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Transcript of Hearing

Date: February 20, 2025

Case: CTC Retail, LC & Weiss Markets, Inc. (CU 25-02)

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Transcript of Hearing
Conducted on February 20, 2025

1 (74 to 77)

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OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

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FOR MONTGOMERY COUNTY, MARYLAND

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In Re Application Of:

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CTC Retail, LC & Weis Markets, Inc. (CU 25-02)

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HEARING BEFORE EXAMINER KHANDIKILE MVUNGA SOKONI

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DAY TWO

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Rockville, Maryland

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Thursday, February 20, 2025

14

10:00 a.m.

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Job No: 570334

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Pages: 74 - 283

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Transcribed by: Nicole Mastrosimone

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A P E A R A N C E S

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ON BEHALF OF THE APPLICANT:

4

ROBERT R. HARRIS, ESQUIRE

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LERCH, EARLY & BREWER

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7600 Wisconsin Avenue, Suite 700

7

Bethesda, Maryland 20814

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301-841-3845

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ON BEHALF OF THE OPPOSITION:

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LESLIE POWELL, ESQUIRE

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POWELL, LLC

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19 North Court Street, Suite 201

14

Frederick Maryland 21701

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301-668-7575

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AMY PRESLEY, RESIDENT OF TOWN CENTER

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19

ALSO PRESENT:

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David Samba

21

Joe Bozzonetti and Andrew Rouff, Technicians

22

Steve Feather

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Tabatha Ialacci

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Susana Gonzalez

25

Gaustavo Rojas

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Michael Herson

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Tim Longfellow

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Keith Bennett

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Hearing held at:

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Montgomery County Office of Zoning and

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Administrative Hearings

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100 Maryland Avenue

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County Office Building

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Room 200

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Rockville, Maryland 20850

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Before Cody Handlir, Notary Public in and

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for the State of Maryland.

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C O N T E N T S

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OPENING STATEMENT

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By Mr. Harris

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By Ms. Powell

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WITNESSES

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Kevin Foster

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By Mr. Harris

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By Ms. Presley

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By Ms. Powell

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By Ms. Ialacci

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By Mr. Feather

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Kate Kubit

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By Mr. Harris

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By Ms. Presley

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Jack O'Hara

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By Mr. Harris

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By Ms. Powell

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By Ms. Presley

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<p>1 E X H I B I T S 2 (Retained by OZAH.) 3 1. Conditional Use Application 4 2. MNCPPC Checklist 5 3. Statement of the Case/Statement of 6 Operations 7 4. Certified Zoning Map 8 5. Notice List 9 A. Adjoining and Confronting 10 B. HOA/Civic Associations 11 C. OZAH Mailing List 12 6. Traffic Statement 13 7. Owner Authorization Affidavit 14 A. Authorization Letter 15 B. Supplement 16 8. Existing Features Plan 17 9. Conditional Use Plans 18 A. Cover Sheet 19 B. Approval Sheet 20 C. Conditional Use Site 21 D. Site Details Sheet 22 E. Landscape Plan and Details 23 10. Approved NRI and FSD Plan 24 11. Final Forest Conservation Plans 25 A. Cover Sheet B. Overall Plan C. Final FCP D. Final FCP 2 E. Final FCP 3 F. Final FCP Approval G. Final Forest Conservation Tabulations H. Final FCP-Approval Sheet I. Final FCP-Approval Sheet J. Final FCP-Approval Sheet 12. Final Water Quality Plans A. Cover Sheet B. Composite Final Quality Site Plan C. Final Water Quality Plan D. Final Water Quality Plan E. Final Water Quality Plan F. Final Water Quality Plan 13. SWM Concept Plan Approval Letter 14. Record Plat 25584 or 61 15. Resumes A. Kevin Foster B. Tim Longfellow C. David Samba D. Edward M. Steere</p>	<p>1 A. Attachments 2 37. Applicant's Prehearing Statement 3 38. Updated Needs Analysis 4 39. Letters of Support 5 A. Dennis Swihart 6 B. Eric A. Krandi 7 C. Deborah D 'Attilio 8 D. Gregory Willitis 9 E. Heather & Erik Mann 10 F. Michael Herson 11 G. Clarksburg HOA Statement 12 H. Mark Liebermann 13 I. Steve Feather 14 40. Amy Presley Testimony 15 41. Request to be made Party of Record from Amy 16 Presley 17 42. Exhibits submitted by Amy Presley 18 43. Compliance Program Staff Report June 1, 2006 19 44. Compliance Plan 20 45. Planning Board Resolution dated June 15, 2006. 21 46. Staff Report Submission Revised Plans for Plan 22 of Compliance 23 47. Corrections to Compliance Program Site Plans 24 and Minor Changes 25 48. Affidavit of Posting submitted on 1/22/2025.</p>
79	81
<p>1 EXHIBITS CONTINUED 2 (Retained by OZAH.) 3 4 16. Fire Access Site Plan 5 17. Open Space Plan 6 18. Circulation Plan 7 19. Color-Coded Utility Plan 8 20. Planning Board's Resolution 11-6-08, 12-11-08 9 21. Planning Board's Resolution 07-23-15 10 22. Planning Board's Resolution 02-29-24 11 23. Statement of Justification 12 24. Sign Location Exhibit 13 25. Architectural Plan Exhibit 14 26. Lighting Plans 15 27. Applicant's Acceptance of the Posting of Signs 16 28. Applicant's request to amend to add Weis 17 Markets, Inc. as Applicant 18 29. Motion to Amend submitted by Keith Bennet 19 30. Revised Application for Conditional Use 20 31. Revised Statement of the Case 21 32. Revised Conditional Use Plan Cover Sheet 22 33. Revised Fire Access Plan 23 34. Needs Analysis 24 35. 12-3-2024 Notice of Public Hearing 25 36. Staff Report Completed on 12-11-2024</p>	<p>1 EXHIBITS CONTINUED 2 (Retained by OZAH.) 3 49. Opposition to Conditional Use Application 4 submitted by Leslie Powell, Esq. 5 A. Clarksburg Town Center Plan of 6 Compliance 7 B. Five Mile Radius of CTC 8 C. Destination Analysis Clarksburg 9 D. Tank Capacity 10 50. Preliminary Plan Final Water Quality and Site 11 Plan submitted by Amy Presley 12 51. E-mail Exchanges between the Hearing Examiner, 13 Robert Harris, Amy Presley, Leslie Powell 14 52. Affidavit of Posting 15 53. Planning Board Resolution dated 3-25-24 16 54. Clarksburg Town Center Project Plan 17 55. Planning Board Transmittal Letter received on 18 January 10, 2025. 19 56. 2-23-2025 E-mail from the Hearing Examiner to 20 Parties 21 57. E-mail exchange between the Hearing Examiner 22 and Amy Presley 23 58. 2-5-2025 E-mail Exchange between the Hearing 24 Examiner and Parties 25 59. 2-5-2025 Overall Site Plan 60. 2-5-2025 Subpoena Request from Leslie Powell 61. 2-7-2025 Letter from Leslie Powell Attachments 62. Affidavit of Ajay Patel 63. Motion to Deny CUA 64. Exhibits A to I 65. Opposition to Leslie Powell's Subpoena Request 66. Exhibits submitted by Applicant's Landscape 67 Architect Keith Bennett 68 A. Map of Gas Stations within 1 mile 69 B. Project Location 70 64. Reply to Motion to Deny Conditional Use 71 Application submitted by Robert Harris 72 A. Attachments to Reply to Motion 73 (Exhibits A to H) 74 65. Order regarding Leslie Powell's Subpoena 75 Request issued by Hearing Examiner</p>

