROBESON: Right.
8 THE WITNESS: -- Park and Planning.
9 MS. ROBESON: They're not implementing the
10 development --
11 THE WITNESS: Okay.
12 MS. ROBESON: -- plan amendment --
13 THE WITNESS: Uh-huh.
14 MS. ROBESON: -- statute, so keep going.
15 MR. HARRIS: Just again let me interject here.
16 You know, 59-D-1.3(i), subparagraph (i), whatever, just says
17 that the applicant has to submit water quality inventories
18 and plans and secure required approvals in accordance with
19 Chapter 19. What Mr. Hughes is saying is that they have
20 determined what has to be -- they, I guess, have determined
21 what has to be submitted in, under Chapter 19 and that we
22 have complied with that.
23 THE WITNESS: DPS doesn't consider it a
24 significant change --
25 MS. ROBESON: Well --

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1 THE WITNESS: -- enough to warrant us going back
2 and revising it.
3 MS. ROBESON: -- Mr. Chen is saying they have an
4 executive regulation no matter what Mr. Brush is saying,
5 that there is an executive regulation that a development
6 plan amendment is a significant change. But let me go --
7 MR. HARRIS: I don't think it says that, ma'am.
8 MR. CHEN: Just for the record, the zoning
9 ordinance does not even make that a distinction. The
10 requirements of subsection (i) do not even qualify.
11 MS. ROBESON: That's true.
12 MR. HARRIS: What was, excuse me, what was the
13 section that Mr. Chen quoted of the Comcorp?
14 MR. CHEN: It's Comcorp, do you want the zoning?
15 MR. HARRIS: Yes, Comcorp. I know it's 19.67.01.
16 MR. CHEN: 19.67.01.01.
17 MR. HARRIS: .01 is just the authority?
18 MR. CHEN: Yes.
19 (Discussion off the record.)
20 MR. HARRIS: Following an executive regulation
21 applies to applications for approval. Okay. So it says the
22 regulations apply. I don't see anywhere in there that it
23 says that this is a significant amendment or that a new
24 preliminary water quality plan has to be submitted.
25 MS. ROBESON: Well, I guess -- go ahead, Mr. Chen.

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1 Do you want to respond to that?
2 MR. CHEN: Yes. All I'm, the point that I'm
3 making is that when you read the zoning ordinance
4 requirements and you read the Comcorp requirements, they're
5 right here, that this DPA comes within the scope of these
6 regulations. Indeed, my recollection, and I know what Mr.
7 Harris's response is going to be, well, Mr. Unterberg
8 expressed his opinion that they're not significant. I have
9 yet to hear, and I could be mistaken, I could be mistaken,
10 any evidence about earth moving areas, changes that will
11 have to occur by virtue of this DPA that are different from
12 the approved DP.
13 And Mr. Unterberg's, their opinion without any
14 factual foundation is worthless. Quite frankly, you are
15 quadrupling the retail on this site and in my layman's or
16 unlearned opinion, when you are quadrupling the retail, the
17 word significant becomes important. And as I have already
18 said, subsection 9 does not even put that qualification on
19 it. And I have been seeing, for what it's worth, we do know
20 that at a minimum under the zoning ordinance what the
21 applicant had to submit, that's had to submit is the water
22 quality inventories and plans and secure required approvals
23 in accordance with Article 5's Chapter 9. And then it goes
24 on that the development plan shall demonstrate how any water
25 quality protection facilities proposed in the preliminary

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1 water quality plan can be accommodated on the property as
2 part of the project. I could be saying, I think that's
3 exactly where Mr. Kline was going.
4 MR. HARRIS: And that's exactly what has been done
5 already. And as Mr. Hughes testified, this development does
6 not change any of those conclusions.
7 MS. ROBESON: Well, wait a minute. That's your
8 opinion.
9 MR. HARRIS: No, he testified. My question was --
10 MS. ROBESON: Okay.
11 MR. HARRIS: Okay.
12 MS. ROBESON: I haven't heard that.
13 MR. HARRIS: Okay.
14 MS. ROBESON: So let me -- what I want to know is,
15 and my concern is there's an aspect of this, it's not based
16 on limits of disturbing, it's based on impervious area. No?
17 Yes? Maybe?
18 THE WITNESS: Your storm water management is based
19 on impervious area.
20 MS. ROBESON: Yes.
21 THE WITNESS: Okay.
22 MS. ROBESON: So I don't have anything in front of
23 me saying what your percentage impervious area is and how
24 you're going to treat it --
25 THE WITNESS: Uh-huh.

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1 MS. ROBESON: -- even on a preliminary basis. I
2 know you've told me the roads can be, the roads are
3 accommodated --
4 THE WITNESS: Uh-huh.
5 MS. ROBESON: -- the residential as it's going to
6 site plan is accommodated, but argue, you could argue, well,
7 I don't know. I don't have anything in front of me --
8 MR. HARRIS: Well --
9 MS. ROBESON: -- saying --
10 MR. KLINE: If I might just explain? I think
11 everybody is kind of getting to where I was trying to get to
12 and that is we're taking away features that are shown on the
13 approved plan and we're replacing them. And as I read the
14 last sentence of (i) in 59-D-1.3,
15 "The development plan shall demonstrate how
16 any water quality protection facilities proposed
17 in the preliminary water quality plan can be
18 accommodated on the property as part of the
19 project."
20 And I believe that that means the applicant has the burden
21 of saying when we change to this new set of techniques,
22 here's what the effect is going to be and, one, we don't
23 have anything to tell us what that's going to be and let
24 alone not even having the plan, the old plan in the record.
25 And the way we, or the way I read (i) is that those things

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1 had to have been addressed at the time of the filing of the
2 application. And if I had been smart enough, thought I was
3 going to be involved in the case, I would have come over and
4 said, sorry, you shouldn't accept that because this is
5 missing.
6 MR. HARRIS: Perhaps --
7 MS. ROBESON: Mr. Chen, do you want to -- is that
8 your position too?
9 MR. CHEN: Yes.
10 MS. ROBESON: Okay. Mr. Harris.
11 MR. HARRIS: Perhaps it would be useful to have
12 Mr. Hughes explain how the water quality protection
13 facilities can be accommodated on the property, the water
14 quality protection facilities that are required under
15 Chapter 19.
16 THE WITNESS: So, ESD facilities, how are they
17 going to be accommodated on the property?
18 MS. ROBESON: Do you have --
19 MR. HARRIS: Yes.
20 MS. ROBESON: -- any idea of the impervious area?
21 THE WITNESS: I can't imagine it's going to be any
22 more than what's proposed and it's probably going to be
23 around 80 percent, 85 percent.
24 MS. ROBESON: Just a second.
25 BY MR. KLINE:

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1 Q What's proposed means what? This proposal --
2 A Well, what --
3 Q -- or the old one?
4 A -- was the old proposal.
5 Q Right.
6 A Well, that was a hospital with a lot of ground
7 parking. You know, there's not going to be a huge swing of
8 impervious there and, honestly, you're probably going to get
9 more green space than what you had before because you're
10 implementing ESD.
11 MS. ROBESON: But isn't the parking for retail a
12 higher ratio --
13 THE WITNESS: But you're --
14 MS. ROBESON: -- or not? I don't know.
15 THE WITNESS: You're going to have, whereas before
16 when the hospital was there, it was all pavement. You
17 really didn't have a lot of facilities. Now you're going to
18 be breaking this up with a lot of green space facilities
19 because you're going to need those to implement your
20 environmental site design.
21 MS. ROBESON: Do you know that for sure?
22 THE WITNESS: Yeah.
23 MS. ROBESON: So for sure you know that this is
24 going to have more impervious area?
25 THE WITNESS: I don't know for sure that it's

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1 going to have more impervious area, but I would bet they're
2 going to be roughly the same. But what I'm saying is you're
3 going to have more green space interspersed throughout the
4 development than you probably previously were going to. And
5 you're also probably going to have the implementation of
6 some kind of green roofs, which the hospital never would
7 have done. Hospitals don't like green roofs. It's a fungal
8 issue to worry about leaks.

9 BY MR. KLINE:

10 Q Mr. Hughes, if the, I require secure required
11 approvals, shouldn't all that have been delivered to DPS and
12 have them say we concur on that? Isn't that the intent of
13 securely required approvals?

14 MR. HARRIS: He testified we have secured --

15 THE WITNESS: We have.

16 MR. HARRIS: -- the approvals.

17 MS. ROBESON: Okay.

18 THE WITNESS: And what --

19 MS. ROBESON: The argument is --

20 MR. KLINE: Oh, no, you don't.

21 MS. ROBESON: -- no, just a second. I have to
22 agree with Mr. Kline on this one. You have a final water
23 quality plan for the road?

24 MR. HARRIS: For the whole site, not just the
25 roads. These ponds serve not just the roads.

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1 MS. ROBESON: What do they serve?

2 MR. HARRIS: The whole development.

3 MS. ROBESON: So do they -- so how do you know
4 when you just change this use, and I'm asking Mr. Hughes,
5 how do you know that this same storm water, or preliminary
6 water quality plan is going to be adequate when the
7 facilities it shows aren't even going to be there?

8 THE WITNESS: Well, the preliminary water quality
9 plan is, was done awhile ago, and we've all said that that
10 gets, you know, gets replaced when the final water quality
11 plan comes through. The final water quality was planned
12 showing the ponds and a number of other facilities.

13 MS. ROBESON: Which aren't going to be, some of
14 which are not going to be there anymore?

15 THE WITNESS: Correct. So you replace those with
16 the ESD, which means you use the smaller drainage areas.
17 And I've done this over a lot of developments and I did it
18 for, and I know Mr. Kline was involved with Butz when Butz
19 property was a lot more impervious than what it was after we
20 got to the final design. And we actually did that and that
21 was upwards of about probably 80 percent. That was a huge
22 crush. And we got that done and DPS was actually using that
23 plan to showcase how you do it. I have no doubt in my mind
24 that I can do it and that it can be done --

25 MS. ROBESON: We just don't know how yet.

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1 UNIDENTIFIED SPEAKER: Oh, I know how.

2 MS. ROBESON: How?

3 THE WITNESS: I just need to sit down with a pad
4 of paper.

5 MS. ROBESON: How?

6 THE WITNESS: Through the implementation, you can
7 use -- well, as I said, microbio filtration, you can use
8 that in open space areas. They make great amenities. You
9 go over to Wegman's, the design for Wegman's --

10 MS. ROBESON: Well, have you seen --

11 THE WITNESS: -- you'll see a lot of those.

12 MS. ROBESON: -- the layout in the development
13 plan on Exhibit 127, which is there?

14 THE WITNESS: Is that the purple?

15 MS. ROBESON: Yes.

16 THE WITNESS: The multi-colored one? Yeah.

17 MS. ROBESON: Yes. And then so where would these
18 bio-retention or bio --

19 THE WITNESS: Well, you've got a number of
20 patterns.

21 MS. ROBESON: No, can you bring that up and put it
22 on the board?

23 THE WITNESS: Oh, sure.

24 MR. KLINE: There should be a number on there
25 somewhere.

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1 THE WITNESS: 59?

2 MR. KLINE: Thank you.

3 MR. HARRIS: That's not right.

4 THE WITNESS: Is this that?

5 MR. HARRIS: Yes.

6 MS. ROBESON: Well, that's -- isn't there a one,
7 yes, that is right. Okay.

8 THE WITNESS: There's a lot of open space in here.
9 That's a lot of space where you can accommodate a lot of
10 nice facilities and you can even do them, suck in the
11 pavement a little bit, you have a nice --

12 MS. ROBESON: Is that open space? So how do you
13 know that's not parking?

14 THE WITNESS: Because this is parking.

15 MS. ROBESON: Okay.

16 THE WITNESS: These are the parking areas.

17 MS. ROBESON: All right.

18 THE WITNESS: So all this is technically open
19 space through here. You can see some of the road outlines,
20 this road. So the roads lead around the outskirts of the
21 parking and this is all interior. I can't say for sure that
22 it's going to be green. But even if it's pavement, they can
23 all be worked in and you just, you submerge them a little
24 bit, you put a nice, you put a nice, little boardwalk
25 crossings over them and make it a long, linear function down

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1 this whole length here, split it up with baffles so that you
2 meet your 20,000 square feet requirement to each for a half
3 an acre, 22, whatever -- you can go up. There's some fudge
4 factor in there because it's hard to hit the exact number.
5 MS. ROBESON: Have you ever done an outlet center
6 before?
7 THE WITNESS: No, but I have done dense,
8 commercial developments with this.
9 MS. ROBESON: Okay. All right.
10 MR. KLINE: May I --
11 THE WITNESS: So you also have a lot of the
12 parking islands here, stuff on the sides, large areas here,
13 here, come out of this --
14 MS. ROBESON: Wait, you've got to tell me where
15 here, the --
16 THE WITNESS: I'm sorry.
17 MS. ROBESON: That's okay. The transcript doesn't
18 know.
19 THE WITNESS: I'm sorry. I get excited about it.
20 I love doing this stuff.
21 MS. ROBESON: Yes.
22 THE WITNESS: But there are large islands here
23 and --
24 MR. HARRIS: And describe here.
25 MS. ROBESON: Here is?

