

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
FOR MONTGOMERY COUNTY

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

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

Lynn A. Robeson  
Hearing Examiner

A P P E A R A N C E S

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E X H I B I T S

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

P R O C E E D I N G S

1 MS. ROBESON: This is a continuation of the public  
2 hearing in the application of Adventist Healthcare, Inc.,  
3 and Cabin Branch Commons, Inc., requesting an amendment to  
4 the development plan approved by the District Council on  
5 September 9th, 2003, in LMA G-806, on property consisting of  
6 283.5 acres east of Clarksburg Road, west of I-270, and  
7 north of West Old Baltimore Road in Clarksburg, Maryland.  
8 Before -- we had scheduled today for closing  
9 arguments. Before we get into that, I wanted to make sure  
10 that the parties, I think you were all cc'd on an e-mail  
11 from Rick Brush that came in yesterday. I have added it to  
12 the record as Exhibit 129. Has everyone seen, okay --  
13 MR. HARRIS: Yes.  
14 MS. ROBESON: -- that e-mail?  
15 MR. KLINE: Yes, ma'am.  
16 MS. ROBESON: Mr. Chen?  
17 MR. CHEN: Yes, ma'am.  
18 MS. ROBESON: Okay. So that is Exhibit 129 in the  
19 record. Are there any preliminary matters --  
20 MR. HARRIS: No, ma'am.  
21 MS. ROBESON: -- before we begin? All right.  
22 Mr. Harris.  
23 MR. HARRIS: Okay. Good morning. First of all, I  
24 want to thank the Hearing Examiner for her patience during  
25

1 this somewhat testy case that's gone on longer than I ever  
2 thought it would be, but we are finally at the closing  
3 argument point. My closing argument, I have three main  
4 areas I want to talk about: first of all, the general  
5 introduction; secondly, I want to address the facts and the  
6 evidence in support of the application; and then, thirdly, I  
7 want to address the opposition case and our response to  
8 that, particularly the issue of substantial compliance with  
9 the master plan.  
10 In terms of introduction, this is a development  
11 plan amendment. The property is already zoned MXPDP, and all  
12 of the findings for the zone have been made, and many of  
13 them remain intact today -- virtually all of them, in fact.  
14 Among the key conclusions is the approval for two point four  
15 million square feet of unspecified commercial uses in that  
16 rezoning and development plan.  
17 There is extensive public support. That was  
18 amplified by the unanimous support of the planning staff and  
19 the Planning Board. And I'd note that while a hospital, a  
20 nursing home, and medical facilities were in fact  
21 contemplated in Area A of the development plan, neither the  
22 development plan nor the preliminary plan, for that matter,  
23 mandated those uses or precluded others in that area. To  
24 the contrary, the MXPDP zone allows 20 percent of the total  
25 commercial density to be retail, and it deems that amount to

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1 establish what it calls a, quote, dominant employment  
2 character for a mixed-use project.  
3 With the unfortunate turn of events of Adventist  
4 Healthcare's loss to Holy Cross Hospital of the rights to an  
5 upcounty hospital, this DPA merely seeks to take advantage  
6 of that allowance in the MXP zone for 20 percent to be  
7 retail so that they can include a use that will spur and  
8 support other employment uses on the property and which will  
9 serve Clarksburg and the county.  
10 So let me turn to, secondly, to the facts and, I  
11 think, the evidence and strong support for this case. First  
12 in that respect, the addition of specialty retail in the  
13 form of an outlet center will unequivocally have a positive  
14 impact on Cabin Branch. Mr. Kaplan spoke about that,  
15 Mr. Bogorad did, and Mr. Unterberg did, and they indicated  
16 how this use would jump-start the demand for other  
17 employment uses by putting Cabin Branch and Clarksburg on  
18 the map. And they underscored, as well, how it would  
19 provide a symbiotic retail use, common to mixed-use  
20 employment centers of the 21st century and how that would  
21 make both Cabin Branch and Clarksburg more competitive in  
22 the region. But it wasn't just Messrs. Kaplan, Bogorad, and  
23 Unterberg who addressed that issue. Both the Planning Board  
24 and the planning staff repeated it in great detail how they  
25 found it to be a positive effect, but again, don't take

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1 their word alone. Even the Peterson Company recognizes  
2 this. While they testified to the contrary in this case, as  
3 reflected in Exhibit 110, quote, the developer asserts that  
4 the shops, restaurants, and personal service uses proposed  
5 for development will create an amenity base that will help  
6 drive a higher-quality employment center that grows more  
7 quickly than would be possible under the current zoning.  
8 They clearly recognized the benefit, although they argue the  
9 contrary here.  
10 Second, in addition to the benefit that it will  
11 have on Cabin Branch, it will have a positive impact on  
12 Clarksburg as a whole, and I think this is reflected by the  
13 huge community support for this. There was a flood of more  
14 than 200 letters and e-mails in support of this application,  
15 indicating in each person's own personal words why this is  
16 important to the Clarksburg area. These weren't form  
17 letters. They were personal communications from each of  
18 these people. Most of those are contained in Exhibits 38  
19 and 43, but there are a number of other individual letters  
20 throughout the record as well. I can unequivocally say that  
21 this is by far the largest support I've ever had for a  
22 zoning case that I've ever handled, and I think it's, you  
23 know, impressive.  
24 The -- in addition to the letters, there was  
25 personal testimony from those who are and have been