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3 (82 to 85)

82	1 PROCEEDINGS 2 Whereupon, 3 HEARING EXAMINER SOKONI: Good morning, 4 everyone. We are gathered here in the OZAH 5 hearing room with regard to conditional use 6 application case number 2502. It's the 7 application of CTC Retail, LC and Weis Markets, 8 Inc. 9 I apologize for the delay. We had some 10 tech issues. So we're starting close to right 11 around 10 a.m., which is significantly later than 12 we were scheduled to start. We were scheduled to 13 start at 9:30. And my apologies for the tech 14 issues we experienced. 15 I hereby open the hearing. This is a 16 public hearing regarding the above-referenced 17 application. It's an application for a 18 conditional use for an automobile filling station. 19 With regard to the application itself, the 20 Applicant has the burden of proving that the 21 application meets the requirements of Section 22 59.7.3 of the Zoning Ordinance, as well as the 23 general development standards set out in Section 24 59.6, as well as any other use standards in the 25 Zoning Ordinance.	84	1 terms of what will happen. I was a participant in 2 the violation hearings way back in 2005 all the 3 way through to the creation of the compliance 4 program. 5 HEARING EXAMINER SOKONI: Thank you. 6 Do we have anyone else in the audience, 7 any members of the public who are appearing in 8 opposition? 9 I'll turn to the Zoom. Could any 10 participants on the Zoom kindly introduce 11 yourselves? The top one is the Zoom operator. 12 Let's see. Okay. So I'm calling on anyone on the 13 Zoom. If you could kindly -- if you wish to 14 participate in the proceedings, if you could turn 15 on your camera and unmute yourself and introduce 16 yourself. 17 MR. FEATHER: Good morning. My name is 18 Steve Feather. I live at 13111 Hawkeye Alley, 19 Clarksburg. I've been a resident here for four 20 years, and I am in support of the grocery store, 21 the filling station, EV charging station. 22 HEARING EXAMINER SOKONI: Thank you. 23 Anyone else on the Zoom who wishes to participate 24 must kindly introduce themselves. If you could 25 turn on your camera, unmute yourself and identify
83	1 I'll introduce myself. My name is 2 Khandikile Sokoni, last name spelled S-O-K-O-N-I, 3 and I am the Hearing Examiner in this case, which 4 means that I will listen to testimony, review the 5 evidence and render an opinion -- and render a 6 decision, a report and decision on the application 7 pursuant to the criteria set forth in the Zoning 8 Code. 9 I would like to identify the parties 10 present starting with the Applicant. 11 MR. HARRIS: Good morning, Ms. Sokoni. 12 For the Applicant, Bob Harris of Lerch, Early, 13 Brewer. 14 HEARING EXAMINER SOKONI: Thank you. 15 MS. POWELL: Good morning, Ms. Sokoni. 16 Leslie Powell on behalf of Shankar Limited, the 17 Patel -- I'm just going to go with the Patel 18 parties because the list goes on. 19 HEARING EXAMINER SOKONI: That's fine. 20 Anyone else present in opposition? 21 MS. PRESLEY: Yes. 22 HEARING EXAMINER SOKONI: Would you like 23 to come to the microphone and speak? 24 MS. PRESLEY: Amy Presley, I am a resident 25 of the Town Center since 2002 and a stakeholder in	85	1 who you are. 2 MS. IALACCI: Hello. Tabatha Ialacci, 3 23517 Public House Road, also a resident as well 4 as member at large for the CTC HOA. I am in favor 5 of and will be testifying as necessary. 6 HEARING EXAMINER SOKONI: Thank you. 7 Are you good with all the spellings of the 8 names? 9 Sorry. If you could, kindly spell your 10 name out slowly. We have the proceedings being 11 recorded word for word by a court reporter, so 12 I'll go back. Starting with the last speaker, if 13 you could kindly spell your name for us, please. 14 MS. IALACCI: First name Tabatha, 15 T-A-B-A-T-H-A, last name, I-A-L-A-C-C-I. 16 HEARING EXAMINER SOKONI: Thank you very 17 much. 18 And did you catch the HOA? 19 THE REPORTER: Yes. 20 HEARING EXAMINER SOKONI: Thank you. 21 And I'll go back to the first person who 22 spoke on the Zoom. Sir, if you could kindly spell 23 your name out for us, please. 24 MR. FEATHER: Sure. I go by Steve, so 25 it's S-T-E-V-E, and last name is Feather,

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4 (86 to 89)