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1 THE WITNESS: Just right in the middle of the
2 parking area.
3 MR. HARRIS: In area A?
4 THE WITNESS: A or E.
5 MS. ROBESON: On the north, on the --
6 THE WITNESS: Correct.
7 MS. ROBESON: -- perimeter of area A? That's the
8 parking?
9 THE WITNESS: Uh-huh. And there are also, let's
10 go through all these things.
11 MS. ROBESON: No.
12 THE WITNESS: Okay.
13 MS. ROBESON: Unless we really need to.
14 THE WITNESS: But as far as, like even through
15 these smaller areas, and even if you weren't doing --
16 MS. ROBESON: Wait, the small areas are --
17 THE WITNESS: The smaller areas in between the
18 buildings and they're probably --
19 MS. ROBESON: There are small areas in between the
20 buildings that could be what?
21 THE WITNESS: They would probably -- walkways, but
22 you could do bio-filtration planters for the rooftops there
23 that are just like nice, little raised planting beds that
24 are under drains that you direct the roofs down into. You
25 could do, actually probably do some brick pavers through

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1 here that are pervious to an under drain system. You could
2 definitely do microbio retention areas in between there to
3 catch all the sidewalks and raining them. And with ESD what
4 you end up doing is integrating everything so you make a
5 more planted, more desirable kind of area. You wouldn't,
6 you know, ideally you wouldn't even know they were there.
7 MR. KLINE: Madam Hearing Examiner, I don't
8 think -- well, let's put it this way. The reason the (i)
9 says give us the water quality plan so that you don't have
10 to rely on this witness to basically support the water
11 quality, what he's going to do as a solution, here's -- when
12 I started on this, it was because I thought all the bio-
13 filtration measures that we're talking about would actually
14 push out the building envelope because instead of having a
15 big pond down at the end, now we're going to filter all
16 these things in and that would basically mean we would need
17 more land area. So I was thinking, okay, we need to know
18 how that's going to work.
19 And what he's talking about, I think we understand
20 the technology, but he needs to know his soil types, he
21 needs to know whether his fills and everything else --
22 that's all supposed to be in a water quality plan that is
23 supposed to have a secured approval by DPS that is supposed
24 to be in the record and he shouldn't be testifying basically
25 to bail himself out of something that the ordinance

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1 requires.
2 THE WITNESS: I don't need soil types. I don't
3 need cut fills, not required. Soil types only make, are
4 required if you're doing certain types of infiltration
5 practice. That's infiltration. If you're doing microbio
6 retention, that's all undertone. You don't need to know
7 soil types. You don't need to know where there's fill. It
8 doesn't make a difference.
9 MR. KLINE: Thank you for the education.
10 THE WITNESS: If it did --
11 MR. KLINE: Then let me --
12 THE WITNESS: -- the projects would not go
13 forward.
14 MR. KLINE: Let me say the ordinance --
15 MS. ROBESON: I guess what he's saying --
16 THE WITNESS: I know what he's saying.
17 MS. ROBESON: -- what Mr. Kline is saying is that
18 I would have this addressed by -- and I'm not saying your
19 testimony isn't credible, but I would have a government
20 agency saying, yes, this can be done on this site.
21 THE WITNESS: Uh-huh.
22 MS. ROBESON: And so you've talked to Mr. Brush,
23 I --
24 THE WITNESS: Uh-huh. Yes, ma'am.
25 MS. ROBESON: And so I guess I tend to agree that

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1 it is, it is a requirement of the development plans that we
2 have, amendments that we have had before.
3 MR. HARRIS: A preliminary water quality plan is a
4 requirement under the regulations at the proper point in
5 time. We have that. In order to move this along, and
6 because Mr. Bossong isn't here, we're hamstrung a little
7 bit. May I suggest several things?
8 One, we will secure a copy of the approved
9 preliminary water quality plan and submit it into the record
10 to check that box. I believe that, as Mr. Hughes has said
11 today and Mr. Bossong who testified when we come back on
12 whatever day we come back, that the approved, or that the
13 proposed development here conforms with the approved
14 preliminary water quality plan with the exception that the
15 ponds go away so that a disturbed area is less than it would
16 have been under the development plan and better solution,
17 and that the ESD devices can be designed. But I believe he
18 would also testify that those ESD devices are not designed
19 at the time of a preliminary water quality plan and that the
20 regulations here, frankly, are outdated in that respect.
21 They were written before we had the ESD regulations.
22 MS. ROBESON: Well, okay, but you know I'm already
23 supposed to throw out the master plan and now I have to
24 throw out chapter whatever it is.
25 MR. HARRIS: No, no, no.

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1 MS. ROBESON: 19.
2 MR. HARRIS: No, I'm not suggesting we do that.
3 We have to comply with Chapter 19.
4 MS. ROBESON: Yes, and there has to be some
5 showing. I don't have a showing.
6 MR. HARRIS: We believe that that --
7 MS. ROBESON: And he --
8 MR. HARRIS: I'm sorry.
9 MS. ROBESON: Go ahead.
10 MR. HARRIS: We believe that finding was already
11 made in the original development plan and that this does
12 not, I'll say, adversely affect that, negatively affect
13 that. But we would do, we would bring that preliminary
14 water quality back and let Mr. Bossong explain how that
15 works and how this meets the requirements here.
16 MR. KLINE: And my position would be I'm glad to
17 have a copy of the existing preliminary water quality plan,
18 but my understanding of (i) in the Comcorp regulations in
19 Chapter 19 says that there has to be an amended, preliminary
20 or final, whichever it is, water quality plan with some
21 representation of what the new facilities would be so DPS
22 could conclude, yes, those will work and that Mr. Bossong's
23 testimony is not the same as having the secured approvals of
24 a water quality plan presumably from a public agency. So I
25 think that's what we're missing right now.

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1 MR. CHEN: That's where I am too.
2 MR. HARRIS: This says that you have to secure it.
3 It doesn't say you have to have a secured approval in
4 advance of this and beyond that the regulations talk about
5 significant amendments and Mr. Hughes --
6 MS. ROBESON: Well, what we'd normally do, and I
7 don't know if it means approval, but we at least have a plan
8 showing the proposed facilities or now it can be
9 accomplished on the site that DPS has at least reviewed.
10 MR. HARRIS: You do when there's storm water
11 management ponds, but you don't when there are ESD devices
12 because ESD devices are little, tiny things.
13 MS. ROBESON: Have to wait until --
14 MR. HARRIS: You have to wait until --
15 MS. ROBESON: -- site plan.
16 MR. HARRIS: -- site plan.
17 MS. ROBESON: Okay. Well --
18 MR. KLINE: Can I do one more step and this is
19 sort of beyond Mr. Hughes. And how we got into this was my
20 comment that with the ESD devices, you basically are having
21 a proliferation of storm water management treatments. The
22 outfalls are going to be, there's going to be a lot more of
23 them rather than just one down to the pond. And I wanted to
24 be sure that we knew what those were and they wouldn't
25 conflict with the forest conservation plan. And I realize

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1 that's not his specialty, but there is another dimension
2 once you say the ESD works from an environmental point of
3 view, we still need to know whether that's inconsistent with
4 the approved preliminary forest conservation plan.
5 MR. HARRIS: We recognize that the forest
6 conservation plan is applied there and I think Mr. Unterberg
7 testified that the proposed development will conform with
8 the forest conservation plan. So Mr. Kline's concern --
9 MS. ROBESON: Well, it doesn't though because not,
10 it doesn't as far as the ponds are concerned.
11 MR. HARRIS: It didn't as far as the development
12 was his testimony. The entire --
13 MS. ROBESON: Yes, but with his, the forest
14 conservation is to determine what kind of forest is on there
15 and whether you can meet your reforestation, you know,
16 whether there's specimen or important forest and whether you
17 can meet your reforestation requirements. So their limits of
18 disturbance is relevant. This is different and there are
19 many factors that go into it.
20 We have had, and I'm trying to think through now,
21 we have had cases that use bio-retention, you know, where
22 they say we're going to treat this with a green roof and,
23 you know, bio-retention planters here and it's going to
24 drain to here. I mean that's typically the testimony we
25 get. So I guess my question is have you planned that out?

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1 THE WITNESS: Do I have a plan --
2 MS. ROBESON: Yes.
3 THE WITNESS: -- for this development?
4 MS. ROBESON: Yes.
5 THE WITNESS: Not on paper. But I can tell you
6 one thing. There will be no additional outfalls from the
7 stream valley. Per Montgomery County, you cannot deviate
8 from the drainage areas to a specific stream, which means
9 they don't like you taking water from here and moving it
10 over to the other side of the valley. It's got to come out
11 in that drainage divide. So where the pond outfalls are now
12 are the low points and that's where they'll stay. You'll
13 just use ESD to pick up all the water and hold it and then
14 it will get slowly released to that same outfall. There
15 will -- Montgomery County does not, nor do the ESD or
16 regulations for MDE require you to have multiple, additional
17 outfalls to meet ESD.
18 MS. ROBESON: Did technical staff comment on this?
19 I guess what I --
20 MR. HARRIS: They did.
21 MS. ROBESON: And where? They just said they have
22 an approved plan.
23 MR. HARRIS: And let me see if I can find that.
24 MS. ROBESON: Because I've been looking for it and
25 I can't find it.

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1 MR. KLINE: It's pretty much on pages, I draw your
2 attention, some on 22, which is a forest conservation issue,
3 and then some on page 27, which used the reference
4 grandfathering, and then some on 28 also talking about
5 compliance with both Chapter 22 and Chapter 19. So 22 --
6 MS. ROBESON: Well, 22 is the forest conservation
7 plan, right?
8 MR. KLINE: Right. Right. Yes, that is --
9 MS. ROBESON: That's not what I'm talking about.
10 MR. KLINE: I understand, but what I'm trying
11 to -- they do all relate to each other though.
12 MR. HARRIS: Yes. Page 22, it says,
13 "The DPA conforms to all forest conservation
14 plans, water quality plan and storm water
15 management approvals which were approved for the
16 overall development of the Cabin Branch
17 community."
18 MR. CHEN: Page 28, it says,
19 "Any applicable requirements for forest
20 conservation under Chapter 22 and for water
21 resource protection under Chapter 19 also must be
22 satisfied. And the zoning ordinance requires a
23 part of that already be approved and supplied with
24 the application."
25 MR. HARRIS: And Park and Planning Commission

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1 staff says it does at page 22.
2 MR. CHEN: No.
3 MS. ROBESON: No, they say it's consistent with --
4 MR. HARRIS: It conforms to.
5 MS. ROBESON: -- but they don't -- it conforms to,
6 but that doesn't mean that -- I don't know what that means,
7 it conforms to. Does that mean, A --
8 MR. HARRIS: It meets the requirements.
9 MS. ROBESON: No.
10 MR. KLINE: There was nothing in front of them
11 they could have come to that conclusion because we have just
12 proven there is no plan.
13 MS. ROBESON: Yes, well, no, they would mean the
14 one that was done in 2007, but --
15 MR. KLINE: Okay.
16 MS. ROBESON: -- I don't even have that in the
17 record. So let's do this.
18 MR. HARRIS: Okay. That's why --
19 MS. ROBESON: Rather than argue about this more,
20 let's get that in the record. I may refer the question to
21 technical staff because I don't think conforms to, but I
22 don't, haven't seen a plan. So I'm not clear on what that
23 means.
24 MR. HARRIS: Okay. Well, then --
25 MS. ROBESON: You can -- how could it conform to

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1 something that obviously still uses these cons? I mean that
2 doesn't make sense to me.
3 MR. HARRIS: The essential element has to do with
4 the disturbed area and because the disturbed area, the
5 limits of disturbance is less, in fact, because the pond,
6 whatever it was, goes away.
7 MS. ROBESON: But you could have the same
8 disturbed area and, disturbed area and greater impervious
9 area.
10 MR. HARRIS: The impervious area is not calculated
11 at the time of a preliminary water quality plan, so you do
12 not know what --
13 MS. ROBESON: Well, I don't want you to --
14 MR. HARRIS: -- that is.
15 MS. ROBESON: -- testify but, you know, just bring
16 the plan back.
17 MR. HARRIS: I'm fine with that. That's what I
18 suggested.
19 MS. ROBESON: My, I guess my concern was I did
20 think that technical staff sort of punted on a lot of things
21 and I think they're raising valid questions and I think that
22 you may very well be able to show that everything is hunky
23 dory. Well, it's better to show it now than to take the
24 risk on appeal.
25 MR. HARRIS: Amen to that. So how, I have

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1 suggested a moment ago that we adjourn the testimony of Mr.
2 Hughes now because we don't have that preliminary water
3 quality plan in hand now. We will secure that and submit it
4 maybe by tomorrow, if not by Monday, well, in advance of our
5 next hearing date and we'll bring Mr. Bossong in to show how
6 we meet these requirements.
7 MR. KLINE: And our position will be short of
8 having an approved, water quality plan approved --
9 MS. ROBESON: I know that's your position.
10 MR. KLINE: -- by DPS, we would say the record is,
11 the application shouldn't have been accepted.
12 MS. ROBESON: And I understand that's your
13 position. I haven't ruled on that issue yet.
14 MR. KLINE: All right. Okay.
15 MS. ROBESON: But my, what I am saying is I don't
16 think there's enough in this record and I do think technical
17 staff on some things may be more general than would have
18 been desirable.
19 MR. HARRIS: Though should we, my suggestion would
20 be that we --
21 MS. ROBESON: What I would like you to do at the --
22 MR. HARRIS: -- discontinue --
23 MS. ROBESON: -- next hearing, bring in the
24 approved final water quality plan and tell me why, and it
25 would be real -- how you're going to make it work for this

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1 development plan amendment and, you know, it would be really
2 nice to have something from DPS saying, hey, they can really
3 do this.
4 MR. HARRIS: Fine. We will do that for you. The
5 benefit of a distant hearing date, the only one I've found.
6 MR. KLINE: Yes, right, as I was going to say.
7 MS. ROBESON: All right. So now are there any
8 other things that you or Mr. Chen are going to say are
9 inadequate about this, you know, aside from the substantive
10 disagreements, is there any piece of the application you are
11 going to say or you continue to say is missing?
12 MR. CHEN: It depends on who they put on. This is
13 their case.
14 MS. ROBESON: No, no, no, no, no, no. You have
15 the application as far as it is in front of you, correct?
16 We all have what exists as far as we have it in front of
17 you, correct? So is there any other element that's laid out
18 in 59-D-1 --
19 MR. KLINE: 3 -- the contents of the development
20 plan.
21 MS. ROBESON: -- contents of the development plan
22 that you are alleging is missing at this time?
23 MR. KLINE: Thank you.
24 MS. ROBESON: You may --
25 MR. KLINE: No, no, thank you. The answer --

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1 MS. ROBESON: -- I, you may want to say --
2 MR. KLINE: -- is yes.
3 MS. ROBESON: -- you know, subject to further
4 testimony you don't think there is?
5 MR. CHEN: That's where it was.
6 MR. KLINE: We go through the checklist.
7 MS. ROBESON: I just want to avoid --
8 MR. KLINE: That's the one.
9 MR. CHEN: I think I've --
10 MS. ROBESON: -- having to delay the hearing
11 for -- okay. So do you --
12 MR. KLINE: That was --
13 MS. ROBESON: -- have any other questions of Mr.
14 Hughes at this time?
15 MR. CHEN: I thought they wanted to suspend?
16 MS. ROBESON: Are you asking --
17 MR. HARRIS: No.
18 MS. ROBESON: -- to suspend this?
19 MR. HARRIS: And proceed to, you know, Mr.
20 Ferguson who is here and any other witnesses. We certainly
21 don't want to waste good daylight.
22 MR. CHEN: He hasn't finished --
23 MR. KLINE: Well --
24 MR. CHEN: -- he's got to finish his questions.
25 MR. KLINE: Okay. Well, let's finish this first.