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1 political and civic leaders in the Clarksburg community.  
2 Former council member Mike Knapp, who spent years working to  
3 implement the Clarksburg Master Plan, testified, and his  
4 letter is in the record and unequivocally supporting this.  
5 The former head of the Clarksburg Civic Association, Kathy  
6 Hulley, her letter is at 38Q and she also testified. And  
7 Melane Hoffman, the head of Liveable Clarksburg Coalition,  
8 came and testified. And while her letter was not submitted,  
9 she did read it, and it says, among other things: I'm here  
10 today in very strong support of the proposal for a retail  
11 center from Streetscape Partners, Simon Property Outlets,  
12 New England Development on the Cabin Branch parcel. I and  
13 many of my neighbors unwaveringly support the development  
14 plan amendment that would allow this partnership to build an  
15 outlet mall and mixed retail on the site. She goes on to  
16 explain why it would be positive.  
17 In addition, there is a letter in the record,  
18 Exhibit 37, from Mr. Flanagan, the developer of the  
19 Clarksburg Town Center retail. In that letter, he says, and  
20 I quote: Based on our extensive development experience  
21 throughout the Washington metropolitan area, we are  
22 confident that development of specialty outlet retail on  
23 either side of I-270 will have an equally positive impact on  
24 Clarksburg and the town center. Goes on to say: It will  
25 generate additional economic activity and bring new people

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1 and shoppers to Clarksburg and the town center. In  
2 addition, specialty outlet retail will have a catalytic  
3 effect on bringing jobs to Clarksburg and will add to  
4 residential property values. Mr. Flanagan knows what he's  
5 talking about. He's been a developer in the county for many  
6 years, and his words mean a lot in terms of support.  
7 In addition, there were letters of support from  
8 each of the other Cabin Branch property owners. These are  
9 the properties that are most affected by what does or  
10 doesn't happen at, on this property, and they testified or  
11 indicated in their letter their belief that this would have  
12 a very positive effect.  
13 Third and certainly not least, the planning staff  
14 and the Planning Board, as I mentioned, fully support the  
15 application and find it to be consistent with the intent of  
16 the master plan. The Park and Planning staff members on  
17 this include John Carter, who was one of the authors of the  
18 1994 master plan and is now the chief planner for the  
19 Clarksburg area, and his comments are reflected in Exhibits  
20 50 and 51 as well as elsewhere in documents. And, as I also  
21 mentioned, the project has, not qualified, but unequivocal  
22 unanimous support of the Planning Board. That includes  
23 Commissioner Presley, who, as we all know, hails from the  
24 Clarksburg area and who made the motion to, quote,  
25 enthusiastically support this proposal. It also included

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

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

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

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1 develop them for more intense uses. Interestingly,  
2 Mr. Unterberg testified that any development of the  
3 Miles-Coppola property, doesn't have to be an outlet mall,  
4 would require sewer to that property, providing the  
5 community with the same capacity to hook up. So they don't  
6 need the outlet center on that side of the, on that side of  
7 270.

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

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

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

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

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

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1 will help energize, they say it won't, but as I noted,  
2 that's completely undercut by their own testimony in the  
3 Crosstrail case in Leesburg, reflected in Exhibit 110 and  
4 127, that they do believe this kind of thing is very  
5 beneficial for employment centers. So that argument is  
6 quite weak.

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

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

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

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

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

17 The second component of this analysis of master  
18 plan consistency has to do with the development plan  
19 requirements. Even though the zone itself doesn't require  
20 consistency with the master plan, again, in conflict or in  
21 contrast with other zones, I recognize that the rules of  
22 59-D, having to do with development plans, do include a  
23 broad indication that a development plan should be  
24 substantially consistent with the master plan. So I think  
25 it's an indirect issue of this, but it's not as compelling

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

3 Clearly, the overarching vision of the master plan  
4 for the MXPDP area of Cabin Branch is for a comprehensively  
5 designed mixed-use employment center. As the expert  
6 testimony in this case indicates, Mr. Bogorad and  
7 Mr. Unterberg, this development plan amendment will help to  
8 achieve that vision. It will help to make this area the  
9 21st century mixed-use employment center that so many people  
10 want. The planning staff and the Planning Board, again,  
11 reached that same conclusion, that it would be consistent  
12 with that overarching goal. In fact, the Planning Board  
13 further commented that the development plan would not be a  
14 significant change from the 2003 development plan. That's  
15 at page 1 of Exhibit 52, their letter of support, letter of  
16 recommendation.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MS. ROBESON: Okay, Mr. Chen.