<p>86</p> <p>1 F-E-A-T-H-E-R.</p> <p>2 HEARING EXAMINER SOKONI: Thank you very</p> <p>3 much.</p> <p>4 MS. GONZALEZ: Hello. My name is Susana</p> <p>5 Gonzalez, S-U-S-A-N-A, last name G-O-N-Z-A-L-E-Z.</p> <p>6 I'm owner of property 23520 Overlook Drive --</p> <p>7 sorry -- Overlook Park Drive, Unit L, and I am in</p> <p>8 favor of the study of the Town Center.</p> <p>9 HEARING EXAMINER SOKONI: Thank you very</p> <p>10 much.</p> <p>11 I think as far as I can tell that's all</p> <p>12 the Zoom participants we have, if we exclude the</p> <p>13 Zoom operator.</p> <p>14 THE TECHNICIAN: We have 11 participants.</p> <p>15 HEARING EXAMINER SOKONI: You do? Okay.</p> <p>16 I was going by what I would see.</p> <p>17 Do we have anyone else on the Zoom who</p> <p>18 wishes to participate? Kindly turn on your</p> <p>19 camera, identify yourself and spell out your name</p> <p>20 for us, please.</p> <p>21 MR. ROJAS: Hello. My name is Gaustavo</p> <p>22 Rojas, G-A-U-S-T-A-V-O, Gaustavo, Rojas,</p> <p>23 R-O-J-A-S, husband of Susana Gonzalez. It's the</p> <p>24 same address. I am also in support of the</p> <p>25 construction of the Town Center, all the</p>	<p>88</p> <p>1 Weber, and I'm just observing at the present time.</p> <p>2 HEARING EXAMINER SOKONI: Thank you.</p> <p>3 Spelling of your name, sir?</p> <p>4 MR. LONGFELLOW: L-O-N-G-F-E-L-L-O-W.</p> <p>5 HEARING EXAMINER SOKONI: Thank you very</p> <p>6 much.</p> <p>7 MR. LONGFELLOW: Thank you.</p> <p>8 HEARING EXAMINER SOKONI: Next on Zoom?</p> <p>9 MR. BENNETT: This is Keith Bennett with</p> <p>10 Gutschick, Little and Weber. Keith Bennett,</p> <p>11 that's K-E-I-T-H, last name B-E-N-N-E-T-T.</p> <p>12 HEARING EXAMINER SOKONI: Thank you.</p> <p>13 All right. We'll move this along. I have</p> <p>14 identified the parties. This proceeding is a</p> <p>15 hybrid proceeding, which means we have people on</p> <p>16 Zoom. While you're not speaking, you can turn off</p> <p>17 your camera and please be on mute. But when it's</p> <p>18 time to speak, you'll have to turn your camera on</p> <p>19 and unmute yourself.</p> <p>20 I would ask that people kindly not</p> <p>21 interrupt when someone else is speaking, unless</p> <p>22 it's an objection, unless it's you're raising an</p> <p>23 objection for the record on something that someone</p> <p>24 else is saying. The reason for this is we do have</p> <p>25 a verbatim transcription going on. We have a</p>
<p>87</p> <p>1 facilities you have been listed.</p> <p>2 HEARING EXAMINER SOKONI: Thank you.</p> <p>3 Next person, someone else on Zoom. Last</p> <p>4 call for anyone. People are welcome to simply</p> <p>5 observe incognito. That's fine, but I just want</p> <p>6 to make sure that anyone who wishes to be on the</p> <p>7 record as, you know, participating can identify</p> <p>8 themselves.</p> <p>9 MR. HERSON: Hi. I'm simply observing,</p> <p>10 but I did send a letter in, which is, I guess, a</p> <p>11 part of your script. So for this purpose I am</p> <p>12 observing, though.</p> <p>13 HEARING EXAMINER SOKONI: Okay. So we can</p> <p>14 track attendance at the hearing, could you please</p> <p>15 spell out your name for us, please?</p> <p>16 MR. HERSON: Yeah. So it's Michael,</p> <p>17 M-I-C-H-A-E-L, last name's Herson, H-E-R-S-O-N.</p> <p>18 HEARING EXAMINER SOKONI: Thank you very</p> <p>19 much.</p> <p>20 MR. HERSON: You're welcome.</p> <p>21 HEARING EXAMINER SOKONI: Next on Zoom,</p> <p>22 whether you're speaking or not, just so we can</p> <p>23 track attendance.</p> <p>24 MR. LONGFELLOW: Good morning. This is</p> <p>25 Tim Longfellow. I'm with Gutschick, Little and</p>	<p>89</p> <p>1 court reporter present, and whenever we have</p> <p>2 crosstalk it's very difficult to track the</p> <p>3 proceedings in the transcript.</p> <p>4 I also would like to alert people on Zoom.</p> <p>5 You may see a notice that the session is being</p> <p>6 recorded. That may appear at the top of your</p> <p>7 screen. However, please be aware that the only</p> <p>8 official record of this proceeding is the court</p> <p>9 reporter's transcription. Any recording notices</p> <p>10 you see are simply for the assistant to aid the</p> <p>11 transcription.</p> <p>12 THE TECHNICIAN: There's no recording.</p> <p>13 HEARING EXAMINER SOKONI: There is no</p> <p>14 recording. Sorry. I have the wrong script. That</p> <p>15 might be for Teams.</p> <p>16 THE TECHNICIAN: His is the only official</p> <p>17 recording.</p> <p>18 HEARING EXAMINER SOKONI: Okay. And the</p> <p>19 chat function is also disabled. So if anyone on</p> <p>20 Zoom has something to speak, you have to raise</p> <p>21 your hand or just unmute yourself and speak.</p> <p>22 Unfortunately, I can not see all the</p> <p>23 participants, so I'm hoping you can help me track.</p> <p>24 If there's a hand raised, please let me know.</p> <p>25 THE TECHNICIAN: Yes.</p>

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5 (90 to 93)