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1 No, we don't have any more questions of Mr. Hughes.
2 MS. ROBESON: So are you prepared to call Mr.
3 Ferguson?
4 MR. KLINE: Well, I go back to Mr. Chen's speech
5 before about the advantage of having our land planner coming
6 after the applicant has made his presentation because he has
7 the benefit of hearing all that testimony.
8 MS. ROBESON: Well, is he a civil engineer?
9 MR. KLINE: No, he's not a civil engineer, but he
10 does need to know essentially how the, as I pointed out, how
11 basically they're going to organize those facilities in
12 terms of how it works on the site and what its effect is
13 going to be.
14 MS. ROBESON: Well, what I'm going to do is this.
15 I'm going to give you the opportunity to recall him, but I
16 want to proceed today.
17 MR. KLINE: Okay.
18 MS. ROBESON: So we will proceed and you may after
19 Mr. -- you can reserve the right to bring him back after Mr.
20 Bossong testifies.
21 MR. KLINE: Can we just take a break for a second
22 then to kind of clean up and get oriented?
23 MS. ROBESON: I'm -- yes.
24 MR. KLINE: Thank you.
25 MS. ROBESON: Five minutes please.

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1 MR. KLINE: All right.
2 (Recess.)
3 MS. ROBESON: Okay. We are not going to -- do I
4 have everybody? Yes. We are not going to go past 5:00
5 tonight because I have a commitment that I --
6 MR. CHEN: You have a life.
7 MS. ROBESON: What?
8 MR. CHEN: You have a life.
9 MS. ROBESON: All right. So we have, I think, Mr.
10 Kline's witness, Mr. Ferguson. Please raise your right
11 hand.
12 (Witness sworn.)
13 MS. ROBESON: All right. Go ahead, Mr. Kline.
14 DIRECT EXAMINATION
15 BY MR. KLINE:
16 Q Mr. Ferguson, would you please state and spell
17 your name for us?
18 A My name is Mark Ferguson, F-E-R-G-U-S-O-N.
19 Q Mr. Ferguson, if you could please give us your
20 professional address?
21 A It's 14603 Main Street in Upper Marlboro, Maryland
22 20772.
23 MS. ROBESON: Okay. I apologize before we start.
24 I have somebody's Chapter 19 of the Code. I don't want to
25 get it mixed in with the rest of the stuff. I'm sorry, Mr.

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1 Kline, go ahead.
2 MR. KLINE: Bear with me. I was just trying to
3 check and find the reference to Mr. Ferguson's resume.
4 MS. ROBESON: In the exhibit list?
5 MR. KLINE: Yes, ma'am.
6 BY MR. KLINE:
7 Q Mr. Ferguson, Exhibit 76 in the record of the case
8 is a copy of your resume. Would you please just give us a
9 brief overview of what it tells us?
10 A Certainly. My education is a bachelor of
11 architecture from the University of Maryland in 1985. I was
12 registered as an architect in 1987. Since 1989, I've worked
13 with one interval for the firm of RDA Engineering in Upper
14 Marlboro as a land planner. Between 1999 and 2005, I have
15 my own shingle out doing substantially the same. And my
16 experience in cases where I have been accepted as an expert
17 have been laid out at great length in my resume.
18 Q Do you feel your credibility will be in any way
19 impugned by virtue of having attending high school with Mr.
20 Robins?
21 A It may very well.
22 MS. ROBESON: I don't know. He's -
23 MR. ROBINS: I object.
24 MS. ROBESON: Go Terps! Okay. Go ahead.
25 MR. KLINE: Based on Mr. Ferguson's detailed,

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1 lengthy resume, I'd like to offer him as an expert in the
2 field of land use planning.
3 MS. ROBESON: Any objections, Mr. Harris or Mr.
4 Robins?
5 MR. HARRIS: No, I have no objections.
6 MS. ROBESON: Okay. I --
7 MR. HARRIS: No, no.
8 MS. ROBESON: I will qualify you as an expert in
9 land planning.
10 THE WITNESS: Thank you, Madam Examiner.
11 BY MR. KLINE:
12 Q Mr. Ferguson, would you please first tell us what
13 you review in terms of preparing for the hearing and what
14 you've seen and read and listened to?
15 A Certainly. I, of course, if review of the master
16 plan, the Clarksburg master plan and its technical appendix.
17 I have reviewed other master plans that were the subject of
18 plans which have been referenced in some of the case
19 materials as being analogous to what has been proposed. I
20 have, of course, read the staff report of your technical
21 staff, the Park and Planning staff. I have reviewed the
22 applicant's statement of justification and some of his other
23 case materials. And I have read through the transcripts of
24 the Planning Board and the first three of the hearings
25 before you, Madam Examiner.

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1 MS. ROBESON: Okay.
2 BY MR KLINE:
3 Q Have you formed a conclusion of the, whether the
4 application for the development plan amendment is in
5 substantial conformance with the 1994 Clarksburg master
6 plan?
7 A Well, I have and I would make a caveat. One of
8 the things that I note is that the criteria for approval,
9 which the District Council must find, is more narrow and
10 defined than a broader master plan compliance, which is
11 ordinarily the case. The MXP zone, and I'm going to
12 struggle with those letters throughout the whole hearing, is
13 a planned unit development zone. And I'll just repeat
14 what's in the zoning ordinance. That it's subject to a
15 binding plan which is to say the development plan proposed
16 by the applicant and approved by the District Council is a
17 part of the grant of the zoning category. And so the
18 development plan really is a part of the zoning. And the
19 criteria for the approval of the development plan do go on,
20 but the first one very simply in 59-D-1.61(a) is that the
21 proposed development plan substantially complies with the
22 use and density indicated by the master plan or sector plan.
23 And I note that it's a distinction, Madam
24 Examiner, because if this were simply a case of broad master
25 plan compliance, I would certainly feel a lot more latitude

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1 as a planner to apply the policies and the goals of the plan
2 towards a holistic finding of conformity or compliance. But
3 I believe that the ordinance would straight-jacket me into
4 more narrowly looking at the use and density requirements
5 precisely because those are part of the grant of the zoning.
6 And so I really did not pay a lot of attention in
7 my preparation for this hearing to transit orientation. I
8 didn't pay virtually any attention to the environmental
9 impact and some of the other components of the master plan
10 because it was apparent to me that there was a, there was
11 not a nexus in my opinion between the use and particularly
12 the density recommendations in the master plan in the
13 contents of the development plan amendment.
14 Q Can you go ahead and elaborate on that some more?
15 And what were the factors you identified that led you to
16 that conclusion?
17 A Well, as I mentioned briefly, but will more
18 specifically, the MXPDP zone is a planned unit development
19 zone. And those zones, Madam Examiner, are very
20 specifically plan implementation zones, and quoting from 59-
21 C-750, it's the objective of this zone specifically, MXPDP,
22 to establish procedures and standards for the implementation
23 of master or sector plan land use recommendations. And in
24 so doing, it carries on later, it's intended that this
25 zoning capacity be utilized to implement existing public

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1 plans and pertinent County policies in a manner and to a
2 degree more closely compatible with said County plans and
3 policies to make it possible under other zoning categories.
4 And so it's apparent to me that the intent of the
5 ordinance, again, requires you to pay very specific
6 attention to those use and density recommendations because
7 they form essentially what your permissible density would
8 actually be allowed to be and to a degree that permissible
9 uses and I'll expand further on why I said to a degree in a
10 moment. But those are part of the zoning. Certainly, there
11 are other provisions in the ordinance that provide for the
12 development regulations and so on and so forth. But this
13 use and density requirements are a part of the zoning and
14 there is a particular degree of conformity that is required
15 by the ordinance to find.
16 We've heard extensive testimony, or at least I
17 have today, about the plan's requirement for, or plan's
18 proposal for 120,000 square feet of retail amongst a total
19 of 2,420,000 square feet of employment and retail uses and
20 that's pretty specific. And I think, Madam Examiner, if I
21 were asked to construct an argument for approval of this, I
22 would have to do, as the applicant has done, and essentially
23 contend that retail is employment. And while I applaud his
24 creativity, I think that the uses, the use types are far
25 enough apart that that really strains my ability to say,

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1 yes, employment, you know, and retail are the same thing.
2 The characteristics of an employment use are a use
3 where you go to it in the morning, you stay there most of
4 the day, you go home at the end of the day and there's some
5 degree of coming and going in between, but you're bringing
6 in a large number of people to one location where they're
7 employed. Whether that employment is office, whether it's
8 manufacturing, light industrial or, indeed, there are any
9 number of things which could fall under the employment
10 category.
11 When you look at retail, Madam Examiner,
12 essentially you have a use where there are a small number of
13 people that are employed there all day and you have a large
14 number of people that are coming and going at various times
15 through the day and particularly during hours when it's not
16 customary to go off to your employment land use to, you
17 know, have your commercial interactions. Land use is a
18 gradient. You know, certainly there was discussion earlier
19 about a hotel. And a hotel has been found to be an
20 employment use.
21 I would characterize a hotel as officish. You
22 know, you're not residing there but you're not, you know,
23 it's not a, it's not a retail destination. So I think it is
24 valid to be able to say that that is a use that is at least
25 sufficiently ancillary to an employment concentration that

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1 it would be a reasonable thing to say, sure, a hotel is
2 employment enough. Similarly, a hospital where you do have
3 a concentration of employment activity there, retail is
4 something different.
5 Madam Examiner, if you look at ordinances
6 throughout the country, Euclidean zones are typically
7 categorized into three broad categories, you know,
8 industrial, residential and commercial. And industrial very
9 often does include, you know, office uses and sometimes
10 there, you know, well, maybe it's commercial, sometimes it's
11 manufacturing and industrial. But retail is a fundamental
12 category. It's not employment. And saying retail is
13 employment is, you know, it's Orwellian, war is peace,
14 freedom is slavery, ignorance is strength. I mean you have
15 to really make language into something that it isn't to be
16 able to conclude that retail use is employment. And I'm
17 unable as a planner to do that. I look --
18 Q Before you leave that, have you ever run into the
19 term retail employment as either a term in a zoning
20 ordinance or a term in the Argo of the planning industry
21 or --
22 A I have not and I was taken by the creativity of
23 the term. So I did use, God bless the Internet, I did use
24 Google and do a very directed search to see if that, if that
25 came up anywhere and there were six results and all of them

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1 had to do with discussing jobs, you know, generally as
2 somebody employed in retail or being employed in service or
3 being employed in, you know, government or something like
4 that, but not in terms of a description.
5 Q So it has no currency in planning?
6 A Not in my experience.
7 Q I'm sorry I interrupted. Go ahead.
8 A No, not in my experience. Certainly, I looked
9 through the master plan at some length and it's fairly clear
10 that the master plan conceived the employment uses as being
11 similar to the Comsat, you know, building which it refers
12 to, which is to say office uses that are solely office uses
13 or solely R&D, which is provided for on some of the land use
14 maps in the plan, and not in what I would concede is a more
15 modern, integrated fashion such as what the applicant is
16 proposing. But I do have to return to the language of the
17 master plan and this master plan conceived of employment as
18 employment and it conceived of retail as retail in the
19 commonly understood senses of those words. And, you know,
20 we characterizing one into the other is certainly not what
21 is plainly apparent that the master plan meant to do.
22 One of the things that applicant and staff did in
23 their review of the project is to note, and this is
24 basically a discussion from pages 13 through 20, roughly, of
25 the staff report where they discuss master plan consistency

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1 and they refer to several comparable projects including
2 Washingtonian Center, Rock Spring Park and Park Potomac.
3 And, of course, what I did was I looked to see not that
4 those developments were a precedent to the subject
5 development in form and content, but rather, Madam Examiner,
6 terms of process.
7 And so when you look at Park Potomac, it's in the
8 I-3 zone. The I-3 zone is not a plain unit development
9 zone. It does not have a requirement for a development plan
10 and doesn't have that same requirement for conformance to
11 the use and density requirements. So to a degree I would
12 contend that it's moot.
13 I looked at the Rock Spring Park case and found
14 that the North Bethesda master plan very specifically
15 recommended a mix of employment and retail, and substantial
16 retail uses. It provided that the retail density could be
17 increased over a base density from 150,000 to 220,000 if a
18 commensurate amount of office space were, in fact,
19 subtracted. And so the Rock Spring Park plan as it was most
20 recently approved in 2011 conforms exactly to the use and
21 density requirements of the master plan. And so regardless
22 of the content of that development with regard to the
23 content of the subject development, it may very well be that
24 a planner would find that one would be an appropriate model
25 for the other. But the MXPDP zone isn't a planner

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1 implementation zone and I don't mean to be glib. It's a
2 planned implementation zone and so we can't substitute our
3 judgment as planners for what the plan of record is.
4 And, finally, I did look at the Washingtonian
5 Center which is an MXPDP plan and the Shady Grove study area
6 master plan of which I have the last copy, but I will need
7 to sacrifice into the record. In its discussion of the
8 Washingtonian Center plan, bear with me while I find it. I
9 thought I had that written down.
10 MS. ROBESON: Turn on the air? You can, yes.
11 MR. KLINE: Yes?
12 THE WITNESS: Yes, on page 60 of the Shady Grove
13 study area, which is a July 1990 amendment to the
14 Gaithersburg plan --
15 MS. ROBESON: Right.
16 THE WITNESS: -- since it is a plan amendment. It
17 did not actually provide any specific use or density
18 recommendation. And so were that the case, I would
19 certainly grant the District Council a great deal of
20 latitude in finding what an appropriate mix of uses to be,
21 but they didn't and, as I said, if you would like this, I'm
22 happy to give it up.
23 And there has been a lot of discussion in this
24 case about the provisions of the MXPDP zone which do allow
25 for up to 20 percent of the use volume to be retail uses.