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

14 MS. ROBESON: Thank you.

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

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

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

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

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

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

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

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

5 Throughout -- and I listened very carefully to  
6 Mr. Harris's closing argument, and I wrote down every time  
7 -- he uses the word substantially consistent. He used it  
8 several times. He used it in reference to Mr. Unterberg's  
9 testimony, that Mr. Unterberg said it was consistent with.  
10 He said the staff report, referring to some pages, said it  
11 was consistent with. He sums it with the words master plan  
12 consistency. At another point, at the end, he said  
13 substantially compliance, and a moment ago he just said  
14 substantial compliance. That is not the language used in  
15 59-D-1.61(a), and unless I'm mistaken -- and maybe I don't  
16 have the most current version of the code, but I think I do  
17 -- but it uses the words that it must be, substantially  
18 complies with, and that's important. That's real important.  
19 It's not being consistent with. They got to show compliance  
20 with.

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

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

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

20 By the way, just on that, they -- and this is,  
21 again, one of Mr. Harris's comments -- they talk about the  
22 20-year life of the master plan, and he used two words.  
23 They say, gee, this is a 20-year-old master plan and  
24 therefore it has to evolve. That was his word, it has to  
25 evolve, and he transitions that to be flexible and that's

1 his word. So that what he is saying is, gee, this is an old  
2 master plan, it ain't working, it has to evolve, and the way  
3 we're going to do it is by making it flexible to allow this  
4 use, because this use is really what is appropriate today,  
5 the master plan is not appropriate because it's 20 years  
6 old, so you ignore the master plan requirements under the  
7 rubric of evolve and flexibility. Quite frankly, I don't  
8 think that's the law of Maryland. This master plan is the  
9 master plan. It has been reinforced in 2011 by the District  
10 Council and the Planning Board; so that its standards, its  
11 requirements, when it talks about 120,000 square feet of  
12 retail, they have been reinforced, reaffirmed as recently as  
13 2011.

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

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

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

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

15 It further says -- again, this is still at page  
16 101 -- Noting that the weight to be accorded a master or  
17 comprehensive plan recommendation recommends upon the  
18 language of the statute, ordinance, or regulation  
19 establishing the standards pursuant to which the decision is  
20 to be made. Same page and quoting -- that was Boyds versus  
21 Montgomery County, an old 1987 decision that I'm intimately  
22 aware with because I represented the community that took it  
23 up in the Court of, had to take the Court of Appeals  
24 decision -- same page: In such cases, we look first to the  
25 words of the applicable statute, ordinance, or regulation to

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

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

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

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

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1 said that -- and I apologize, but I think I got this right  
2 -- but after he referenced Schultz versus Pritts, Terrapin  
3 Run, and some other cases that were not court decisions, he  
4 says they dealt with development plans. Maybe the cases,  
5 the zoning cases that were not court decisions did, but  
6 Terrapin Run and Schultz versus Pritts were not development  
7 plan cases at all.  
8 Stormwater management, I have to go to the  
9 language that we cite. Mr. Harris's position is that they  
10 will meet that when they have, when it has to be addressed  
11 at another step in the process. Well, I look at the  
12 language in the ordinance -- and I know we've talked about  
13 this many times -- I'm sorry. That's subsection (i). I had  
14 it right here.  
15 MS. ROBESON: I think it's 59-D 1.3(i).  
16 MR. CHEN: Yes. Wait a minute. I got my pages --  
17 yes, it's small i: If a property proposed for development  
18 lies within a special protection area, which is our case,  
19 the applicant must submit water quality inventories and  
20 plans and secure required approvals in accordance with  
21 Article V of Chapter 19. The development plan should  
22 demonstrate how any water quality protection facilities  
23 proposed in the preliminary water quality plan can be  
24 accommodated on the property as part of the project. This  
25 is ordinance language. Now, I do understand in

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1 administrative practice, and they say we'll deal with it at  
2 site plan, that's an overall, but I don't think, and I  
3 submit to the Examiner, that is not what the ordinance  
4 requires.  
5 I have case cites too.  
6 MR. HARRIS: Oh, thank you.  
7 MR. CHEN: I'm going to give you a list of case  
8 cites. I have, I have not put Bil Chen's characterization  
9 of any case. I've just given you a list of cases and  
10 quotations from the cases. That's all you're getting. So  
11 this is not a legal memo as such. It just gives the  
12 Examiner a series of cases that deal with what I think is a  
13 concern about the status, the requirements of the zoning  
14 ordinance language and an administrative interpretation of  
15 it.  
16 MS. ROBESON: Okay. Well, I am going to give it,  
17 we don't usually take -- I'm thinking of housekeeping.  
18 Normally we give anything an exhibit number simply so we can  
19 refer to it. So I am going to give it Exhibit 130.  
20 (Exhibit No. 130 was marked  
21 for identification.)  
22 MR. CHEN: Okay. And as I say, there is no  
23 editorial comments. It is literally a string cite, if you  
24 will, of Maryland court decisions that pertain to the  
25 interpretation of an administrative agency of an ordinance