<p style="text-align: right;">90</p> <p>1 HEARING EXAMINER SOKONI: All right. This 2 is an administrative proceeding. The nature of 3 the proceedings are -- contrasted to, say, a court 4 trial, we are somewhat informal, but we are 5 governed by rules of procedure. We have OZAH 6 rules. But, you know, we're a little bit more 7 informal than, say, a court proceeding. 8 However, I want to highlight the fact that 9 anyone who speaks, your testimony will be under 10 oath. I will administer an oath. You may be 11 asked questions about your testimony. That's 12 cross-examination. And the proceedings -- now 13 I'll get to the order of the actual proceeding. 14 As a preliminary matter, I would like to 15 mention that we're starting today off with 16 argument on motions. We had motion papers 17 exchanged. Ms. Powell submitted a motion. 18 Mr. Harris had a reply. We'll start out with 19 presentation. So for purposes of the motion, the 20 person making the motion goes first, which is 21 Ms. Powell. Mr. Harris will have an opportunity 22 to respond. And you may have a rebuttal at the 23 end. I have your motion papers, so I'm hoping 24 that that can be a concise argument. I want to 25 mention -- I may have said this at the last</p>	<p style="text-align: right;">92</p> <p>1 Department of Permitting Services or any County 2 department? I hear none. 3 Before we get into the proceeding itself, 4 can we -- before we get into the motion argument, 5 I would like us to dispose of the issue of 6 exhibits. Online there is an exhibit list, and I 7 put copies of the -- hard copies at the counsel 8 table. If any member of the public would like a 9 copy of the exhibit list, there are copies at the 10 back. And I'm hoping everyone has had -- we have 11 a lot of exhibits. So if you believe you 12 presented anything that is not listed, please 13 bring it to my attention. 14 I'll start with the Applicant's counsel. 15 Are you moving to have all these exhibits in the 16 record? Any issues? Any problems with the 17 exhibits as they are presented on this list? 18 MR. HARRIS: No, ma'am. No, ma'am. We 19 support all the exhibits that we have submitted so 20 far. There is one additional exhibit that you 21 asked us to prepare when we had our discussion on 22 Tuesday. At that time Ms. Powell questioned the 23 form of the affidavit because it did not identify 24 how Ms. Kubit -- what her authority was to do 25 that. So you asked us to prepare another one that</p>
<p style="text-align: right;">91</p> <p>1 hearing. I will reserve my ruling on the motions. 2 I want us to go through the whole proceeding. At 3 the end when it's time for me to render my report 4 and decision, I will handle the motions at that 5 time. 6 Once we are -- once we dispose of the 7 motion argument, I want to just address what the 8 order of the proceedings will be with regard to 9 the application itself. There's an option for 10 opening statements by both parties. And when I 11 say both parties, the Applicant first and then 12 anyone in opposition. The Applicant goes first, 13 and what they're presenting is their case in 14 chief, and they have the burden of showing that 15 the Applicant is eligible for the, I'll say, 16 relief sought, that they are eligible for the 17 application that they are presenting. Anyone 18 opposing will proceed with their case in chief. 19 So the opposition also has a case in chief. And 20 after completion of the Applicant's case is an 21 opportunity for cross-examination. So for each 22 witness that the Applicant has there's an option, 23 there's an opportunity for cross-examination. 24 I would like to check in. Do we have 25 anyone from a County department present,</p>	<p style="text-align: right;">93</p> <p>1 does that. I'll note as an aside that the form 2 that was submitted is the form that's called for 3 in the application. The fact that it didn't have 4 that is not -- that's, you know, standard 5 procedure. But, nonetheless, because Ms. Powell 6 asked for it, we've prepared another one. 7 HEARING EXAMINER SOKONI: Thank you. And 8 I believe you're referring to Exhibit 7 is the 9 form you already had on record? 10 MR. HARRIS: Yes. Yes, Exhibit 7. And I 11 think you pre-identified that this exhibit would 12 be Exhibit 7B. 13 HEARING EXAMINER SOKONI: Correct. And 14 just for the record, the conversation that 15 Mr. Harris is referring to was not a conversation 16 between Mr. Harris and I privately. This was a 17 conversation in conference with counsel for both 18 parties on February 18, the afternoon of February 19 18. I had invited the attorneys for the parties 20 to attend a conference to discuss a subpoena 21 request, which we have since disposed of. 22 Any objections to inclusion of Exhibit 7B, 23 which is a document that supplements Exhibit 7? 24 Hearing none, Exhibit 7B is added to the record. 25 And this is actually a document that Ms. Kubit had</p>

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6 (94 to 97)

<p>94</p> <p>1 e-mailed to me, so we now have officially entered 2 this into the record. 3 HEARING EXAMINER SOKONI: Any other issues 4 around exhibits? Does anyone have any hard copies 5 of something you might have submitted 6 electronically that you would like to give me a 7 hard copy of? 8 MS. POWELL: Not at this time. 9 HEARING EXAMINER SOKONI: All right. I'll 10 turn it over to Mr. Harris to get started with -- 11 sorry. I'll turn it over to Ms. Powell because we 12 are starting with the motion. 13 MS. PRESLEY: I'm sorry. I just had one 14 quick question on procedure. Am I permitted to 15 make a statement as pertains to the motions? You 16 had mentioned that following the motion discussion 17 that the Applicant would present, and then we 18 would have cross and then anyone else could make 19 statements. My statement is directly -- at least 20 initially is directly related to the motions. 21 HEARING EXAMINER SOKONI: Why don't I -- I 22 think what I'll do is I'll start with Ms. Powell, 23 present your motion. Are you supporting the 24 motion or opposing it? 25 MS. PRESLEY: I'm supporting the motion.</p>	<p>96</p> <p>1 no longer valid or binding. Neither of these is 2 accurate. 3 Originally, Newland, the developer back at 4 the time when Ms. Presley bought her residence, it 5 had constructed 725 homes out of the planned 6 development. And during this process numerous 7 violations came to light regarding the 8 construction, the process, the heights, the 9 setbacks and the list goes on. 10 The Planning Board held a hearing 11 originally on this, and it found that there were 12 no violations. Well, it then went the other way 13 and had another hearing to determine whether a 14 plan of compliance should be adopted, or whether 15 fines should be imposed. 16 At this point the County Council stepped 17 in and directed the Board to take action because 18 of serious violations that had occurred and that 19 the enforcement of Montgomery County's ordinances 20 was woefully lacking in the context of this 21 particular development. 22 After more hearings and a determination 23 that over \$1 million in fines should be assessed, 24 the parties went to mediation at the urging of the 25 County. The County Council acknowledged the</p>
<p>95</p> <p>1 HEARING EXAMINER SOKONI: Okay. So why 2 don't we start, Ms. Powell, you present your 3 motion. 4 Ms. Presley, you can -- if there's no 5 objection, you can speak briefly about the motion. 6 Have you submitted anything in writing with regard 7 to the motion? 8 MS. PRESLEY: What I submitted in 9 testimony that was on the record originally 10 involves the same thing I would say, but 11 specifically now in support of the motion. 12 HEARING EXAMINER SOKONI: All right. We 13 do have a long day ahead. I'm trying to keep -- 14 I'm going to try to keep things moving 15 efficiently. So yes, you may speak. If it's in 16 support of the motion, why don't we have 17 Ms. Powell start; Ms. Presley, you speak; and then 18 Mr. Harris will respond to the motion. 19 MS. POWELL: Thank you, Madam Examiner. I 20 am cognizant of what you've said about reading the 21 motions and your familiarity with the exhibits. I 22 do think, however, that a brief chronological 23 outline is important to review because of repeated 24 statements by the Applicant that the compliance 25 plan is of no moment, and that it is essentially</p>	<p>97</p> <p>1 settlement agreement and set forth the general 2 requirements of the design. I've cited Exhibit D 3 in my motion -- or Exhibit B -- excuse me -- but 4 it should actually refer to Exhibit D. I flipped 5 them, and I apologize for that. So but if you 6 look at Exhibit D, the Council states that the 7 mediation resulted in a settlement agreement that 8 set forth -- 9 HEARING EXAMINER SOKONI: Ms. Powell, I 10 just would like to call up the exhibit that you're 11 referring to. 12 MS. POWELL: Sure. If we look at Exhibit 13 D. 14 THE TECHNICIAN: There's multiple Exhibit 15 Ds. 16 MS. POWELL: Okay. That would be -- where 17 am I? If you just bear with me a second, I can 18 tell you. It was Exhibit D to my motion, so it's 19 going to be at the end. I beg your pardon. Now 20 I've lost my list of exhibits. Okay. Here I go. 21 HEARING EXAMINER SOKONI: Exhibit 61? 22 MS. POWELL: Exhibit -- 23 HEARING EXAMINER SOKONI: I believe your 24 motion papers -- 25 MS. POWELL: 61. Yeah, so it'd be 61</p>