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1 But, again, I go right back to the very beginning, the
2 criteria of 59-D-161(a), the MXPDP zone is intended to
3 implement the plan and that's why it says up to 20 percent.
4 And if the master plan doesn't provide for that intensity of
5 retail use, your uses and your intensity aren't fixed by the
6 zoning ordinance, they're fixed by the master plan and
7 following from that the development plan.
8 Now what in the end, Madam Examiner, it appears to
9 me that the staff did and I like your phrase of punt because
10 I believe it is just that. And in their conclusion to the
11 master plan on page 34 of the staff report, they provided
12 the Planning Board, and presumably gave three alternatives.
13 And the first was approve it, go to a, go on to the next
14 phase; two, deny it; or, three, defer action on the
15 development plan for master plan amendment.
16 In my view, that would probably be the most
17 appropriate alternative for them to have recommended if
18 there is some desire for the plan to go forward because I
19 don't have tremendous issue with the contents of their
20 proposal, but process I do and process is important because,
21 you know, Madam Examiner, there are a number of issues that
22 have to be considered in the review of any large-scale plan
23 and we certainly just confronted them in hearing Mr.
24 Hughes's testimony where, well, do we have, you know, a
25 water quality plan to actually look at and review and what

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1 we were potentially in the position of having to do was
2 simply to take Mr. Hughes's word for it as an expert.
3 In addition to the difficulties that poses for
4 being able to evaluate things, to be able to see on paper
5 and to see whether or not that is constant with the words
6 that come out of his mouth and to be able to look at the
7 relationship of what is or is not on that plan with the
8 other things that have to be considered, there isn't the
9 same opportunity for the public to be able to participate
10 in, comment on and potentially to influence a development
11 proposal in a proceeding such as this as there is in more
12 public proceeding for a master plan amendment.
13 So I do think that largely it is reasonable. I do
14 think that there are questions that would need to be asked.
15 I think, Madam Examiner, there has been a lot of discussion
16 about regional outlet center and what exactly that is. And
17 what I can certainly say from my experience is that an
18 outlet center is not a monolithic land use type in a way
19 that a gas station or a convenience store is. There are
20 great differences in the land use effects that depend on how
21 it is merchanted by its operator, how it is operated.
22 I mean certainly there are some outlet centers
23 that get a lot of their business by having organized bus
24 tours bring people to that site and as they get off the bus
25 you get a coupon and essentially all of those users are then

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1 captive users that would not really have any opportunity to
2 influence the commercial activity outside of that particular
3 site. There are other outlet centers that operate
4 essentially as another regional shopping mall, but with more
5 of what they say in the industry is a value proposition,
6 okay?
7 The kind of -- and I don't know how you can
8 address that because is a value-oriented shoe store
9 different than a shoe store from a zoning ordinance and land
10 use regulation perspective? I don't know that it is. But
11 there may be site plan considerations that attend to the
12 kind of choices that are made in the design of an outlet
13 center that vary substantially from an operator to operator,
14 developer to developer.
15 And I think it is a reasonable thing to look at.
16 For instance, is there going to be a food court? Typically
17 they are, I believe. The applicant has proposed that there
18 is. Where is that food court going to be located? Is that
19 food court going to be out next to the residential area such
20 that those restaurants effectively act as neighborhood or
21 community-sized retail or in this case I would say town-
22 scale retail or are they wholly interior to the, you know,
23 to the proposed setter. You know, I don't know, but points
24 like that could have a substantive impact on issues that the
25 plan does express a great deal of concern about, mainly the

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1 viability of retail in the town center district.
2 I'm not going to give you a conclusion as to
3 whether I think that their proposal would or would not
4 impair, you know, the success of retail in the town center
5 district simply because I don't know enough about it. It
6 could, but I don't know.
7 And there are other things that, as I said at the
8 beginning in my statement but I didn't go through that
9 perhaps could be studied. Is it important for a more self-
10 contained outlet center, regionally oriented outlet center
11 to be as transit-oriented as you might expect other parts of
12 a development to be? Maybe there isn't. You know, so that
13 might impact other aspects of the plan that we don't really
14 have the same opportunity or really, you know, the liberty
15 to take even a few months to stand back, look at it and say,
16 well, let me consider this, let me see what you think, let's
17 put it out to the public and so on and so forth.
18 So, you know, my opinion is not that the
19 applicant's plan doesn't have merit. It may very well. My
20 opinion, my strong opinion is that the forum for judging
21 that isn't this one.
22 MS. ROBESON: Okay.
23 BY MR. KLINE:
24 Q Does the change from the hospital or office use,
25 the office employment use, to a retail employment use change

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1 the character or the intensity of the use as was
2 contemplated in the plan, the '94 plan?
3 A It could. I mean to a certain degree I would need
4 more information to be able to study that. I don't know
5 what the scope of the hospital was going to be. I don't
6 know what the trips, for instance, going in and out would
7 have been. I don't know what the orientation of that
8 hospital to the surrounding road network, you know, would
9 have been and all of those factors do attend to a conclusion
10 like that. So I don't know that I can give you an answer.
11 Q Okay. On page 9 of the applicant's justification
12 statement, the following sentence is found there at page 9,
13 applicant justification statement.
14 "The fashion center employment retail
15 proposes part of the DPA will be a catalyst for
16 the remainder of the development of the employment
17 center. There is a proven track record to
18 substantiate this statement."
19 Do you have any professional experience or familiarity with
20 any professional opinions on the subject, whether that is a
21 correct statement that the regional outlet center will
22 stimulate office development?
23 A Again, I don't think that there is sufficient
24 information in the record, or at least that I have been able
25 to review that would allow me to make a definitive opinion.

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1 It is certainly the case that some of the uses which can
2 attend an outlet center could be complimentary to office
3 uses. That's not necessarily the same thing as it would
4 stimulate the development of office uses, but certainly it
5 is very, it is becoming more and more desirable from a, in
6 the land use, how should I say this, in the land use
7 community and I don't mean that to sound, well, I'm
8 floundering a little bit, but it is desirable to have
9 complimentary uses to an office concentration that make the
10 working environment a more positive place, a place to take
11 clients to lunch, a place where you can go out and get a new
12 white shirt for a meeting in the afternoon to replace the
13 one that you spilled coffee on in the morning. You know,
14 even entertainment such that, you know, a creative type
15 could knock off for a couple of hours in the afternoon to
16 refresh while they, you know, work hard on their statement
17 of justification in the evening, you know, whatever it may
18 be.

19 So there are uses which are complimentary. And
20 some of those uses absolutely could be in that facility. At
21 the same time, you would have to look at the inter-
22 connection of them. So if you had, for instance, you know,
23 a nice little restaurant and a, you know, a men's clothing
24 store or a women's clothing store as the case may be, on the
25 ground floor of your office building so you had to just

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1 simply ride down the elevator and didn't need to spend the
2 time to get into your car and drive around, park, you know,
3 do whatever you had to do and return to the office, that
4 would be more complimentary than something which was wholly
5 self-contained and remote, for instance.

6 So I don't know that I've given you an answer
7 except to, expect to try and explain that really the devil
8 is in the details. Things could be complimentary depending
9 on how they are merchanted and sited. They could, in fact,
10 you know, really help make an office development more
11 attractive to lessee.

12 Q In your opinion in the 1994 plan, the up to
13 120,000 square feet of retail was addressing what type of
14 retail?

15 A Well, the technical appendix makes it clear that
16 it was addressing both convenience goods and shoppers
17 convenience. We've had a lot of discussion in this hearing
18 about neighbor-oriented, neighborhood oriented retail and
19 specialty retail and there's not 100 percent correspondence
20 in between those two, but there is a substantive amount.
21 Convenience goods, groceries, prescriptions, dry cleaning
22 and so on are the kinds of uses that are ordinarily
23 concentrated in neighborhood retail centers.

24 Shoppers' goods are things by definition for which
25 you might go a lot farther to get to. You might go to

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1 several other places to compare prices and quality. And
2 specialty retail ordinarily is shopper, ordinarily are
3 shopper's goods. They're not synonymous, but you can, I
4 hope I've illustrated the degree of overlap.

5 Q The plan, did the plan recommend that there be
6 some service retail, neighborhood-oriented use, to serve the
7 residents of the Cabin Branch neighborhood?

8 A It did.

9 Q Okay. In kind of a worst case scenario question I
10 asked Mr. Unterberg, I asked him if you go to the regional
11 outlet center, it's 450,000 as set forth in the applicant's
12 justification statement and then deduct what's been called
13 the Gosnell property on the north side of 121 of 86,000
14 square feet, I asked what was left and the answer was 25,300
15 square feet to be located within the Cabin Branch
16 neighborhood. In looking at the Cabin Branch diagram to the
17 right --

18 A Uh-huh.

19 Q -- in the center, whatever --

20 A Uh-huh.

21 Q -- assuming there was no other neighborhood retail
22 but that, would you feel that would be a critical, enough
23 critical mass to provide the service needs of the Cabin
24 Branch neighborhood?

25 A I guess I would stipulate at the outset that I am

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1 not a market analyst. I would certainly defer to Mr.
2 Bogorad on questions like that. I will say, however, that
3 economic and market analyses are something that are
4 particular interest to me in my planning practice. And I
5 will say that -- which quantity did you ask me would be
6 sufficient for the neighborhood --

7 Q The --

8 A -- 25,000 was what was left over?

9 Q Well, 25,300 was what Mr. Unterberg said.

10 A I would say that feels on the low side, however, I
11 would certainly defer to a rigorous analysis that establish
12 trade areas, give the population an income analysis and
13 determine just how much, how much dollars there was to
14 support various different kinds of retail. And that's
15 evolving. You know, as time goes on, shopping patterns
16 change. There was no Internet shopping in 1994. There
17 were, as has been pointed out, a number of uses back then
18 which essentially don't exist any more such as video rental
19 places.

20 And the proliferation of retail throughout the
21 region has made for many, many more opportunities for people
22 to shop all sorts of locations, not just near where they
23 work or where they live or in between but, you know, each of
24 us can certainly consider our own shopping behavior and look
25 at that for examples of how, you know, people behave. So as

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1 I say, it feels low to me. The technical appendix, I
2 believe, well, I'll read it, suggested that west of 270
3 there was 75,000 square feet of supportable retail use and
4 that's supportable both by household demand and by demand
5 for the employment areas.
6 So would 25,000 support that? That would, again,
7 be a suggestion where you do the simple math and subtract
8 25,000 from 75,000 and suggest that there would be 50,000
9 square feet shortage. But, again, I would largely defer to
10 a market based on that.
11 Q But there's nothing in the record --
12 MR. HARRIS: Objection.
13 MR. KLINE: Thank you.
14 MR. HARRIS: Is there.
15 BY MR. KLINE:
16 Q Is there anything in the record --
17 MS. ROBESON: He doesn't even have to state the
18 basis anymore. Go ahead.
19 MR. KLINE: I appreciate the guidance from someone
20 more experienced than I. Is there --
21 MS. ROBESON: Wait a minute. Okay, never mind.
22 Go ahead.
23 MR. HARRIS: I don't accept that.
24 MS. ROBESON: I was going to say something and
25 then --

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1 MR. HARRIS: I'll object to that.
2 MS. ROBESON: -- I was like, no, I better not say
3 that.
4 BY MR. KLINE:
5 Q Is there any of that technical analysis, that
6 empirical analysis that disputes the numbers that we see
7 very clearly in the master plan?
8 A Well, I have to go back and re-read Mr. Bogorad's
9 testimony. I would, again, return to the point that
10 regardless of that, what is in the master plan has a great
11 deal of weight in this proceeding.
12 Q You indicated that you weren't getting into the
13 competitive aspects of retailing in Cabin Branch and
14 retailing in the town center, but does the change in the use
15 mix in Cabin Branch have an effect, an impact on the town
16 center in your professional opinion?
17 A Well, I would say, again, with the same caveats
18 that it depends on details such as the configuration and the
19 use mix. You know, it certainly could. Knock on laminate,
20 the economy is improving and there will be more retail
21 activity than there has been in the past six, you know,
22 years or so. But certainly it's been the case that in, at
23 least in many places one of the only uses that, and reliably
24 able to occupy retail spaces for restaurants, okay? And if
25 there is a concentration of restaurants in the form of a,

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1 whether in the form of a food court or in the form of pad
2 sites, again, I don't know about the specifics of the
3 proposal because I don't know that it exists yet, could that
4 have a material effect on the desirability of locating
5 restaurants in the town center? Absolutely.
6 Q The applicant's justification statement on page 17
7 has a statement that reads, the master plan is nearly 20
8 years old and the master plan itself recognizes that
9 circumstances will change over the 20-year life of the plan
10 such that the recommendations of the plan would, quote,
11 become less, well, I actually I shouldn't say that, maybe I
12 put the quotes in the there, become less relevant over time.
13 And this goes to the issue you've heard about, how much do
14 we rely on a plan that's 19 years old? From a planner's
15 perspective, how do you deal with a plan that circumstances
16 have changed and how do we deal with those?
17 A Well, the answer, unfortunately, perhaps for the
18 applicant, at least in my opinion, is that it really depends
19 on the particular process that you seek to go through to
20 implement what you want to do. I do believe that the
21 Clarksburg master plan is in many aspects obsolete. And so
22 many of the things that were envisioned by the plan, this
23 plan is supposed to have a 20-year outlook and the amount of
24 employment absorption in the Clarksburg area over that 20
25 years since the plan has been a great deal less than what I

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1 am certain that the plan expected. So if I were advising a
2 client at the beginning of a proceeding, okay, Mr. Client,
3 perhaps you have MXPZ zoning now, but I think you have a
4 pretty decent argument for a mistake case in the Euclidean
5 zone to say that, Euclidean rezoning to say I-3 because a
6 number of things which the District Council relied upon in
7 making their land use and zoning recommendations clearly are
8 not going to pass. But this applicant didn't do that. He's
9 resting with his existing zoning which is whatever the
10 defects of that plan may be, it's still a plan
11 implementation zone. And until such time as there is a new
12 master plan or a substantive amendment to the current plan,
13 it's still what this zone has to implement.
14 Q So this is a piecemeal technique and avoids the --
15 is this a --
16 MR. HARRIS: Objection.
17 MR. KLINE: I'm starting to anticipate that.
18 BY MR. KLINE:
19 Q So is this a piecemeal technique that avoids a
20 more proper technique for basically addressing this issue?
21 A Well, I don't know that I would call it -- my
22 proffered solution of a Euclidean I-3 rezoning would be the
23 classic piecemeal technique. I don't have the same, you
24 know, shudder of disgust that many people do to Euclidean
25 rezonings. I do believe they have a purpose. But, you

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1 know, the applicant's proposal, you know, I think he's
2 attempting to work within what the existing zoning, you
3 know, had him to do and I think he's simply hamstrung by the
4 fact that the plan doesn't agree with what he wants to do.
5 And so he's forced to say, unfortunately, or as you
6 yourself, Madam Examiner, said a few moments ago, you know,
7 we have to throw out the master plan. If you do throw out
8 the master plan, then, you know, sure. You can improve it.
9 But I don't see the use by date on the master plan. It's
10 still the valid plan.
11 Q You did review it as part of your preparation of
12 the 2011 limited master plan amendment?
13 A I did.
14 Q Did that not provide an opportunity to address
15 some of these out-of-date aspects of the Clarksburg plan?
16 A Well, as a matter of process I can't really, you
17 know, comment on that. Certainly, there was a specific
18 request made to the District Council to get some relief on a
19 staging aspect of the plan which was done. Whether there
20 was an opportunity afforded to everybody else who might have
21 an interest in the plan to add to the scope of work of that
22 amendment, I don't know. But if there were, that would have
23 been the right time to do it.
24 Q Is there anything in the text of the 2011 plan
25 that suggests that it is stale and should be reviewed in the