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1 that it operates under. I will --  
2 MS. ROBESON: And just to clarify -- I'm sorry to  
3 interrupt -- when you submit your citations, that will have  
4 an exhibit number.  
5 MR. HARRIS: Thank you.  
6 MS. ROBESON: Okay. I'm sorry, Mr. Chen. Go  
7 ahead.  
8 MR. CHEN: It's okay. Look, I'm not going to  
9 spend more time on it, but what we've heard is apparently an  
10 administrative interpretation of this subsection that defers  
11 compliance with it until site plan stage or -- well, as to  
12 use Mr. Harris's words, at another step in the process. I  
13 don't think so. On behalf of my client, they had to comply  
14 now. And I appreciate the fact that maybe the Planning  
15 Board and the Planning Board staff and DPS may do something  
16 else and there may be a logical reason why they do it, but  
17 if there is, they should go to the legislative body and have  
18 the legislative body change the law, and among the case  
19 cites that I've given you are situations in which even  
20 District Councils have been reversed by the appellate courts  
21 for failing to comply with the requirements of their  
22 ordinances.  
23 So that, again, respectfully, as far as the  
24 argument is concerned and these agencies, they have to  
25 comply today. The record has to show compliance with

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1 subsection (i). The record does not show compliance with  
2 subsection (i), and this application therefore cannot be  
3 granted by the District Council as a matter of law. And  
4 that's all I've got.  
5 MS. ROBESON: Thank you Mr. Chen. Mr. Kline.  
6 MR. KLINE: Good morning. Bear with me for a  
7 second here with my throat. Mr. Harris has apparently just  
8 worn me out after all these hearings.  
9 MS. ROBESON: Never.  
10 MR. KLINE: I'll try and speak up. I'd like to  
11 reiterate the same, the same compliment that was mentioned  
12 by both the other attorneys, to co-counsel at the table for  
13 the manner in which they all conducted themselves,  
14 particularly Mr. Harris, who showed very great  
15 professionalism and even courage at a time in his life when  
16 I probably wouldn't have even had enough strength to get out  
17 of bed myself. It's very impressive.  
18 Having said that, though, the thrust of our --  
19 MS. ROBESON: That was short-lived.  
20 MR. KLINE: The thrust of my argument is the  
21 converse of that old phrase damned by faint praise, and in  
22 this case, DPA 13-02 should be damned for any excessive  
23 praise of the application. Everything about it is just too  
24 much. It's over the top. It's too much square footage,  
25 it's too much activity, and it's too exaggerated in

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

3 You start with the obvious issue that Mr. Chen  
4 already mentioned; that's the 120,000 square feet. And how  
5 much are we getting? Four hundred and eighty-four thousand.  
6 And how many times did you hear people say, how can you say  
7 484,000 is consistent with the master plan recommendation of  
8 120,000 square feet? Mr. Chen basically kind of gave you  
9 the legal significance of the master plan recommendations.  
10 I'll try and put it into master planning context.

11 The only way that you could justify the leap from  
12 120 to 484 was to essentially create a zoning fiction of  
13 something called, which was originally called employment  
14 retail use which morphed into specialty retail use --  
15 something that has no significance, well, no designation or  
16 definition or zoning ordinance and, based on my experience,  
17 doesn't have any practical application in the zoning  
18 practice itself, at all. And, of course, the argument from  
19 the applicant has been that the 120,000 relates to the  
20 neighborhood convenience retail and that other retail was  
21 not prohibited or precluded, but remember how the regional  
22 outlet center essentially reaches its desired size. It does  
23 so at the expense of the neighborhood-oriented convenience  
24 retail that was specifically mentioned in the plan of  
25 120,000 square feet.

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

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

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1 So, it's interesting. When you've got the ratio  
2 of 450,000 square feet of regional retail facilities against  
3 25,4, soon to go up to 50,000 square feet, I find it  
4 fascinating that if you live in Cabin Branch, you're going  
5 to find it easier to buy a ball gown than it will be to buy  
6 a jug of milk or to get your laundry picked up in terms of  
7 how that -- basically, the neighborhood convenience retail  
8 that was contemplated in the plan has been cannibalized in  
9 order to increase the size of the regional outlet center.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 I think all the parties agree that the plan did

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

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

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

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

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

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

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

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

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

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

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

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

1 exaggeration, the claim we heard last week, that the Council  
2 resolution on the original rezoning suggested that you could  
3 go up to 240,000 square feet, and we basically had a  
4 dialogue about that at the time. And the resolution on page  
5 14 actually reads: Retail uses would occupy roughly 10  
6 percent of the commercial floor area, well below the 20  
7 percent limit. And I'm going to say that's nothing more  
8 than a simple description of a fact, albeit with an  
9 arithmetic error, because 120,000 square feet is not 10  
10 percent of 2,420,000. It's only five percent, give or take.

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

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

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

1 in the plan, because of its deleterious effect on the town  
2 center and the structure of the entire plan that Mr. Noonan  
3 and Mr. Ferguson both talked about in terms of the balance  
4 and how you're supposed to have the district, town center  
5 district, and the subordinate neighborhoods basically all  
6 kind of working together, one subordinate to the town  
7 center; and, finally, for its effect on the whole town scale  
8 intent of the master plan, because you cannot introduce  
9 450,000 square feet of regional retail outlet center and  
10 maintain a town scale, either with -- particularly in Cabin  
11 Branch and because of the effect it has on the town center  
12 as well.