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7 (98 to 101)

98	<p>1 little B, subpart I, and that subpart I contains</p> <p>2 Exhibits A through I. So I am now talking about</p> <p>3 Exhibit D to the motion.</p> <p>4 HEARING EXAMINER SOKONI: So we're looking</p> <p>5 at OZAH Exhibit 61b, and it has --</p> <p>6 MS. POWELL: D as in dog. Okay. Yep.</p> <p>7 And so if you look at subparagraph four on</p> <p>8 Exhibit D, the Council acknowledges that the</p> <p>9 mediation resulted in a settlement agreement that</p> <p>10 set forth the terms of a detailed proposed plan of</p> <p>11 compliance for consideration by the Board, and it</p> <p>12 goes on to identify the improvements that were</p> <p>13 expected to be included in the plan of compliance.</p> <p>14 Among them were an indoor lap pool. There were</p> <p>15 some other improvements.</p> <p>16 So after that, the Board -- the plan of</p> <p>17 compliance was then adopted by the Planning Board</p> <p>18 pursuant to your County Code 59-D3.6. And these</p> <p>19 terms were material, and it's important to</p> <p>20 remember that because these terms of the plan of</p> <p>21 compliance, which required substantial</p> <p>22 improvements not in the residential area that was</p> <p>23 in the process of being built, but also within the</p> <p>24 Town Center, and that's what we're talking about</p> <p>25 today. And the goal of the plan of compliance was</p>	100	<p>1 community, which the Staff had found to be in</p> <p>2 excess of \$14 million, and that's at the Staff</p> <p>3 Report page 14. Nowhere in this resolution or the</p> <p>4 Staff Report indicate that this is a cafeteria</p> <p>5 plan where a developer gets to pick and choose</p> <p>6 what terms it wants to comply with. Great</p> <p>7 emphasis was placed upon the Town Center</p> <p>8 improvements that were required as a result of the</p> <p>9 plan of compliance. And the plan in the Staff</p> <p>10 Report provides that instead of extensive surface</p> <p>11 parking, as proposed in the plan that had been</p> <p>12 submitted previously to the Department of Parks</p> <p>13 and Planning, the new mixed-use core includes two</p> <p>14 parking garages lined by three-story retail spaces</p> <p>15 and residences to maintain a pedestrian scale and</p> <p>16 orientation. The plan explicitly sets forth the</p> <p>17 amenities that would be required, and the</p> <p>18 compliance plan requires strict compliance with</p> <p>19 its terms and it also applies to future review</p> <p>20 processes.</p> <p>21 So if you look at then the -- and this,</p> <p>22 Mr. Harris and I don't see eye to eye on this,</p> <p>23 among other things, but the plan says that it's</p> <p>24 subject only to unforeseen project conditions,</p> <p>25 applicable law and regulations, express terms of</p>
99	<p>1 to maintain a pedestrian-friendly and essentially</p> <p>2 a walkable community, and it articulated certain</p> <p>3 things that had to be done. And those terms were</p> <p>4 material in consideration for the waiver of what</p> <p>5 at that time would have been more than \$3 million</p> <p>6 in fines.</p> <p>7 And I'm quoting here the terms and</p> <p>8 conditions. Okay. Now I'm at the resolution, so</p> <p>9 if we go to subpart Exhibit E to my motion, it</p> <p>10 says, The terms and conditions of the compliance</p> <p>11 program approved by this resolution are intended</p> <p>12 by the Board as remedial measures that shall be</p> <p>13 legally required in order to address certain</p> <p>14 violations, paren, such violations both found or</p> <p>15 known to be alleged as of the effective date of</p> <p>16 this resolution.</p> <p>17 Then, if you look at -- and I believe it</p> <p>18 is Exhibit C, the Staff Report, which was</p> <p>19 incorporated explicitly in the resolution adopted</p> <p>20 by the Board, it, quote, recognized the importance</p> <p>21 that the mediation group placed in the plan of</p> <p>22 compliance.</p> <p>23 The County, on behalf of its citizens,</p> <p>24 gave away the right to millions of dollars in</p> <p>25 fines in exchange for improvements to the</p>	101	<p>1 the resolution and the compliance program. Now,</p> <p>2 the Board, in my reading of this resolution,</p> <p>3 permits deviation according to the merits</p> <p>4 presented of an application at that time from the</p> <p>5 plan, but it does not permit deviation from the</p> <p>6 express terms of the resolution and the compliance</p> <p>7 program, so the terms that are legally required,</p> <p>8 for example, so ADA requirements which change over</p> <p>9 time in terms of sidewalk width and things like</p> <p>10 that. You have to comply with the law as it's</p> <p>11 written at the time. But the terms of this</p> <p>12 agreement and the requirement that it maintain its</p> <p>13 pedestrian-friendly scale and orientation continue</p> <p>14 to apply to this Town Center, and, frankly, the</p> <p>15 improvements that should have been built by the</p> <p>16 developer.</p> <p>17 Now, a lot of the Town Center or areas of</p> <p>18 the Town Center have not yet been constructed, and</p> <p>19 it was known that this would -- at the time that</p> <p>20 Elm Street purchased it that this was a long</p> <p>21 horizon.</p> <p>22 So the proffers set forth in the</p> <p>23 resolution were knowing and involuntary, and the</p> <p>24 Applicant, by the terms of the agreement, is</p> <p>25 estopped from challenging any of the terms. And</p>

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8 (102 to 105)