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1 foreseeable future or should be interpreted more flexibly?
2 A No, no, it really did just deal with that staging
3 element.
4 Q And, in fact, the 2011 plan basically confirmed
5 all the land use planning --
6 MR. HARRIS: Objection.
7 BY MR. KLINE:
8 Q Did not the 2011 plan confirm --
9 MS. ROBESON: No. No.
10 MR. HARRIS: That's the same.
11 MS. ROBESON: Okay. Well, okay. I don't want to
12 get into -- this is an administrative proceeding, but can
13 you ask it, what are your conclusions as to what the 2011
14 plan did?
15 THE WITNESS: And, Madam Examiner, as it was
16 really limited to -- its only change to the plan, it's a
17 plan amendment, it leaves what it doesn't amend intact. The
18 only thing it really changed was its staging element to
19 allow neighborhood retail for the grocery store to be able
20 to proceed.
21 BY MR. KLINE:
22 Q You've reviewed the MXD plan, I'm sorry, the MXD
23 text of the zoning ordinance?
24 A The MXPDP, the regulations?
25 Q Yes. Right. Well, the zoning ordinance text

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1 itself.
2 A Yes.
3 Q Okay.
4 A And I say that with not exhaustively, recently,
5 you know, so I couldn't enumerate the entire text for you.
6 Q Do you view the MXPDP recommendation in the 1994
7 plan for the Cabin Branch neighborhood as allowing a better
8 mix of uses within the RMX TDR zone and I-3 or as an
9 encouragement to rezone the MXPDP to be able to increase
10 retail to more than 120,000 square feet?
11 A Well, certainly not the latter. I mean I think
12 the plan was pretty explicit in saying that it did want to
13 afford the ability to obviously provide a vehicle for its
14 own limitation. Secondly, to provide flexibility to be able
15 to incorporate what to me the plan was pretty clear about
16 saying, its residential uses into the employment
17 neighborhood, something I considered weird, but it's not my
18 plan.
19 MR. KLINE: I have no further questions of Mr.
20 Ferguson.
21 MS. ROBESON: Mr. Chen.
22 MR. CHEN: I have no questions.
23 MS. ROBESON: Mr. Harris.
24 MR. HARRIS: Yes, ma'am.
25 CROSS-EXAMINATION

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1 BY MR. HARRIS:
2 Q Let's see. I have to find where I started.
3 You've testified about Section 59-1.6(a) within the
4 development plan provisions of the zoning ordinance. With
5 respect to 59-C-7.5, the MXPDP zone, there is nothing in that
6 section of the zoning ordinance that requires substantial
7 compliance with the master plan, is there?
8 A No, there isn't?
9 Q And to the --
10 MS. ROBESON: Wait a minute.
11 THE WITNESS: Well, let me, let me --
12 MS. ROBESON: Okay. You can keep asking, but I
13 see it, it's right there.
14 THE WITNESS: And, Madam Examiner, you are
15 correct. It's the paragraph after (i). There is language
16 that this loading zone may be approved.
17 MS. ROBESON: No, no. Never mind. You can ask
18 him in his expert opinion, but my position is the zone
19 speaks for itself.
20 THE WITNESS: And, Madam Examiner, I would only
21 have read the contents of the zone back to you.
22 MS. ROBESON: Okay.
23 THE WITNESS: And not to disagree with your
24 statement.
25 BY MR. HARRIS:

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1 Q The zone uses the word compatible with the general
2 plan, is that correct?
3 MS. ROBESON: No.
4 MR. CHEN: No, it doesn't.
5 MR. HARRIS: Turn to page --
6 MS. ROBESON: Are you going to -- oh,
7 "In a degree more closely compatible --
8 MR. HARRIS: Correct.
9 MS. ROBESON: -- to implement existing public
10 plans and pertinent County policies in a manner
11 and to a degree more closely compatible with said
12 County plans and policies than may be possible
13 under other zoning categories."
14 MR. HARRIS: Correct. You agree with that?
15 THE WITNESS: And it is what it says.
16 BY MR. HARRIS:
17 Q And nowhere in there is the word consistency with
18 the master plan used?
19 A That's correct. That word does not --
20 MS. ROBESON: Oh, you're making a, or a -- okay.
21 Go ahead.
22 BY MR. HARRIS:
23 Q And whereas other zones in Montgomery County,
24 including the RMX zone, do use the word consistency with the
25 master plan?

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1 A I'll take your word for that.
2 Q Okay. Would you agree with me that the MXPDP zone
3 groups uses into three categories, residential, commercial
4 and industrial?
5 A Sure.
6 Q And under commercial uses, it allows all permitted
7 and special exception uses that are allowed in the C-2 and
8 the HM, the hotel/motel zone?
9 A Sure.
10 Q And so under that use category, office uses and
11 retail uses both fall?
12 A I would agree with that.
13 Q Are you aware, well, do you have any information
14 with respect to the traffic impact of the proposed outlet
15 other than the applicant's statement in this case that the
16 traffic generation would be lower than the approved traffic
17 generation from the project, including the hospital?
18 A No, I don't have anything different from that.
19 Q Okay. Are you -- you testified about your opinion
20 that retail is not an employment use, do you remember that?
21 A I do.
22 Q And you are aware that in the Seneca Meadows case
23 the Planning Board concluded that the Wegman's store was
24 employment use?
25 A I did read the Seneca Meadows case, some of the

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1 Seneca Meadows case materials. I would point out that the
2 Seneca Meadows case is a, you know, it's a different zone.
3 It's not the MXPDP zone and as I shuffle through my notes,
4 I'll tell you what it is.
5 Q We'll accept that it is a different zone. I'm
6 aware of that.
7 A And not a zone that requires a development plan.
8 It does require a project plan. The criteria for a project
9 plan are different. The criteria for approval of a project
10 plan are different. Certainly, in their statement, they did
11 recognize that Wegman's has a lot of employment. And I
12 think, Madam Examiner, this goes really to the issue that I
13 brought out at the beginning of my testimony which is that
14 the fact that there is a different standard is important
15 because that zone has a more general compliance requirement
16 than the MXPDP zone, Seneca Meadows TMX-2 zone, and I do have
17 the criteria to approve the project plan which if you
18 believe is important, I can continue to shuffle through my
19 notes until I find them.
20 MS. ROBESON: Well, I can, I can read the
21 approval. You don't have to read it to us.
22 THE WITNESS: But I would point out that it is
23 materially, it is a master plan compliance finding, but it's
24 the more broad finding which I do believe gives the Council
25 more latitude to apply --

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1 MR. HARRIS: Hold on. I'm just going to take out
2 the back side. I apologize.
3 THE WITNESS: -- the policies and goals --
4 MS. ROBESON: Somebody ran into the zoning
5 ordinance --
6 MR. HARRIS: Well, the zoning ordinance --
7 MS. ROBESON: -- notwithstanding --
8 THE WITNESS: The --
9 MR. HARRIS: It was 20 pounds in a 25-pound box --
10 THE WITNESS: That's right.
11 MR. HARRIS: -- and it upset it.
12 THE WITNESS: It would give you more latitude to
13 apply broadly the policies of the zoning to finding
14 compliance that I don't believe the current zone affords you
15 the opportunity to do.
16 BY MR. HARRIS:
17 Q Did the Seneca Meadows case have to go through a
18 preliminary plan of subdivision approval?
19 A It did.
20 Q And are you aware that the subdivision regulations
21 in Montgomery County require that a preliminary plan of
22 subdivision substantially conform to the recommendations in
23 a master plan?
24 A I am.
25 Q So isn't that the same standard that you're saying

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1 applies in the MXPD zone?
2 A No, I believe I think I was pretty explicit in my
3 answer to the question you just asked me that it was not the
4 case.
5 Q So even though the master plan did not recommend
6 that use, did the master plan recommend a Wegman's there?
7 A No, it did not.
8 Q Despite that, did the Planning Board find that it
9 substantially conformed with the master plan?
10 A It did.
11 Q And wouldn't the same be true in Park Potomac
12 where you said it was not a planned development zone without
13 a conformity requirement, with a conformity -- it was a
14 planned, it was not a planned development zone that had a
15 conformity requirement?
16 A Correct. It did not have the same development
17 plan requirement.
18 Q But they would have had to go through a
19 preliminary --
20 A Preliminary.
21 Q -- plan of subdivision --
22 A Yes, they would.
23 Q -- that would have had to find the development
24 substantially conforming with the master plan?
25 A Yes, they would.

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1 Q And did they find that there?
2 A Yes, they did.
3 Q The Shady Grove study area plan, what was the year
4 of that?
5 A 1990.
6 Q Do you know when the Washingtonian Center project
7 was approved?
8 A Well, it had a series of approvals, one prior to
9 this plan and one after.
10 Q When was the one prior to that?
11 A I don't recall the date.
12 Q And do you know whether that project was largely,
13 the first phases of it were built before this study area
14 plan came out?
15 A There were some components of it that were.
16 Q And so your review of this study area plan does
17 not in any way change the testimony that Mr. Unterberg gave
18 about the 1985 Gaithersburg plan and its recommendations
19 with respect to the Washingtonian Center?
20 A Well, the Washingtonian Center that I believe was
21 being held up is the analog to the subject development was
22 approved in '94 or '95, subsequent to this plan.
23 Q I'm sorry, say that -- what, I was writing
24 something. Would you say that again? I apologize.
25 A I believe that the --

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1 MS. ROBESON: He's using big words. Go ahead.
2 MR. HARRIS: And speaking eloquently and fast,
3 but, so I'm following.
4 THE WITNESS: I apologize.
5 MR. HARRIS: Yes.
6 THE WITNESS: The, I believe that the
7 Washingtonian, the components of the Washingtonian Center,
8 specific components, the entertainment and restaurant
9 components were approved subsequent to that 1990 plan and I
10 believe 1994 to 1995.
11 BY MR. HARRIS:
12 Q Wasn't the Rio Center with the movie theaters and
13 restaurants built more like in 1986 or '87?
14 A As I say, there were some components of it. There
15 was the substantive change to the entertainment.
16 Q Was the movie theater then, there before this
17 sector plan or before this Shady Grove study area plan?
18 A I do not recall.
19 Q Okay. So if the evidence showed that it was built
20 before this, would you agree with me that this Shady Grove
21 study area plan did not control what was happening in those
22 earlier stages of development there?
23 A Of course.
24 MS. ROBESON: Mr. Harris, I'm sorry, I need to
25 interrupt. Kathy, do you have a back-up? When those lights

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1 go like they just did, that sometimes means we lose power
2 here. Is everything you have backed up on the computer?
3 THE COURT REPORTER: We should be okay.
4 MS. ROBESON: Okay. I just, I don't want to lose
5 a day's worth of testimony. Okay. I am sorry, Mr. Harris.
6 MR. KLINE: The ultimate contingency.
7 MS. ROBESON: Yes.
8 THE COURT REPORTER: Get your flashlights ready.
9 MS. ROBESON: We were in the bomb shelter the
10 other day, but I digress. Go ahead, Mr. Harris.
11 BY MR. HARRIS:
12 Q Would you agree with me that the MXPD zone is
13 intended to be one of the more flexible zones in the County
14 to accomplish the purposes stated there?
15 A I would.
16 Q And would you agree with me that the review of
17 a -- never mind, strike that. You talked about how people
18 might arrive at an outlet center in a bus as opposed to
19 driving and I think your implication was that then they're
20 not likely to interact with the broader community, other
21 stores in the area, et cetera?
22 A In that example, that's correct.
23 Q Do you have any idea what percentage of the people
24 come to an outlet center by bus?
25 A It would vary from center to center.

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1 Q They typically have large parking lots, don't
2 they?
3 A Typically.
4 Q So would you agree with me that a large number of
5 people drive?
6 A Certainly.
7 Q And so those people would be able to interact with
8 the rest of the community?
9 A Certainly.
10 Q You talked about the importance of addressing the
11 uses and understanding exactly how a project would be build
12 such as where would the food court be, et cetera, do you
13 remember that?
14 A Yes.
15 Q And are you aware that the site plan review
16 process in Montgomery County does exactly that?
17 A It does, but here you are required to have a
18 development plan and I guess I would be interested in
19 reviewing the contents of the development plan which do
20 require you to provide some level of that detail at this
21 stage. Now does your plan show a schematic development for
22 an outlet center? It does. Would I characterize it as an
23 isolated type of center? Generally, yes. I couldn't tell
24 where in that plan necessarily the rest of the food courts
25 would be and there are some other uses which are --

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1 MS. ROBESON: Sorry. Go ahead.
2 THE WITNESS: That was a close one. Which are
3 more outwardly located.
4 BY MR. HARRIS:
5 Q Wouldn't you agree with me that the criteria in a
6 development plan do not call for that information to be
7 submitted, that they call for the general locations of
8 points of access and the locations and uses of buildings and
9 structures?
10 A Well, I guess that depends on what your
11 interpretation of locations and uses of buildings and
12 structures means because if you have to show the locations
13 and uses of the building, presumably you have to show at
14 least in some level of detail the building. And so you can
15 interpret that to mean what you would like it to mean.
16 Q Would you agree with me that the location and uses
17 of the buildings shown on the DPA is the same, contains the
18 same level of detail as the uses and locations of buildings
19 shown on the approved development plan? And I can put them
20 up if you want to see them.
21 A If you would? And if this was only to --
22 Q So on the top I have Exhibit 21(f) that is the
23 approved development plan.
24 A Right.
25 Q And below that is Exhibit 59 that is the DPA plan.

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1 And if you look at it, wouldn't you agree with me that the
2 indication of buildings on here is the same level of detail
3 as in the other one?
4 A Yes, I would.
5 Q So you're not maintaining that the original
6 development plan was inappropriately --
7 A No, no, not at all.
8 Q -- approved?
9 A Not at all.
10 Q So that if that level of detail is shown now, that
11 must be the acceptable level of detail?
12 MR. CHEN: Objection.
13 MS. ROBESON: Sustained.
14 BY MR. HARRIS:
15 Q You indicated that you didn't have experience in
16 concluding the extent to which an outlet center would be a
17 catalyst for other employment development, was that your
18 testimony?
19 A I don't believe I characterized it exactly that
20 way, but I don't think I said I didn't have experience. I
21 don't think -- I think I didn't, I think that I said that
22 given the information that I had before me, I couldn't
23 characterize whether this center would or would not.
24 Q Okay. And were you here when Mr. Bogorad
25 testified?