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

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

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

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

15 When do you submit that water quality plan? Under  
16 19-65(a)(1), it is coordinated with the project review.  
17 That's a quote from 19-65(a)(1). Water quality review must  
18 be done in conjunction with the review process for a  
19 development plan. They are supposed to go in tandem  
20 together, at the same time.

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

1 stormwater management, and the sediment control plan. All  
 2 that stuff is supposed to come in at that point in time.  
 3 And whether -- well, no. Who gets to review it is  
 4 determined by whether it's minor or significant.  
 5 19.67.01.01, if you remember my quotation, was if it -- all  
 6 amendments are significant unless they're minor, and it  
 7 lists the minor, and you may recall my questioning of  
 8 Mr. Bossong and you know what the facts are of this case.  
 9 What is going on at Cabin Branch does not meet any of the  
 10 three criteria for what is a minor amendment. So that means  
 11 DPS has to review it, Park and Planning can't do it, and it  
 12 has to be done in accordance with the whole shooting match  
 13 of materials that have to be submitted, excuse me; and, when  
 14 that's done and under 59-D-1.3(1)(i), and approval secured,  
 15 meaning you have to submit it and you have to get DPS's  
 16 approvals as well.  
 17 So the answer to the question that you asked  
 18 Mr. Etheridge was -- can the Council make a finding here  
 19 that current stormwater management requirements can be met  
 20 for the maximum amount of development shown on the  
 21 development plan amendment based on the water quality plan,  
 22 showing outdated ponds? The answer in my opinion is  
 23 unequivocally no because they don't have the information  
 24 today to be able to make that decision. They basically have  
 25 an outdated plan. That's what Mr. Brush's letter says to

1 you. And that process all makes sense under the new policy  
 2 and the new emphasis in the 2007 Stormwater Management Act.  
 3 Mr. Chen alluded to the administrative practice  
 4 that's occurred in the past, and you said, mentioned it in  
 5 some of your memos. I can understand how the water quality  
 6 plans that have been approved today -- I'll rephrase that.  
 7 The site plans that have been approved today and the water  
 8 quality plans that have been amended today all occurred  
 9 without having to go through the process of 59-D-1.3(i)  
 10 because those were all dealing with parts of the property  
 11 that had been grandfathered, and this is an area of the  
 12 property that hasn't been grandfathered at all. And the  
 13 whole philosophy and change in 2007 basically shifted that  
 14 burden.  
 15 You know, the applicant's position today is, we're  
 16 not making it any worse, so we should be allowed to go  
 17 forward. The mantra of ESD to the maximum extent practical  
 18 shifts that burden and puts on the applicant an affirmative  
 19 obligation to demonstrate that it can't make it any better.  
 20 It has to come in and it has to say this is what we're going  
 21 to do before but take our word for it that that's to the  
 22 maximum extent practical, and that's not the way this system  
 23 is set up. Now you have to basically just, basically  
 24 demonstrate that it is to the maximum extent practical.  
 25 So the what happened before is essentially not the

1 process that we can follow today, and under the change, the  
 2 philosophy where the burden shifts, they basically have to  
 3 come in and demonstrate that, hey, there isn't anything else  
 4 we can do to make it any better. It just isn't -- this rule  
 5 of we're not making it any worse just doesn't sit any  
 6 longer.  
 7 So the full review of the Chapter 19 procedures is  
 8 required before the amended development plan is approved.  
 9 That's why you do the two things in conjunction with each  
 10 other, and the post-2007 law says that no project approval  
 11 until water quality plan approval has been, has been  
 12 achieved.  
 13 Now, what do you do with that? I mean, I, you  
 14 know, we've never really been trying to kill this thing.  
 15 We've just always been saying you got to play by the rules.  
 16 So I believe you got two choices, and I guess your e-mail  
 17 to, yesterday, to the, about your conversation with  
 18 Mr. Carter, we can either sort of suspend everything and  
 19 have the applicant go and basically do that water quality  
 20 plan review and then put it in the record -- and I don't  
 21 probably doubt that it'll probably do pretty well, but they  
 22 still have to go through that exercise -- but we shouldn't  
 23 be going forward with Council because how can the Council be  
 24 basically making a decision based on plans that show  
 25 features that no longer are going to be approvable by DPS,

1 and that's what Mr. Brush's letter said to you yesterday.  
 2 That deals with the procedural issue. With --  
 3 this is sort of the point in time in my presentation I'm  
 4 supposed to look at you very intently and say, and we -- you  
 5 must recommend denial of this application, and in fact,  
 6 that's not our position. We've never been trying to kill  
 7 this application. We just thought they should have to go  
 8 through a master plan amendment the same way we've have to  
 9 go through a master plan amendment on that east side of  
 10 I-270, the Ten Mile Creek plan.  
 11 So our recommendation is, is that you recommend  
 12 deferral of the application or remand back to the hearing  
 13 examiner until such time as the County Council has amended  
 14 the work program from the Planning Board to do a master  
 15 plan, and then whether its minor or major -- I would think  
 16 it would have to be major because, as we've talked about, if  
 17 there was to be, if there is to be a regional outlet center  
 18 on the west side of I-270, it does have some effect on the  
 19 town center the way the plan is structured today. So it  
 20 seems to me that's got to be bigger than just a minor master  
 21 plan amendment, but maybe it could be done that way. But  
 22 that's the complaint we've raised through the whole thing,  
 23 is that the plan -- the way the plan is set up today, the  
 24 regional outlet center is basically inconsistent with that  
 25 plan and this application shouldn't be approved until that