<p>102</p> <p>1 it says repeatedly in the Staff Report and the 2 resolution that the Town Center has to be 3 configured in a pedestrian-friendly manner. If 4 you look at the application for the conditional 5 use of the gas station, which, by the way, does 6 not include EV charging stations, there's no 7 attempt to argue that the instant parking lot with 8 the gasoline station plopped in the middle of it 9 with a 1,275 square foot, quote, unquote, open 10 space with no pedestrian access surrounded by 11 parking in any way meets the express terms of the 12 compliance program to maintain a pedestrian scale 13 and orientation. 14 And as this application has evolved over 15 time, it's become clear that the gasoline station 16 is not intended just to capture people that go to 17 the shop, to the grocery store. They've expanded 18 the hours. And the Planning Board, apparently, at 19 the hearing said, Well, okay, you can open at four 20 a.m., and that was done to capture commuters, and 21 this will increase traffic within the Town Center, 22 and it will have an adverse impact on the design 23 of the Center. 24 And if you look at OZAH Exhibit 20, which 25 is in the record, and the site plan that was</p>	<p>104</p> <p>1 amenities and facilities for CTC, which was the 2 group of homeowners who had bought into this 3 project, and Montgomery County as a whole. 4 Then we move forward to -- I mean, and 5 there were some other things going on in the 6 meantime. But moving forward to OZAH Exhibit 21, 7 which is after Third Try purchased the property, 8 it sets forth the 2015 amendments, and affirms the 9 plan of compliance and also sets forth Third Try's 10 obligations to, quote, complete the unbuilt 11 portions of the community subject to the 12 amendments of the plan. 13 Now, putting aside what that plan 14 approved, the project was evaluated by the Board 15 in the context of the compliance plan and its 16 purposes. And so what I'm suggesting to you is 17 that when you evaluate this application, it has to 18 be evaluated not solely in the context of your 19 conditional use requirements and your general 20 requirements in Article 59, but it also has to 21 comply with the plan of compliance. And the 24 22 resolution that's before us now still refers to 23 the plan of compliance -- excuse me -- previously, 24 but there is repeated emphasis throughout that 25 resolution to the, quote, prior Applicant, quote.</p>
<p>103</p> <p>1 adopted in 2008, it again affirms the mixed-use 2 nature of the project and the desire to promote a 3 pedestrian-friendly environment. It's to reduce 4 the number of parking spaces, and one would assume 5 reduce the amount of asphalt. And it harkens back 6 to the parking structure that was to have been 7 required, and notes that this parking structure 8 itself further enhances the pedestrian realm. It 9 refers to the importance of pedestrian 10 circulation. This is at pages 35 and 38 of OZAH 11 Exhibit 20. 12 Would you like me to slow down so the 13 exhibits can be pulled up, or would you just like 14 a page reference? 15 HEARING EXAMINER SOKONI: A page reference 16 is fine. I mean, once an -- if an OZAH exhibit is 17 mentioned, it's helpful if you could pull it up, 18 but a page reference is fine. 19 MS. POWELL: And with respect to this 2008 20 site plan, the Board explicitly referred to the 21 plan of compliance, and they reviewed the plan to 22 determine if it met the requirements. 23 And referring back to the resolution, the 24 Board decided to make the tradeoff, because it 25 provides substantial enhancements to community</p>	<p>105</p> <p>1 And I don't know what's going on here. I'm not 2 sure why Staff felt it important to say so, but 3 evidently this is to somehow distance Elm Street 4 or Third Try's obligations of conformity to the 5 plan. And to the extent that it does so, it's 6 illegal and an unenforceable act. I suggest also 7 to you that the deviation from the requirements of 8 the 25-meter indoor lap pool, the location of the 9 fountain so that it's part of the community, the 10 integrated retail and walkable space all remain 11 required. And to the extent that these prior 12 plans have deviated from them, they are illegal 13 acts and they are outside the authority of the 14 Board to do so. 15 So, as I said, the Applicant hasn't 16 offered anything to show that this inclusion of a 17 gas station fosters a pedestrian-friendly 18 neighborhood. And certainly, you know, the green 19 area that I've just spoken about that you can't 20 get to safely if you're walking doesn't promote 21 the pedestrian nature of the neighborhood anyway. 22 So even if you adopt Mr. Harris's interpretation 23 of the provisions regarding express compliance and 24 the limitations on the deviations, which we surely 25 do not, you still have to meet these criteria. So</p>

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9 (106 to 109)

<p>106</p> <p>1 because the intent at the time -- because during 2 the mediation they were not able to nail down all 3 these plans because they didn't have time and it 4 cost close to \$200,000, and the County paid for a 5 third of the expenses, I mean, it cared about what 6 was going on and it knew what it was giving up in 7 exchange for these benefits. So the suggestion 8 that there's no need to address the compliance 9 program is simply unsupportable. The compliance 10 program is a legal agreement, and it runs with and 11 is binding on the land.</p> <p>12 Prior incorrect interpretations of the 13 resolution do not mean that the resolution itself 14 is no longer enforceable, even though Elm Street 15 or Third Try or CTC Retail wishes that it were. 16 And in their memorandum in opposition, Mr. Harris 17 has offered no rebuttal to the well-settled law 18 that a municipality can not waive or give up legal 19 requirements. To do so would eliminate the 20 benefits that were imposed pursuant to the plan 21 and the requirements that it be pedestrian 22 friendly.</p> <p>23 Moreover, Elm Street or CTC Retail, 24 standing in the shoes of Newland, can not argue 25 that it doesn't apply. It expressly is a estopped</p>	<p>108</p> <p>1 acquisition isn't just subject to the -- excuse 2 me. Let me make sure I've got this. It's H. I 3 should always look at my exhibits before I cite 4 them. Exhibit H. And if you look at page two of 5 Exhibit H, this property, which was acquired by 6 the developer for \$1, which includes residential 7 areas as well as the Town Center areas, the 8 commercial areas specifically states that this is 9 subject to all easements, encroachments, rights of 10 way. Okay. That's all normal. That's all 11 typically included in a deed, but it goes on and 12 it says site plans, development plans and 13 agreements, subdivision plats and other matters of 14 every kind and nature which are of public record 15 or are discernible from a visual inspection of the 16 property. This is binding. The resolution is 17 binding. And if the developer had said to 18 Montgomery County back in the day, well, you know, 19 I don't have to comply with these terms if I 20 change my mind, this would never have flown. This 21 would never have passed. We would have been back 22 at the hearings, back with the money, back with 23 the fines and back with the enforcement of the 24 plans as they existed. And at this point it's a 25 complete betrayal of the public trust by</p>
<p>107</p> <p>1 from challenging the requirements. And this is in 2 the resolution. And there is nothing in the 3 resolution that says that this provision could 4 just go away because we feel like it. I mean, 5 Montgomery County relied on these representations 6 and gave up over \$3 million or what could possibly 7 have been more in fines. You don't get to just 8 say, well, because we got a bunch of new residents 9 now that know nothing about the history or what 10 happened that it's okay to ignore this 11 requirement, because it's not.</p> <p>12 The analogy that Elm Street offers to the 13 master plans in its memorandum comparing it to -- 14 excuse me -- the master plans that are adopted by 15 the County Council, you know, in terms of the 16 forward-looking zoning and, you know, the 10-year, 17 20-year projections doesn't work here because that 18 is a completely different animal. This is the 19 enforcement of an agreement between the County and 20 whomever was going to develop this property. It 21 is a specific contractual obligation running with 22 the land.</p> <p>23 And if you look at Exhibit D -- I believe 24 it's 61 -- that deed contains some unusual 25 language in the subject-to clause where the</p>	<p>109</p> <p>1 Montgomery County to allow the developer to just 2 walk away from these requirements. I mean, Elm 3 Street or Third Try knew what it was doing and 4 accepted the encumbrances and the agreements that 5 bound this property when it bought it for \$1, and 6 at the time it apparently still made the 7 determination that it could make money on this 8 project because it proceeded with the development.</p> <p>9 There's some other things that are 10 interesting. In its memorandum or its opposition, 11 CTC suggests that, you know, at the hearing before 12 the Board there was really no need to address the 13 compliance program because nobody was there. And 14 that's not the standard. The County isn't excused 15 from doing its job just because no one was present 16 at that hearing to call them out. It doesn't 17 work.</p> <p>18 And there's another reference to the 19 appearance of a gas station on a plan. Well, a 20 gas station appearing on a plan or a drawing isn't 21 an endorsement of anything. And I believe that it 22 was made clear at the hearing when -- a prior 23 hearing when they went forward with the grocery 24 store site plan application that the gas station 25 conditional use was not and could not be before</p>