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1 A I was not.
2 Q Did you review his testimony?
3 A I did.
4 Q And do you have any information to submit to us
5 today that would indicate that Mr. Bogorad's conclusions
6 about the catalytic effect of outlet retail on employment
7 would be incorrect?
8 A No, I certainly can't rebut them from a market
9 standpoint.
10 Q We, there was testimony about the effect of a
11 master plan and the extent to which it is a mandate, if you
12 will, do you remember that?
13 A Ask your question.
14 Q Would you agree with me that master plans are
15 guidelines and are not mandates?
16 A In this --
17 MR. CHEN: Objection. It calls for a legal
18 conclusion.
19 MR. HARRIS: He offered a lot of legal conclusions
20 about the MXP zone and what it means and all of that. He's
21 clearly qualified to talk about these things.
22 MS. ROBESON: I'll let it in for the weight it
23 deserves.
24 THE WITNESS: Thank you, Madam Examiner. I would
25 say that the particular requirement for a substantial

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1 compliance with the use and density requirements of the
2 master plan in this particular case, or in the case of a
3 development plan for MXP or any other development for which
4 a development plan is required actually do make that
5 particular recommendation of the master plan rise above the
6 mere guide.
7 BY MR. HARRIS:
8 Q Even if you take your interpretation that the
9 development plan provisions calling for substantial
10 compliance apply here, substantial compliance, it does not
11 mean absolute compliance, does it?
12 A That's correct.
13 MR. CHEN: Objection.
14 THE WITNESS: It does -- well, from a planning
15 standpoint it does not.
16 BY MR. HARRIS:
17 Q Okay. And I assume that you've probably handled
18 any number of development approvals where you argued that a
19 requirement for master plan conformity did not need to be
20 met because the master plan was flexible?
21 A I can't recall that I have personally made that
22 specific argument.
23 Q Have you made --
24 A And I don't mean to be evasive. I don't recall
25 that I have actually ever had to make that specific

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1 argument.
2 Q Do you recall a case involving a Carmax dealership
3 in Brandywine?
4 A Very well.
5 Q Didn't the master plan in that case call for town
6 center, neo-traditional development and a transit station
7 and not a car dealership?
8 A Well, there were a number of items of dispute
9 about that particular case. I would note for the record
10 that that particular master plan was set aside by the court.
11 There were disputes as to whether the, that the site of that
12 project in particular was a part of the town center or not,
13 or to the degree, you know, what part of the town center it
14 would have been in and, therefore, what degree of, in this
15 case the issue was auto orientation, would be appropriate.
16 But certainly there were issue in that case where the
17 applicant and the staff's opinion of what the master plan
18 said were not the same.
19 Q You were the land planner in that case for the
20 applicant?
21 A I was.
22 Q And do you recall in the opinion that it said,
23 "The applicant's witness, who was accepted as an
24 expert in land use planning, opined that the
25 application met all of the applicable provisions

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1 of the zoning ordinance. He noted that the
2 application does not strictly comply with the
3 master plan's vision for properties within
4 designated centers since these areas are earmarked
5 for more intensive growth and associated with mass
6 transit service,"
7 do you remember that?
8 A I'll take the Examiner Nichols's opinion as
9 gospel.
10 Q And in that case wasn't the master plan a 2009
11 master plan?
12 A I believe the sub-five master plan was 2009,
13 correct.
14 Q And that case was just two years later in 2011,
15 wasn't it?
16 A The Carmax case?
17 Q Yes.
18 A And trickled into 2012.
19 Q And so that wasn't a situation where the master
20 plan was particularly old, was it?
21 A No, it was not.
22 Q And was the -- would you agree with me that the
23 conclusion in the approval of that where the requirement is
24 to implement the general plan area master plans and
25 functional plans that the County concluded the 2009 sub-

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1 region five master plan envisioned a commercial use of the
2 subject property and the SMA did not recommend any changes?
3 Well, language within the plan also placed the property
4 within a community center which does not recommend such a
5 land-intensive use.
6 "It is a use permitted by the zone and it can
7 be considered a transitional use until such time
8 as the transit facility envisioned by the master
9 plan comes to fruition, thus, this purpose that is
10 compliance with the master plan is met."
11 A I wrote that.
12 Q You were very convincing in this case, I will
13 argue.
14 A It was approved.
15 Q It did get approved and it showed the flexibility
16 of even a very recent master plan.
17 A It does. I will point out that was a Euclidean
18 zone, not a plan implementation.
19 Q Okay. Have you handled any other cases where you
20 argued the same thing, that is that master plans are
21 flexible?
22 A Well, as I say, I -- and perhaps I'm being
23 overzealous in defending my particular language. I do
24 accept that it is common to argue sometimes for a more
25 expansive definition of what compliance with a master plan

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1 may mean than say an opposition, you know, entity would.
2 That being said, all of these cases that we are discussing
3 are not cases where you have a plan implementation zone and
4 a specific requirement where essentially the use and density
5 requirements of the master plan become a part of the zoning
6 through the vehicle development plan.
7 MS. ROBESON: So you're saying it depends on the
8 language of the particular zone what weight to give the
9 master plan?
10 THE WITNESS: It does, absolutely it does, or in
11 this case whatever the process of approval is. So here the
12 language is not specifically in the zone description and
13 purposes, but rather it's in the process for the approval of
14 the development plan which is not applicable to all zones,
15 but it is to the MXPDP.
16 BY MR. HARRIS:
17 Q Okay. Other than my reminding you of that case
18 that you have not recalled, do you recall any other cases
19 where you have argued that a development proposal should be
20 approved because the master plan should be read flexibly?
21 A If you hand me my resume, I'm sure I could go
22 through and get them for you.
23 Q Let me see that.
24 A I would, I would not, I would not propose for your
25 broad contention, but yes I have, and almost certainly on

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1 more than one occasion.
2 Q I'm sorry, on?
3 A On, or more than one occasion.
4 Q Okay. And wasn't one even very recent? Do you
5 recall the Town of Riverdale Park mixed use town center
6 development, also known as the --
7 A I --
8 Q -- Cafritz property?
9 A I absolutely do.
10 Q It made a lot of news, didn't it?
11 A It certainly did. I think I managed to keep my
12 name out of most of the news, but --
13 Q And you were the planner for the applicant in
14 that?
15 A I was. I was.
16 Q And in that case there was a 1994 master plan?
17 A Yes, there was.
18 Q And with that 1994 master plan, didn't the County
19 write,
20 "The following comments relate specifically
21 to the Cafritz property. While zoned R-55,"
22 which I think I, you would agree is a single-family
23 residential zone --
24 A It is. It's analogous to the R-60 zone in
25 Montgomery County.

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1 Q Correct.
2 "While zoned R-55, the property should be
3 considered for a residential, comprehensive design
4 zone provided that the proposed development is
5 compatible with surrounding residential
6 development and continues existing design and
7 development patterns."
8 That was the recommendation in the master plan?
9 A That's correct.
10 Q Correct?
11 A Yes, it is.
12 Q And your client did not apply for the CDZ zone --
13 A That's correct.
14 Q -- they applied for the mixed use town center --
15 A That's correct.
16 Q -- MUTC zone, right?
17 A That's correct.
18 Q And so where the County concluded that,
19 "The applicant is proposing to rezone the
20 subject property from the R-55 to the MUTC zone.
21 While the MUTC zone is not a CDZ, it is quite
22 similar in that its fundamental purpose is to
23 allow flexibility with respect to site design and
24 review procedures. It also does not have a
25 prescribed height setback and lot coverage

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1 requirements and it's specifically designed to
2 provide a regulatory mechanism for the
3 redevelopment in more urban areas."
4 Isn't --
5 A I don't think that's actually an accurate
6 characterization, so whoever wrote that, I would not agree
7 with that characterization of the MUTC. And who was the
8 case --
9 Q That was written by the Park and Planning staff.
10 A Yes, no, it was and I don't remember who had that
11 case in particular, Susan? No, she was --
12 Q No.
13 A -- urban design. I don't remember who had zoning.
14 Q Yes.
15 A At any rate, it's not --
16 Q In respect --
17 A -- I don't agree --
18 Q -- isn't the --
19 A -- with that statement.
20 Q -- MUTC zone in some respects akin to the MXPDP
21 zone in that it's a broad, floating zone that allows --
22 A It, no, it really is not. It's a very, very
23 unique zone that was created by the 1994 plan. I was on a
24 committee that helped, for instance, draft the table of uses
25 for that zone. And it is very specifically a revitalization

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1 zone. It was intended to be applied over existing developed
2 commercial concentrations to be able to facilitate
3 revitalization because there's so many issues of conformance
4 with all of these old properties with the current zoning
5 standards when most of these areas were developed not just
6 before the 1949 current zoning in Prince George's County,
7 but even before the Regional District Act of '28 and '27.
8 Q And didn't the development plan conflict with a
9 master plan recommendation to preserve the existing wooded
10 image and to create a tree save area?
11 A It did. I mean the plan certainly did not
12 preserve the trees over most of the site. There was a
13 wooded buffer which was a specific recommendation of the
14 plan to be preserved along the Route 1 frontage and that
15 was, in fact, substantially preserved at least in the
16 intentions.
17 MS. ROBESON: I was guessing this was Route 1
18 zone.
19 MR. HARRIS: Yes.
20 BY MR. HARRIS:
21 Q And through your good advocacy, didn't they
22 approve the plan despite the fact that they concluded that
23 it did not adhere to the requirements of the 2004
24 development plan for the Town of Riverdale?
25 A They did what now?

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1 Q The subject application does not adhere to the
2 requirements of the 2004 development plan? And when they
3 use, they're referring --
4 A You mean --
5 Q -- to the Town of Riverdale.
6 A That makes no sense because the 2004 development
7 plan is actually a component of the MUTC zone. You need to
8 have a town center development plan. That is what
9 establishes the height and setback requirements in that
10 zone. So the statement earlier, the MUTC zone doesn't have
11 them, every zone, every MUTC zone does have to have its own
12 development plan which does establish all of those
13 requirements.
14 MS. ROBESON: Okay. It's like New Town in
15 Columbia, they have a final development plan that sets all
16 the parameters. Well, never mind.
17 THE WITNESS: Yeah.
18 MS. ROBESON: We won't get into an esoteric
19 discussion.
20 BY MR. HARRIS:
21 Q Aren't they concluding that it did not conform
22 with that?
23 A What they're, what I believe that they're saying
24 is that some of the aspects proposed by the Cafritz proposal
25 were not in conformance with the current contents of the

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1 2004 town center development plan which had to be amended as
2 part of the approval to be able to expand the scope of the
3 MUTC zoning area --
4 MS. ROBESON: Well, when it's --
5 THE WITNESS: -- and, of course, supply
6 development regulations throughout that area.
7 MS. ROBESON: Was -- okay.
8 THE WITNESS: So I'm not sure what the import of
9 that --
10 MS. ROBESON: I'm not sure if it --
11 THE WITNESS: When the whole thing was done, of
12 course, it did comply with the development plan because the
13 development plan was amended as a part of the zoning
14 approval.
15 BY MR. HARRIS:
16 Q In any respect, you were able to get the project
17 approved despite the fact it didn't conform with the 1994
18 master plan?
19 A Well, I would say that it did not conform with
20 certain provisions of the master plan and I think, again,
21 this is a repetitive theme where because of Plan A in that
22 plan, the same date as the Clarksburg plan, you know, didn't
23 account for some of the changes in land use and planning
24 that have occurred in the intervening two decades. And
25 because there wasn't a specific tie of the requirements of

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1 the MUTC zone to density and use restrictions or
2 requirements or standards set in the, in that master plan
3 that, therefore, a more broader interpretation of
4 conformance was something that was able to be argued, and as
5 it turned out, successfully.
6 Q And didn't you advise the County that the
7 recommendation for the CDZ zone had to be viewed in light of
8 the, as you put it, the zoning tools available at the time
9 of the 1994 master plan and, therefore, you argued that it
10 was really a good idea to accommodate a mix of uses here
11 irrespective of what they were thinking then?
12 A I do remember being particularly eloquent on that
13 point. I don't remember the exact substance of what, of
14 what it was that I said since certainly there were a number
15 of substantive changes, the Purple Line, which wasn't in
16 the, you know, in anybody's wildest dreams except for some
17 really visionary planners at that time in '94 to having a
18 station within a half mile of the site. Now, and so
19 certainly some of the things which the plan wanted
20 conceptually, but couldn't apply to that site at that time,
21 you know, didn't allow the plan to make a recommendation
22 that you would comply with today, but in terms of the broad
23 principles that the plan did espouse, it did comply to. And
24 it's that degree of flexibility that you often do have.
25 It's often much more appropriate to argue in older zones. I

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1 would reiterate again you have a particular constraint in
2 this that you don't in the other cases.
3 Q The -- you talked about the amount, well, let me
4 back up. Other cases --
5 MS. ROBESON: He's not backing.
6 BY MR. HARRIS:
7 Q Well, do you recall any other cases in which you
8 argued that degree of flexibility should be applied in an
9 development application?
10 A As I say, if -- I went through my resume case-by-
11 case. I'm sure I can come up with one.
12 Q All right. We won't delve into any more. You
13 talked about the amount of neighborhood retail that is
14 proposed here. Are you aware that the applicant has
15 indicated they would be producing between 50 and 100,000
16 square feet of neighborhood retail?
17 MR. KLINE: Objection. That's not a development
18 plan provision.
19 BY MR. HARRIS:
20 Q Are you aware that they testified that they
21 would --
22 MS. ROBESON: Wait.
23 MR. HARRIS: I'm sorry.
24 MS. ROBESON: What is your question? I'm not sure
25 I understand it.

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1 BY MR. HARRIS:
2 Q Are you aware that the applicant has indicated
3 they plan to do between 50 and 100,000 square feet of
4 neighborhood retail here?
5 MS. ROBESON: Well, wait. I thought -- assume
6 that, because I'm not sure that's what the applicant --
7 MR. HARRIS: Okay.
8 MS. ROBESON: -- has said. I --
9 MR. HARRIS: Okay.
10 THE WITNESS: Thank you, Madam Examiner. I was
11 saying that --
12 MS. ROBESON: -- because I don't recall that.
13 THE WITNESS: -- that isn't the numbers that stuck
14 in my head either. But let me --
15 MR. HARRIS: Okay.
16 THE WITNESS: -- take that for gospel.
17 BY MR. HARRIS:
18 Q Let me try this another way. Are you aware that
19 the Gosnell portion of this property already has approval
20 for 8,600 square feet of retail?
21 A Yes, I am.
22 Q And that is neighborhood-serving retail?
23 A Yes, I am.
24 Q And in addition to that retail, are you aware that
25 the Gosnell plan also includes approval for two banks?