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1 plan is -- yes, it shouldn't be approved until the plan has  
2 met it. I'm not saying you withdraw it and re-file it, just  
3 saying you got to amend the plan before you can basically do  
4 anything with this application. Thank you.  
5 MS. ROBESON: Thank you. Before you rebut, as to  
6 Mr. Chen's and Mr. Kline's arguments on stormwater  
7 management, would you agree that it's arguable that you do  
8 have to amend the plan? That's one. And, two, when I read  
9 Mr. Brush's e-mail, I, perhaps naively, was under the  
10 assumption that DPS had seen this amendment, and as I read  
11 the statute, DPS is the lead agency on -- they each have  
12 different, different functions, but DPS, you know, performs  
13 a separate function than technical, or the Planning Board.  
14 So, in light, can you address your position on  
15 those aspects raised by Mr. Kline and Mr. Chen, and perhaps  
16 you were already prepared to do that, but I just wanted to  
17 make sure you did it.  
18 MR. HARRIS: Okay. Do you want me to address that  
19 first, or how --  
20 MS. ROBESON: You can go in whatever order you  
21 wish.  
22 MR. HARRIS: Okay. First of all, before I start,  
23 I should have done this before, but the cases --  
24 MR. CHEN: Thank you.  
25 MR. HARRIS: -- that I referenced.

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1 MS. ROBESON: Thank you, and I will make this  
2 Exhibit 131.  
3 (Exhibit No. 131 was marked  
4 for identification.)  
5 MR. HARRIS: Okay. First of all, I guess I'd  
6 start by saying I'm truly touched that a competitor is so  
7 concerned about the, a literal interpretation of the master  
8 plan regarding a completely different property, not even  
9 next to or neighboring their property, that they're so  
10 concerned about good quality design for Cabin Branch, that  
11 they are extremely concerned about the survivability of town  
12 center retail when they want to do the same thing that would  
13 have the same impact there, and that they now are the  
14 conscience of the County with respect to how stormwater  
15 management regulations should be applied. This is just  
16 truly profound for a developer to be so concerned, and it's  
17 great. Our experts disagree with 100 percent of what they  
18 said, and the planning staff, the Planning Board, and the  
19 DPS disagree with them. So while it's touching, it's of  
20 passing interest.  
21 MS. ROBESON: Wait. DPS disagrees --  
22 MR. HARRIS: Correct.  
23 MS. ROBESON: -- because I don't read that.  
24 MR. HARRIS: Okay. Well, I'll address that in a  
25 minute --

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1 MS. ROBESON: Okay. And the other --  
2 MR. HARRIS: -- I'm talking, overall.  
3 MS. ROBESON: Okay. I'm sorry. I have one more  
4 question --  
5 MR. HARRIS: Oh, yes.  
6 MS. ROBESON: -- I'd like you to address. I'm  
7 sorry to interrupt, but why not just amend the preliminary  
8 water quality plan? So if you could do that too.  
9 MR. HARRIS: Okay. I will come to that. Thank  
10 you.  
11 MS. ROBESON: Okay.  
12 MR. HARRIS: In any respect, I'm talking about  
13 both master plan issues, the zoning issues --  
14 MS. ROBESON: I see.  
15 MR. HARRIS: -- and everything else. They've  
16 become the conscience, they're wrong, but it's a nice, noble  
17 gesture.  
18 With respect to the 2011 master plan, they  
19 maintain that that completely reaffirmed the master plan.  
20 Clearly, it was a very narrow, very quickly done master plan  
21 amendment, focusing on one issue only. And if it were such  
22 a complete rewrite of the ordinance, of the master plan, why  
23 are we doing another master plan amendment for the Ten Mile  
24 Creek area now, two years later? Clearly, it was not a  
25 reaffirmation of everything in the master plan.

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1 The -- Mr. Chen just chooses to ignore the  
2 flexibility in the MXP zone and the master plan and  
3 particularly the Washingtonian case that demonstrates that  
4 clearly. So I respectfully disagree with him on that  
5 respect.  
6 He indicates that a grocery is required at Cabin  
7 Branch. That is certainly not the case. There was a  
8 recommendation to allow it, but circumstances have changed  
9 now, and you heard exhaustive testimony as to why it's not  
10 appropriate.  
11 He mentions that the 120,000 is a cap. I know a  
12 cap when I see it. It says a cap, and this master plan does  
13 have a cap for retail in the town center. It does have a  
14 cap for retail in Clarksburg Village. It uses those words:  
15 maximum. It does not use that word in Cabin Branch. So  
16 that is a different circumstance.  
17 We're not saying to ignore the master plan. We're  
18 saying that it should be applied flexibly, as is required by  
19 Maryland law, and that we do substantially comply. Maybe I  
20 used the word conform; maybe I used the word substantially  
21 consistent. To me, those are synonyms. Compatible with is  
22 not a synonym. That's what's in the MXP zone, but we do  
23 substantially comply. There is no numeric standard in this  
24 master plan for the MXP zoning area. So we are  
25 substantially consistent with the absence of that.