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10 (110 to 113)

110	<p>1 the Board at that time. It wasn't included. So</p> <p>2 whether there's a gas station or not has nothing</p> <p>3 to do with anything, and it's -- as I said, it's</p> <p>4 just simply not an endorsement.</p> <p>5 So the benefits and the burdens on this</p> <p>6 property apply to Elm Street, and we ask that, you</p> <p>7 know, you review this conditional use application</p> <p>8 not only within the scope of the law pertaining to</p> <p>9 conditional uses, but also in accordance with the</p> <p>10 compliance plan.</p> <p>11 Mr. Harris says that, well, no gas station</p> <p>12 is prohibited because it wasn't included before.</p> <p>13 But if you look at the concept plan, which I</p> <p>14 believe is OZAH 44, that they did have at the</p> <p>15 time -- here we go. It has the design concepts.</p> <p>16 It has all these great pedestrian-friendly</p> <p>17 walkways and avenues, and at no time is there</p> <p>18 anything anywhere talking about a gas station.</p> <p>19 And if one had to go through and identify</p> <p>20 everything that has to be prohibited, that list</p> <p>21 would have been ridiculously long. What was</p> <p>22 required was what was stated in the resolution,</p> <p>23 and the emphasis was on the pedestrian scale and</p> <p>24 pedestrian-friendly aspects of the neighborhood,</p> <p>25 which were to be met by the construction of these</p>	112	<p>1 Center Advisory Committee. We went and we took</p> <p>2 site plans. We took aerial photographs. We went</p> <p>3 from street to street and measured to see whether</p> <p>4 they had complied with the already-approved site</p> <p>5 plans. What has now been minimized to state that</p> <p>6 there were violations such as setbacks and</p> <p>7 heights, that was not the extent of it. There</p> <p>8 were more than 18 sets of types of violations that</p> <p>9 had still not yet been heard when the County urged</p> <p>10 us to go into mediation. When we brought forth</p> <p>11 these types of violations that included streets</p> <p>12 too narrow to be served by emergency vehicles,</p> <p>13 there were alleyways that had trapped people in.</p> <p>14 They had to later go and retrofit Grasscrete and</p> <p>15 all types of things to support an emergency</p> <p>16 vehicle or a fire and rescue vehicle getting to</p> <p>17 those areas. There were violations of types of</p> <p>18 housing where a site plan had approved for</p> <p>19 townhomes, and there on the promontory instead was</p> <p>20 a five-story building when the stories were</p> <p>21 supposed to be limited to three. There were so</p> <p>22 many things like that that we first presented to</p> <p>23 the Planning Board, and they said, I'm sorry. Go</p> <p>24 home, kids. This is all fine. It took us</p> <p>25 actually locating a forged copy of changes made by</p>
111	<p>1 particular improvements and it's not happening</p> <p>2 here. We don't need to compound the error.</p> <p>3 Thank you.</p> <p>4 MS. PRESLEY: I don't know if I need to</p> <p>5 state my name for the record again, but Amy</p> <p>6 Presley. I have been a resident of the Town</p> <p>7 Center since 2002 when it initially opened. At</p> <p>8 that time -- it was Terrabrooke prior to</p> <p>9 Newland -- what was being presented to the</p> <p>10 community was a plan and a scale model of a</p> <p>11 walkable Town Center, town-square type. In</p> <p>12 fulfillment of the master plan at the time, it</p> <p>13 showed an integration with the Historic District.</p> <p>14 It showed facilities that were designed as a</p> <p>15 town-square scale.</p> <p>16 After a few years in that residence, at a</p> <p>17 meeting held by the developer at that time, which</p> <p>18 was then Newland, Newland stated, I'm sorry, we</p> <p>19 can't provide this type of shopping center. The</p> <p>20 market isn't there for it. I challenged it. You</p> <p>21 can't say the market's not there because this is</p> <p>22 what you sold us. They said, You don't know what</p> <p>23 you're talking about.</p> <p>24 So a couple ladies and I -- I was in</p> <p>25 charge of something called the Clarksburg Town</p>	113	<p>1 the Planning Staff at the time who then resigned</p> <p>2 (indiscernible). It's all in the history. It was</p> <p>3 in the newspapers, front page top of the fold for</p> <p>4 years with the Washington Post and The Gazette,</p> <p>5 because of the severity of the violations. Many,</p> <p>6 many, many of the homes never even had a use and</p> <p>7 occupancy permit.</p> <p>8 So when you look at that scope of</p> <p>9 violation, the outrage by people then who lived</p> <p>10 there -- many of them have moved on -- all we were</p> <p>11 trying to do was hold a developer accountable for</p> <p>12 what they had promised and what people bought</p> <p>13 into. It led to these violations, which, in turn,</p> <p>14 because of the problems caused the County Council</p> <p>15 to issue a moratorium on all building. It was I</p> <p>16 don't even remember how many months, five, six</p> <p>17 months -- I had a good friend who worked in</p> <p>18 development told me, You really hurt us because of</p> <p>19 this -- County closed things down, had the OLO,</p> <p>20 the Office of Legislative Oversight, review the</p> <p>21 problems with site plan approval with the Planning</p> <p>22 Board with what was going on at the time and then</p> <p>23 they -- we got contacted. I got contacted by the</p> <p>24 Council president saying, Will you please go into</p> <p>25 mediation as a resident? Me, I'm gonna take on</p>

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11 (114 to 117)