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1 A I don't recall that specifically.
2 Q If it does, would you agree that those, even if
3 they're not classified as retail in the Montgomery County
4 zoning ordinance, that in common parlance they would be
5 considered retail?
6 A Yes, they would.
7 Q And are you aware that the hotel contemplates a
8 restaurant in it in addition to the 8,600 square feet of
9 retail?
10 A I didn't know that specifically, but I would
11 expect that.
12 Q And if so, that too would serve the neighborhood
13 residents?
14 A It could.
15 Q The, some of the retail services that would be
16 within an outlet center would be used by the local
17 residents, wouldn't they?
18 A I mean to the extent that everybody speaking
19 loosely uses an outlet center at some point in their
20 shopping experience, yes. Would they use it more
21 preferentially? It depends on the store. They could.
22 Q So a Nike store there, there would be a high
23 likelihood that people in the Cabin Branch neighborhood
24 would go buy athletic shoes there?
25 A They might, sure. Sure.

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1 Q And the same for other clothing articles there?
2 A Absolutely. They might.
3 Q And any restaurants that would be there would
4 likely be frequented by people within the community as well.
5 A They likely would, yes.
6 Q Were you here with the debate about the grocery
7 store and, you know, whether one should be built here or
8 not?
9 A At today's? Yes, I was.
10 Q Yes. Okay. So isn't there evidence in the record
11 that the developer of the town center neighborhood retail
12 center wants to do a grocery, but is concerned about
13 attracting a grocer if the Cabin Branch community were to
14 proceed with or plan to build a grocery?
15 A I believe that is the case, yes.
16 Q And so if you took a grocery store out of the
17 equation there to satisfy that objective, the estimate of
18 demand for retail in the technical appendix would have to be
19 reduced?
20 A I would presume so. I think that I don't know
21 what the procedure was that the Planning Staff went through.
22 It was an extraordinarily short market analysis, about half
23 a page. So, you know, I don't know what was in their minds
24 when they came up with this. It's not an unreasonable
25 presumption.

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1 Q Okay. I would agree it's a short analysis, at
2 least as I see it. You did testify, though, that they
3 looked at both convenience retail or neighborhood retail on
4 the one hand and comparison retail on the other?
5 A Yes.
6 Q But the estimate for retail there is simply for
7 the neighborhood retail?
8 A It appears, but it's not conclusive. What they
9 title their table, looking over your shoulder, is on page 12
10 of the technical appendix, amount of square, of neighborhood
11 shopping centers. A neighborhood shopping center, I don't
12 know exactly what that means, but if it is a typical strip
13 center anchored by a grocery store and a drug store, many of
14 those uses would be convenience, retail goods that
15 ordinarily would be strictly neighborhood-oriented. Many of
16 them would be specialty or should I say comparison or
17 shopper's goods, you know, retailers that may not be
18 exclusively neighborhood-oriented. So I don't know exactly
19 what they mean, whether the 75,000 square feet that they
20 suggest is supported for the area west of I-270, you know,
21 is only their convenience goods or if it's also their
22 comparison or shopper's goods.
23 Q So if it did include comparison shopping, would
24 you agree with me that the same table says 130,000 square
25 feet of retail in the town center?

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1 A It does.
2 Q So if it includes comparison retail and doesn't
3 provide for any on the west side, then it doesn't provide
4 for any on the east side either, does it?
5 A Well, I don't believe that I said that. The
6 question is whether it is an aggregate demand from the area
7 both for convenience goods and for comparison goods or only
8 for neighborhood-oriented, which is primarily convenience
9 goods.
10 Q You --
11 A I don't know whether or not it broke it down
12 either way, that's all I'm saying.
13 Q You counsel and the other opposition counsel has
14 been arguing in this case that the recommendations in the
15 land use plan for the town center provided for up to 300,000
16 square feet, including the possibility of comparison retail.
17 A And I do agree with that.
18 Q So wouldn't you agree with me that this number
19 here must only then be neighborhood retail services?
20 A I would speculate that that number is the amount
21 of retail -- and this is what it says, is the amount of
22 square feet of center supported by the household or
23 employment in that area. Now there might be areas outside
24 of the master plan study area, Boyds for instance, which
25 could have been included in the trade area for that. I

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1 don't know.
2 Q Isn't Boyds west of I-270?
3 A It is. But whether or not that's part of the
4 Clarksburg, you know, market area, again, I don't know.
5 Maybe Mr. Bogorad could opine on that.
6 Q In any respect, through your review of the master
7 plan, the 1994 Clarksburg master plan and the technical
8 appendix, you don't see any calculation as far as the amount
9 of comparison retail that could be supportable in
10 Clarksburg?
11 A I don't see a calculation.
12 Q And there is no recommendation anywhere in the
13 master plan specifically to include or not to include
14 comparison retail?
15 A No, there isn't.
16 Q Mr. Bogorad, if the record shows that Mr. Bogorad
17 indicated that restaurants that would be part of the outlet
18 center would likely be different than the restaurants that
19 would be included in the neighborhood retail center in the
20 town center, you don't have any other information to
21 contradict that, do you?
22 A That would surprise me, but I don't.
23 MR. HARRIS: I'm going to have introduced as an
24 exhibit a document here identified -- oh, I'm sorry, you
25 need another one for your review. Here, Jody.

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1 MR. KLINE: Thank you.
2 MS. ROBESON: I'll mark this as 110, I think, we
3 are on.
4 BY MR. HARRIS:
5 Q Would you identify what this document is?
6 A I don't know.
7 MR. CHEN: Objection.
8 BY MR. HARRIS:
9 Q Well, would you agree with me that this is a copy
10 of the Loudoun newsletter from September 6, 2013?
11 MS. ROBESON: Well, it's only marked at the
12 moment.
13 MR. HARRIS: Okay.
14 MS. ROBESON: So do you have an objection to the
15 exhibit, Mr. Chen?
16 MR. CHEN: I object to the question that was
17 posited to this witness.
18 MS. ROBESON: Okay. And --
19 MR. HARRIS: The question was could he identify
20 it?
21 MR. CHEN: No, you didn't ask that.
22 MR. HARRIS: That was my first question.
23 MR. CHEN: No, it wasn't.
24 MR. HARRIS: Okay. Then I'll ask that as my first
25 question.

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1 MS. ROBESON: Okay.
2 MR. HARRIS: I apologize.
3 BY MR. HARRIS:
4 Q Can you identify this document?
5 A Well, it is titled, The Loudoun Newsletter,
6 covering real estate, land use and economic development
7 since 1984, and this is apparently all or part of Volume 28,
8 No. 16, dated September the 6th, last week.
9 Q And would you read from --
10 MS. ROBESON: And do you have personal familiarity
11 with this?
12 THE WITNESS: I have never seen the Loudoun
13 Newsletter before, but I don't do a great deal of work in
14 Virginia.
15 BY MR. HARRIS:
16 Q Would you read for me the first three lines of
17 the --
18 MS. ROBESON: Well, wait. What's -- I'm going to
19 stop you. What's the relevance of this and --
20 MR. HARRIS: The relevance --
21 MS. ROBESON: -- to his testimony?
22 MR. HARRIS: The relevance to his testimony is
23 that he talked about the impact or lack thereof of
24 comparison retail to the development of an employment
25 center. And this goes directly to that point.

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1 MS. ROBESON: Well, I think this would be more
2 appropriate since he just said he doesn't know anything
3 about Loudoun County, doesn't know much about it, and I
4 think if you're going to use it in rebuttal, it's more
5 appropriate that you use it in rebuttal.
6 MR. HARRIS: Well, if the rebuttal testimony shows
7 that your client --
8 MS. ROBESON: How does --
9 MR. HARRIS: -- the Peterson Company, wants to
10 build comparison retail as a part of an employment center
11 and is arguing that that comparison retail will have a
12 catalytic effect on other employment, you don't have any
13 other information here today to suggest anything to the
14 contrary?
15 MR. CHEN: Is that a question or is it --
16 MS. ROBESON: I --
17 MR. HARRIS: He talked about the issue of the
18 relationship. I'm just trying to find out --
19 MS. ROBESON: Yes, but he said it wasn't, he
20 wasn't doing it as far as market demand. He said they could
21 be complimentary, but he wasn't an expert on whether it
22 would or would not from a market standpoint. I just see --
23 MR. HARRIS: That's fine. That's fine.
24 MR. CHEN: It goes way beyond direct exam.
25 MS. ROBESON: I just see no point in asking him

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1 about a document that --
2 MR. HARRIS: We'll deal with it, in fact, when do
3 our rebuttal phase.
4 MR. KLINE: We did not, it was not made an
5 exhibit?
6 MS. ROBESON: No. So we're still on --
7 MR. HARRIS: Okay.
8 MS. ROBESON: -- 110. Now you can feel free if
9 Mr. Bogorad wants to --
10 MR. HARRIS: Yes. Thank you. I don't think I
11 have any further questions.
12 MS. ROBESON: Okay. Thank you. Redirect?
13 REDIRECT EXAMINATION
14 BY MR. KLINE:
15 Q You read Mr. Bogorad's transcript?
16 A I did.
17 Q What did --
18 A If you're going to ask me something very
19 particular about it, I'm probably going to have to refresh
20 my memory.
21 Q What did Mr. Bogorad say about the premise of a
22 regional outlet center being a catalyst for employment or
23 office use?
24 MS. ROBESON: Is this something you want to ask
25 him to look up now or is this an argument you want to make

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1 later, because I know what he said.
2 MR. KLINE: Okay. Then --
3 MS. ROBESON: But if you want to ask --
4 MR. KLINE: Sure.
5 MS. ROBESON: -- him if there's a reason --
6 MR. KLINE: Here's where I am. I don't know. My
7 recollection of Mr. Bogorad's testimony was not nearly as
8 posited as the question was asked, suggested. So I wanted
9 him to go see if he could find it and that may be more
10 difficult.
11 BY MR. KLINE:
12 Q Do you recall if, do you recall if Mr. Bogorad
13 stated that the premise that a regional outlet center would
14 be a catalyst for office use was an unproven premise?
15 A Well, that's exactly -- he said untested was the
16 exact word he used --
17 Q Thank you.
18 A -- on page --
19 MS. ROBESON: I think it's on 121 and 122.
20 MR. KLINE: Thank you. I stand --
21 THE WITNESS: 53 is my transcript and I don't know
22 if that's the same.
23 MS. ROBESON: But, you know what, I guess we're
24 not crossing -- how, where are you going with this?
25 MR. KLINE: I just wanted to have basically that

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1 point made because as I said --
2 MS. ROBESON: And you made it?
3 MR. KLINE: Actually he made it, we didn't.
4 MS. ROBESON: He made it.
5 MR. KLINE: Right.
6 BY MR. KLINE:
7 Q And did he not also say that office use in
8 Clarksburg was many years off?
9 A He did.
10 Q And didn't he say that any retail that might lure
11 office to this space would be helpful?
12 A He did.
13 Q Okay. I think you were going to say something
14 about the Carmax Brandywine case, as to why it was
15 distinguishable from the development plan under the 13-02,
16 but did not do so.
17 A I thought I --
18 Q Why is it that --
19 A -- did get, I thought I did get it out, in that
20 the Carmax was in the CSC zone, which is a Euclidian zone.
21 Q And --
22 A And, yes, it was not, you know, when the SMA in
23 that case was applied and they --
24 Q SMA?
25 A Sectional map amendment, the comprehensive

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1 rezoning following the master plan adoption, while they did
2 talk about town center ultimately occurring in that area,
3 they did not rezone that property to a zone which would be a
4 town center implementation zone. They left it in the CSC
5 zone.
6 Q And in the Cafritz case, wasn't the R-55 zoning a
7 holding zone in anticipation of future development?
8 A Certainly that had been, you know, my contention.
9 I don't believe the master plan ever called it a holding
10 zone.
11 Q I put up a copy of what has been marked as Exhibit
12 92. I've got my finger on what's known was the Gosnell
13 property. Do you know what is proposed to be developed on
14 the 8,600 square feet?
15 A Retail and a couple of banks.
16 Q If I told you that it included a gas station, a
17 car wash and a convenience store, would that, do you know if
18 that's correct or not?
19 A I did not pick that up or I do not recall that
20 from my perusal of the testimony earlier. So thank you.
21 Q Given its location on 121, those uses, would you
22 not consider that to be a highway-oriented land use?
23 A It could be.
24 Q Would it also be serving people traveling on 121
25 and the interstate?

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1 A Certainly on, certainly on 121, potentially on the
2 interstate.
3 Q And given its location and the pedestrian network,
4 is it readily accessible for pedestrian use to facilitate
5 neighborhood orientation?
6 A I would say that it is a little bit remote to
7 expect it to be activated by pedestrian trips.
8 Q In your opinion, is it treated as neighborhood
9 retail for counting purposes rather than necessarily
10 functioning primarily as neighborhood retail?
11 A It certainly does.
12 Q And if you took the grocery store out of the math
13 or the amount of neighborhood retail in the Cabin Branch
14 neighborhood, whatever that number is, are you, aren't you
15 still making the Cabin Branch application further out of
16 conformance with that --
17 MR. HARRIS: Objection.
18 MR. KLINE: Okay.
19 BY MR. KLINE:
20 Q Does the removal of the grocery store from the,
21 failure to provide a grocery store in the Cabin Branch
22 neighborhood make the application not in conformance with
23 the literal language in the plan recommending a grocery
24 store?
25 A Certainly the plan seeks a grocery store in each

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1 of its neighborhood activity centers.
2 Q Thank you.
3 MR. KLINE: No further questions.
4 MS. ROBESON: All right. Mr. Chen.
5 MR. CHEN: No questions.
6 MS. ROBESON: Any recross, Mr. Harris?
7 RECROSS EXAMINATION
8 BY MR. HARRIS:
9 Q The plan doesn't require a grocery store in any of
10 the neighborhoods, does it?
11 A I don't believe it does.
12 Q As far as the gas station and the banks, isn't it
13 likely that if you lived in the Cabin Branch community, on
14 your way to work, on your way home from work or otherwise
15 that you would use the gas station?
16 A Absolutely.
17 Q And the banks?
18 A Absolutely.
19 Q So don't they serve this neighborhood pretty well?
20 A Certainly contribute to the neighborhood retail.
21 Q The, in the Carmax site, doesn't the combination
22 of the zoning ordinance and the subdivision regulations in
23 Prince George's County require substantial consistency with
24 the master plan?
25 A I don't recall the exact, the exact language,

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1 whether it's substantial consistency or, you know, that we
2 not impair it. The zoning ordinance does not require
3 conformance to the master plan as a general, you know, as a
4 condition of site plan or, you know, an ordinary development
5 approval. The subdivision ordinance does. Carmax had been
6 subdivided previously. The use proposed was a special
7 exception use. The special exception criteria is that it
8 not impair the master plan and that was what was being
9 sought in the case you've referenced.