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

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

1 our situation at all.

2 The -- Mr. Chen made a big point about the, where  
 3 a statute requires consistency or compliance that then it  
 4 elevates it, and I don't disagree with that, but the cases  
 5 that I cited, the DPA cases, those are all DPAs under  
 6 59-D-1.6. I think there were nine of them that I cited, and  
 7 in those cases, despite 59-D-1.6, the Zoning Hearing  
 8 Examiner's Office found that the master plan in those cases  
 9 was flexible and that it was appropriate to interpret it  
 10 that way and allow, allow the development to proceed.

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. KLINE: Sure.

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

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

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1 that the Peterson Companies plans to have activity space  
2 like that at the retail center they would do.  
3 MS. ROBESON: Well, well, okay, I know that's not  
4 in the record. So --  
5 MR. HARRIS: Okay. I thought it was, but it may  
6 not be.  
7 MS. ROBESON: No, I don't think so.  
8 MR. HARRIS: In terms of stormwater management,  
9 again, I appreciate the position taken by Mr. Chen and  
10 Mr. Kline, but both Park and Planning and DPS have indicated  
11 they disagree with that position. After being, you know,  
12 you know, I'm -- well, never mind, I won't even say that.  
13 We do have a preliminary water quality plan. That remains  
14 valid.  
15 MS. ROBESON: He's not saying that, though.  
16 MR. HARRIS: Mr. Bossong --  
17 MS. ROBESON: He's saying --  
18 MR. HARRIS: Mr. Bossong did say that.  
19 Mr. Bossong is an expert on the regulations. Nothing in  
20 his, Mr. Brush's e-mail says that it's not valid. All he  
21 says is that, as with all cases, as the project proceeds  
22 through subsequent levels of approval, where more definition  
23 is given to the water quality features, that water quality  
24 plan will become more refined. It's a general preliminary  
25 water quality plan. It's general in nature. It was never

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1 capable of being -- it was never intended to be built in  
2 that regard. It didn't specify exactly where water quality  
3 features would be, such as ESD devices. There are numerous  
4 places throughout the concept plan, in the preliminary water  
5 quality plan, which says, you know, just talks generally  
6 about there will be such things as bioswales, et cetera,  
7 without locating them. That was always going to be done at  
8 the final water quality plan stage.  
9 Again, remember Chapter 19 of the County Code. It  
10 says you do a preliminary water quality plan that says what  
11 are the -- the primary thing of the preliminary water  
12 quality plan is to identify water quality features and  
13 drainage areas so you have a base-conditions circumstance.  
14 It does contain a concept of how stormwater will be  
15 addressed but recognizing that it's a concept that will not  
16 be built in that capacity but, rather, will have to be  
17 approved through subsequent approvals. So that preliminary  
18 water quality plan stays in effect.  
19 As this project goes to, again, under Chapter 19,  
20 the final phase of development approval, prior to building  
21 permit, the site plan phase, a final water quality plan has  
22 to be done and that final water quality plan will do  
23 specific engineering as far as the amount of water that each  
24 building and each parking will generate and how that will be  
25 done. You could not do that today because you don't know

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1 the footprint of those buildings, you don't know the exact  
2 size of the parking lot, you don't know the exact location  
3 of the roads. So it is always an evolving plan, as  
4 Mr. Brush indicates in his e-mail and as Mr. Bossong  
5 testified.  
6 The, they didn't -- contrary to the other  
7 argument, they didn't say the preliminary water quality plan  
8 is outdated, at least not as I read it. They simply said  
9 that it will be finalized, I don't remember their exact  
10 words, through the subsequent approval processes. Chapter  
11 19 clearly calls for a preliminary water quality plan at the  
12 first phase of development, and it calls out a development  
13 plan. We did one and it is there. It doesn't say that you  
14 have to amend that preliminary water quality plan at the  
15 time of a development plan amendment. Rather, it  
16 contemplates that that would be done through the final water  
17 quality plan phase that's done at the time of site plan.  
18 And the DPS notes, in fact, a further stage. There are  
19 three stages to the water quality process. After final  
20 water quality plan and site plan, you actually have to go  
21 through a sediment control plan -- permits, that is -- and  
22 at that time, they will still address things beyond that.  
23 So it is a fluid process that does not require a  
24 new preliminary water quality plan now. We do not have to  
25 amend that. There would be no purpose in amending a

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

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1 doing. And, you know, again, the --

2 MS. ROBESON: How about the question why not do

3 one and just eliminate the issue?