10 Q So even though it was a Euclidian zone, there was
11 still an analysis of the relationship to the master plan?

12 A Yes, there was.

13 Q And in that case you found, you convinced them
14 that even though the master plan hadn't anticipated it, it
15 was a good use to be there and, therefore, they should find
16 it consistent with the master plan?

17 A In substance, yes.

18 MR. HARRIS: No other questions.

19 MS. ROBESON: Well, now I have a question. So
20 I'll give you all a chance to ask questions based on my
21 question. Can you turn to page 28 of the master plan,
22 Policy 7?

23 THE WITNESS: Eventually, Madam Examiner. Thank
24 you for your patience.

25 MR. HARRIS: Here, I've got it here if you want

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1 it.

2 THE WITNESS: Thank you. Policy 7, okay.

3 MS. ROBESON: Okay. Just following up on Mr.
4 Kline's question, that the Gosnell property north of,
5 northwest of 121, Policy 7 under the mix of uses, it says,
6 "Establish a mix of uses in each neighborhood
7 to encourage pedestrian travel and reduce
8 dependency on the automobile."
9 THE WITNESS: Uh-huh.

10 MS. ROBESON: So I guess my question is is that
11 retail there going to reduce dependency on the automobile?

12 THE WITNESS: Oh, no, the Gosnell retail?

13 MS. ROBESON: Yes.

14 THE WITNESS: No, not at all.

15 MS. ROBESON: I just want to make sure I
16 understood that. Okay. Questions based on my questions,
17 Mr. Chen or Mr. Kline?

18 MR. CHEN: No.

19 MR. KLINE: Not from me.

20 MS. ROBESON: Mr. Harris?

21 MR. HARRIS: Just one question.

22 BY MR. HARRIS:

23 Q Even if you assume your conclusion that it does
24 not encourage, reduce dependency on the automobile, you
25 would agree with me that the County approved that use as

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1 being consistent with the master plan?

2 MR. CHEN: Objection. He didn't know that, there
3 isn't any foundation for that.

4 MS. ROBESON: Are you familiar with that land use
5 approval?

6 THE WITNESS: I'm not specifically.

7 BY MR. HARRIS:

8 Q Are you familiar with the MXPDP zone?

9 A I am.

10 Q And the development plan requirement of 59-D that
11 you said requires substantial conformity with the master
12 plan?

13 A To the use and density requirements of the master
14 plan.

15 Q So if that site is zoned MXPDP and it's been
16 approved, someone would have had to make that finding,
17 wouldn't they?

18 A Yes, yes, they would.

19 Q Thank you.

20 MS. ROBESON: Okay. All right. So as far as the
21 next hearing, I know, Mr. Ferguson, you couldn't be here,
22 so --

23 MR. FERGUSON: On the 7th.

24 MS. ROBESON: On the 7th? Correct.

25 MR. FERGUSON: Am I not done?

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1 MS. ROBESON: Yes, you're done. I was just -- no,
2 I was --

3 MR. HARRIS: You don't need to put it on your
4 calendar.

5 MS. ROBESON: I was trying to --

6 MR. KLINE: Could you release the rest of us to --

7 MS. ROBESON: -- refresh my memory as to who was
8 unavailable. Then Mr., was Mr. Bogorad the other one
9 that --

10 MR. BOGORAD: I am not available until the 10th.

11 MR. HARRIS: He's not available.

12 MR. BOGORAD: For that week, that week.

13 MS. ROBESON: Okay. So is there -- do you have
14 anyone -- I guess it would be -- when is Mr. Bossong
15 available?

16 MR. HARRIS: That's a good question. We don't
17 know his schedule. He's still out of town. But I would
18 assume he could make himself available then.

19 MS. ROBESON: Well, I don't want to assume --

20 MR. UNTERBERG: Yes, we can --

21 MR. HARRIS: Okay.

22 MS. ROBESON: -- and have to convene a hearing.

23 MR. UNTERBERG: I could make a quick phone call.

24 MR. HARRIS: Okay. Why don't you --

25 MR. UNTERBERG: I can see what his schedule is.

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1 MR. HARRIS: Okay.
2 MS. ROBESON: Okay. Why don't, okay, why don't
3 you do that. We'll go off the record while he's out of the
4 room.
5 (Recess.)
6 THE COURT REPORTER: I'm sorry. Could you just
7 repeat that?
8 MS. ROBESON: Sure. Sure. I surprised you. In
9 59-C-7.50 --
10 MR. CHEN: 7.5?
11 MS. ROBESON: Yes, 0, 7.50. Mr. Harris, you've
12 suggested in a number of places that there's no master plan
13 consistency requirement, but I read that very first
14 paragraph. It says provides a flexible approach in design
15 and development. It doesn't say land use or density. And
16 it's similar to language in the PD zone which we have
17 interpreted to mean, listen, we can accomplish what the
18 master plan says in a better way. But the flexibility isn't
19 to ignore the master plan. The flexibility is, you know,
20 we're not going to have all the bulk regulations of a
21 Euclidian zone.
22 So that's how I read that, not as saying there is
23 a mandate that the master plan be read flexibly. I read it
24 more that we're going to hold you to a higher level as far
25 as the master plan goes and we're going to give you more

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1 flexibility in layout and design so you can achieve those
2 goals better. So if you can -- and I'm just telling you
3 this in advance in case you want to address it in your case.
4 You don't have to address it now. I would prefer that you
5 don't address it now because I want to get a hearing.
6 MR. HARRIS: Okay.
7 MS. ROBESON: No, it's just that I want to get a
8 hearing date set.
9 MR. HARRIS: I do as well. Thank you.
10 MS. ROBESON: And I do have to leave at 5:00 and
11 this way you'll have an opportunity to really tell me how
12 wrong I am.
13 MR. HARRIS: Mr. Bossong is available on the 7th.
14 MR. UNTERBERG: The 10th.
15 MR. HARRIS: The 10th, I'm sorry, that's what we
16 were talking about. Okay.
17 MS. ROBESON: The 10th? Okay. So what I'm going
18 to do is I'm going to, with the parties agreement, I'm going
19 to continue this case to 9:30 on September 10th. Is
20 everyone in agreement with that?
21 MR. CHEN: October 10th?
22 MS. ROBESON: October --
23 MR. HARRIS: October 10th, yes.
24 MS. ROBESON: And as far as I know at this point,
25 it will be in this room. And then if we need the 15th, I

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1 ask you not to schedule anything on the 15th. If we need
2 the 15th, we will use that for whatever reason we need to,
3 all right?
4 MR. HARRIS: Yes, ma'am.
5 MR. CHEN: That would be on the 15th at 9:30 you
6 also said, I think.
7 MS. ROBESON: Also, yes.
8 MR. CHEN: All right. Are you -- what you said
9 earlier today was that would be an oral argument date?
10 MS. ROBESON: Well, I don't know yet. How many
11 rebuttal witnesses have, do, I know you didn't finish
12 hearing all the expert testimony. Do you anticipate how
13 many rebuttal witnesses you'll have?
14 MR. HARRIS: We do anticipate three. I will say,
15 however, that rebuttal testimony should be short. I've been
16 poor at predicting the length of cross-examination, so --
17 MS. ROBESON: I think what we're going -- I'm not
18 going to restrict the 15th to -- I think I'm not in a
19 position right now to restrict the 15th to argument.
20 MR. CHEN: I'm just bad the week of the 21st and
21 this --
22 MS. ROBESON: Well, then --
23 MR. HARRIS: I'm sorry. I was going to say even
24 if we have to carry over with testimony from the 10th to the
25 15th, we should be able to have time on the 15th for oral

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1 argument as well. I think that was what Mr. Chen was --
2 MR. CHEN: Yes.
3 MR. HARRIS: -- suggesting.
4 MS. ROBESON: Yes, and I have more flexibility on
5 the 15th to go late if we need to. No, Mr. Kline is --
6 MR. KLINE: Well, no, I'm just, I think what Mr.
7 Harris is saying is we should be able to get finished on the
8 10th and I'd like to say come in on the 15th and have oral
9 argument or do a little bit of testimony, wrap up in the
10 morning and then come back in the afternoon.
11 MS. ROBESON: We will hopefully --
12 MR. KLINE: I'd just like a break.
13 MS. ROBESON: We will hopefully do that, but time
14 will tell.
15 MR. KLINE: Okay.
16 MS. ROBESON: All right.
17 MR. CHEN: I'm just repeating our whole week of
18 the 21st.
19 MS. ROBESON: I understand. That's why I'm saying
20 I don't want to restrict the 15th to oral argument. We are
21 going to use every minute of hearing time that we need to.
22 And then I'll give you an option if you'd prefer to do a
23 written closing, but I think that's something we'll play by
24 ear.
25 MR. CHEN: Do you want to set in a third date just

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1 as a possibility that week, the 16th, or --
2 MS. ROBESON: Well, I can't at -- I can't at the,
3 oh wait. I do have Friday as a potential date, Friday the
4 18th. But the other dates, the Board of Appeals is in -- I
5 would have to see if I could get another room on the 16th.
6 MR. CHEN: How about the 17th?
7 MS. ROBESON: I have to see if I can get another
8 room. We have Costco.
9 MR. CHEN: The only issue I have on the 18th is I
10 could cancel something, and I will cancel something if I
11 have to, but that's a filing deadline in that case I'm
12 involved with, it's the deadline.
13 MS. ROBESON: Well, the best I can tell you, I can
14 try for the 16th and 17th, but I can't tell you at the
15 moment because I don't know if we have another room
16 available.
17 MR. CHEN: Would you just check though?
18 MS. ROBESON: Yes, I will.
19 MR. CHEN: Thank you.
20 MS. ROBESON: But I can't check at the moment.
21 MR. CHEN: I understand.
22 MS. ROBESON: Yes.
23 MR. CHEN: Would you just e-mail us --
24 MS. ROBESON: Yes.
25 MR. CHEN: -- and let us know?

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1 MS. ROBESON: I will do that. Anything else?
2 Yes, sir?
3 MR. HARRIS: The debate about the, what was it, I
4 don't even remember --
5 MS. ROBESON: There's so many.
6 MR. HARRIS: -- the binding elements, have you
7 resolved that or do you just intend to resolve that when you
8 decide the case?
9 MS. ROBESON: I am going to resolve it when I
10 decide the case, but I will tell you right now that your
11 arguments are not persuading me. So it's likely that I will
12 not grant it, but I promised myself, you know, in the midst
13 of hearings sometimes there's so many issues you're kind of
14 percolating. So I am going to re-read your arguments.
15 MR. KLINE: Well, thank you. I think Ms. Scala-
16 Demby's response will be very meaningful in terms of what --
17 MS. ROBESON: Well, I didn't ask her to respond on
18 the binding element issue. I asked her only on whether
19 the -- there's two binding element --
20 MR. HARRIS: Whether it could be enforced?
21 MR. KLINE: Yes, right.
22 MS. ROBESON: -- issues.
23 MR. HARRIS: Right. Right.
24 MR. KLINE: I only mean the implementation, the
25 enforcement.

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1 MS. ROBESON: Okay.
2 MR. KLINE: That's all I have on that one.
3 MS. ROBESON: Well, I await her response. So
4 anything else?
5 MR. HARRIS: No, ma'am.
6 MS. ROBESON: Okay. With that, this hearing is
7 continued to, let me get the month right, October 10th at
8 9:30 in this room, the second floor hearing room. All
9 right. Thank you.
10 MR. CHEN: Thank you.
11 MR. KLINE: We'll do the same thing and take
12 everything over to your staff so they don't have to worry
13 about it.
14 MS. ROBESON: No, you don't have to do that --
15 MR. KLINE: They'll do it?
16 MS. ROBESON: -- in this room. You know, we'll --
17 (Whereupon, at 4:46 p.m., the hearing was
18 adjourned.)
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C E R T I F I C A T E
DEPOSITION SERVICES, INC., hereby certifies that
the attached pages represent an accurate transcript of the
electronic sound recording of the proceedings before the
Office of Zoning and Administrative Hearings for Montgomery
County in the matter of:
Petition of Adventist Healthcare and
Cabin Branch Commons
DPA 13-02

By: _____
Tracy Hahn, Transcriber

<p>173:1,3,4,8;187:12; 188:6,23;211:1;217:4; 218:13;224:13,16; 225:15;226:12;237:12; 238:12,22;239:17; 278:25</p> <p>amendments (5) 81:16;148:21,22; 202:2;204:5</p> <p>amenities (1) 196:8</p> <p>American (1) 145:20</p> <p>among (1) 12:4</p> <p>amongst (1) 219:18</p> <p>amount (20) 81:21;87:24;90:19, 23;106:6;111:11; 113:7;114:2;137:9; 139:1;223:18;231:20; 236:23;266:3,13; 270:10;271:20,21; 272:8;280:13</p> <p>amphitheater (4) 125:24;126:1,3,16</p> <p>ample (2) 109:3,5</p> <p>analog (1) 247:21</p> <p>analogous (2) 216:19;259:24</p> <p>analyses (1) 233:3</p> <p>analysis (16) 33:11,24;37:14;69:2; 81:2;89:13;93:1,8; 121:21;233:11,12; 235:5,6;269:22;270:1; 282:11</p> <p>analyst (1) 233:1</p> <p>anchored (1) 270:13</p> <p>ancillary (1) 220:25</p> <p>and/or (3) 27:22;28:22;30:9</p> <p>Annotated (2) 50:22;51:7</p> <p>answered (9) 34:15;36:20;40:25; 82:5;111:9,20;112:20; 119:2;139:25</p> <p>anticipate (5) 12:16;151:11; 237:17;288:12,14</p> <p>anticipated (1) 282:14</p> <p>anticipating (4) 15:9;40:17;127:16; 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