4 MR. HARRIS: It would be pointless to do that --

5 MS. ROBESON: Well, I, I took the --

6 MR. HARRIS: -- because we wouldn't, we

7 couldn't --

8 MS. ROBESON: Okay, just a second.

9 MR. HARRIS: Okay.

10 MS. ROBESON: I took the opportunity to read

11 Chapter 5 of the state --

12 MR. KLINE: Design manual.

13 MS. ROBESON: -- design manual, and it says you,

14 they suggest laying out -- and I'm not trying to argue. I'm

15 trying to, to feel good about this.

16 MR. HARRIS: I want you to feel good about this.

17 MS. ROBESON: It says that one of the things they

18 look at is whether the design of the facilities flows, you

19 know, doesn't interact at the preliminary conceptual phase.

20 One of the things they look at is, is it going to change the

21 flow from the natural flow, and they stress the importance

22 of designing in advance, from day one, to incorporate ESD.

23 So how does that play into it?

24 MR. HARRIS: Sure. The objective of the manual

25 and the regulations in the county is to ensure that ESD gets

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1 done to the MEP, okay? And the principle is that you should

2 be planning your stormwater as you're designing your

3 project. You don't want it to come afterwards: We've got

4 this building. Oh, where are we going to put stormwater?

5 Oh, too bad, we don't have a spot. That's what they want to

6 avoid. And so in the design manual and in the regulations,

7 that's why you do the final water quality plan with the site

8 plan. You're doing detailed work on what you're going to

9 build there at the same time that you're doing the detailed

10 water quality work so you know that they will fill, you know

11 that they'll stay out of forest areas and out of streams,

12 et cetera.

13 Now, in this case, we're actually better off in

14 that because we have a preliminary water quality plan that

15 defines where the stream buffers are; we've got a forest

16 conservation plan that defines where the forest is, and as

17 you've heard the testimony, we are not affecting either of

18 those conditions. The preliminary water quality plan also

19 shows the drainage areas. We're not changing the drainage

20 areas. The final water quality plan that will be reviewed

21 in conjunction with the site plan for this will 100 percent

22 conform with the preliminary water quality plan drainage

23 areas.

24 So the only thing that is left to be done is the

25 specific design and individual location of the probably

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1 dozens, if not, hundreds of ESD devices that will be

2 sprinkled throughout this project, but they, those can only

3 be done when you're doing the detailed design of the

4 buildings, et cetera. So when we come in with a final water

5 quality plan for the northern pod, A and B, let's say, and

6 if we're not doing Pod C at that time, we won't have a final

7 water quality plan for Area C because we won't have the

8 specific development there. That would then -- that final

9 water quality plan would be done then at that later stage.

10 So there is no point to amend and, in fact, no

11 real process to amend the preliminary water quality plan.

12 It is out there and it provides a benchmark from which to

13 operate as we design the ESD devices in conjunction with the

14 development. And I think Park and Planning's letter was,

15 you know, perfectly clear on that, and Park and Planning --

16 there is split lead agency role, as you correctly note. DPS

17 basically is the lead agency for defining where the

18 environmental features are and stuff, and Park and Planning

19 has more of a role in connecting or making sure that the

20 built development coincides with the water quality features.

21 That is exactly what we're doing. Their memo, Park and

22 Planning's memo, was crystal clear that we are completely

23 compliant with the regulations and that we are following the

24 process that the regulations specify. I will say that the

25 successive e-mails from DPS have been less than clear in

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1 that regard, but in my reading, they only affirm and do not

2 conflict with Park and Planning. They had an opportunity to

3 disagree with Park and Planning's memo in their latest memo,

4 because it came well after Park and Planning's memo, but

5 they did not disagree with that. They were consulted when

6 Park and Planning did its memo, as you saw it in the cover

7 letter, and so we are completely following the process.

8 There is, again -- I sound like a broken record, I guess --

9 MS. ROBESON: Yes.

10 MR. HARRIS: -- no point in amending the

11 preliminary water quality plan.

12 Lastly, you know, again, I think the bottom line

13 in this, let's, let's look at the parties. We've got a

14 competitor arguing a, b, c, and d. We've got the planning

15 staff and the Planning Board saying e, f, and g. I think

16 between those two the Planning Board and the planning staff,

17 you know, deserve the benefit of any doubt, and I don't

18 think there is any doubt.

19 MS. ROBESON: Okay. Well, I -- did you have

20 anything else to add in your closing?

21 MR. HARRIS: I think I'm worn out.

22 MS. ROBESON: Well, I don't usually ask questions

23 like that during closing. Mr. Kline, do you want to comment

24 on what Mr. Harris said or --

25 MR. KLINE: Very simple answer -- the law says

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

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

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1 MR. HARRIS: Thank you very much.  
2 MR. KLINE: Thank you.  
3 MS. ROBESON: This hearing is adjourned. The  
4 record will be open until 10/25 solely to receive the  
5 revised -- the development plan with the revised binding  
6 elements and any responses thereto until 10/25. Thank you.  
7 (Whereupon, at 11:28 a.m., the hearing was  
8 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:  
Adventist Healthcare, Inc., and Cabin Branch Commons, Inc.  
Case No. DPA 13-02

By:  
  
Wendy Campos, Transcriber

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