114	<p>1 the responsibility of the County? But we did. A</p> <p>2 group of individuals, we went. We spent the</p> <p>3 better part of two years doing this, so I know</p> <p>4 firsthand what was done in exchange for what.</p> <p>5 There's a settlement agreement, which I</p> <p>6 have checked with Judge Barbara Howe to see when I</p> <p>7 can submit that because it is confidential, but it</p> <p>8 was turned in to the program of compliance,</p> <p>9 adopted by the Board. It was very specific, as</p> <p>10 Ms. Powell has already stated. And one of the</p> <p>11 conditions, as I think Leslie intimated, was the</p> <p>12 direction to the Planning Staff in how they were</p> <p>13 to review things. I'll read from that for just</p> <p>14 one moment. And these exhibits, the Staff Reports</p> <p>15 were in my original submission for the first</p> <p>16 hearing date that we had. In essence, the Staff</p> <p>17 was instructed to report compliance or</p> <p>18 noncompliance with every detail of the compliance</p> <p>19 program when they presented to the Board, and that</p> <p>20 was done for many years.</p> <p>21 To give you an example of the importance</p> <p>22 of that compliance and noncompliance, in 2007 the</p> <p>23 developer, still Newland at the time, wanted to</p> <p>24 make changes to the mediated agreement, which was</p> <p>25 part of the compliance program now, settlement</p>	116	<p>1 Board recently, which is a Board who I said didn't</p> <p>2 even receive an appropriate report from Staff --</p> <p>3 Rose Crasnow has long since gone. And I'm sure if</p> <p>4 I were Mr. Harris I would be working with Staff to</p> <p>5 my client's benefit as well, but that doesn't</p> <p>6 change the underlying legality of the plans that</p> <p>7 are still in effect.</p> <p>8 The County owes it to the residents not to</p> <p>9 let this happen a third time. Third Try, yes, but</p> <p>10 shouldn't be third failure. If the Planning Board</p> <p>11 made errors, there's no reason to continue to make</p> <p>12 errors by failing to adhere to what was promised,</p> <p>13 what was won by a community. That was a</p> <p>14 hard-fought thing.</p> <p>15 And just to augment what Leslie said, it</p> <p>16 was not \$3 million. By the time we were going</p> <p>17 into a potential third set of hearings, the Staff</p> <p>18 had calculated in excess of \$8 million. The</p> <p>19 specific proffers that were made by Newland during</p> <p>20 the mediation and accepted in the settlement</p> <p>21 agreement, ratified in the compliance program</p> <p>22 totaled more than \$11 million.</p> <p>23 So this whole hearing is not about public</p> <p>24 opinion. It's not about whether a community who</p> <p>25 doesn't understand what has transpired in the past</p>
115	<p>1 agreement to roughly \$100,000 worth of</p> <p>2 landscaping. That's minimal. The Board</p> <p>3 understood, the Staff understood at the time --</p> <p>4 there's been several Board changes since then --</p> <p>5 that that required us to go back into mediation.</p> <p>6 They had to mediate with us to get our approval to</p> <p>7 change types of plantings.</p> <p>8 In the 2008 Staff Report when Rose Crasnow</p> <p>9 was still chief of staff, she reviews a submission</p> <p>10 by Newland after all these things and states --</p> <p>11 she reviews that it was approved by the Board.</p> <p>12 She states, As shown in the excerpts below, the</p> <p>13 plan was specific as to the elements to be</p> <p>14 provided. She states that she doesn't find that</p> <p>15 the Applicant has done so, and therefore the</p> <p>16 Staff -- I believe it's like a 62-page report.</p> <p>17 They turn that in to the Board detailing every</p> <p>18 single aspect of compliance and noncompliance.</p> <p>19 This is prior to the Applicant at a next review</p> <p>20 being relieved of a parking structure with their</p> <p>21 reasons as to why. But they state that in the</p> <p>22 terms the only things that can be changed are</p> <p>23 changes according to law or unforeseen physical</p> <p>24 conditions of the property. That's in the</p> <p>25 original Board's resolution. The fact that the</p>	117	<p>1 would like a grocery store. We have a grocery</p> <p>2 store for me less than two miles from my home,</p> <p>3 also belonging to the Applicant. That grocery</p> <p>4 store, Harris Teeter, I can get to it in three</p> <p>5 minutes. There are gas pumps right there as well.</p> <p>6 Then we have the Patels, who have their</p> <p>7 gas station, small scale, located behind their</p> <p>8 what was a home. That was part of the mediated</p> <p>9 and settled agreement. The County had to agree to</p> <p>10 move an historic home to make room for the</p> <p>11 connection of the main street, Clarksburg Square</p> <p>12 Road, right adjacent to the Patels' property.</p> <p>13 They redeveloped in good faith based on the</p> <p>14 compliance program. They have a small gas</p> <p>15 station, and yet still behind their little space</p> <p>16 it's still pedestrian friendly. They have an ice</p> <p>17 cream shop. They redid their shops based on a</p> <p>18 compliance program.</p> <p>19 And now for those residents who are</p> <p>20 listening and who have been waiting four years,</p> <p>21 I'm sorry for that. It's not like we live in</p> <p>22 Calcutta. We do have grocery stores very close to</p> <p>23 us. We have many gas stations less than two miles</p> <p>24 away. I frequent the Patels' because they're a</p> <p>25 local business. That was also one of the</p>

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12 (118 to 121)

<p>118</p> <p>1 objectives of the Clarksburg Master Plan was to 2 support local businesses, to revitalize the 3 Historic District. In fact, there was to be a 4 buffer between the Historic District and the new 5 development to maintain the same scale and 6 pedestrian orientation. 7 None of this has been done with this 8 application. This Applicant has continued to try 9 to erode elements that are critical. Had I had 10 the money and resources -- I've already paid once 11 to mediate and arbitrate this. The County paid a 12 third. We paid the rest for our share. I'm not 13 in a position taking care of an ailing mother and 14 having the money to get an attorney and go to a 15 circuit court and try to enforce the agreement. 16 If I were in that position, I would have done that 17 in 2024 when I saw clearly that the Staff was no 18 longer paying attention to the requirements to 19 them. And at the time the Board had been through 20 two egregious changes with horrible things going 21 on at a Board level, which unfortunately caused 22 the restructuring of the Board. I even served 23 myself as an interim to help with that. So what 24 we have here is a lot more serious than simply 25 deciding if a gas station could help a grocery</p>	<p>120</p> <p>1 So it is a matter to be taken very 2 seriously. And I apologize that people in the 3 community have only been told if you don't get a 4 gas station, you won't get a grocery store. It's 5 sad that that's the case, but that still doesn't 6 relieve -- no matter how many people want that, it 7 does not relieve the Applicant of the 8 responsibility to do what they're obligated to do. 9 And one thing I would like to enter for 10 the record because I don't think we've had it 11 before, I have printed out the recordings where 12 Mr. Flanagan testified live that he bought it for 13 a dollar because he, quote -- bought it for a 14 dollar because it was so encumbered. He can be 15 heard stating in that interview that he told the 16 developer at the time it had no value, and then he 17 confirms that he understands there's a mediated 18 agreement and he had to do those things. I would 19 like this entered into the record, please, and I 20 rest. 21 HEARING EXAMINER SOKONI: Before we enter 22 that into the record, are there any objections to 23 that document being entered into the record? 24 MS. PRESLEY: We can validate it, if you 25 want, in between.</p>
<p>119</p> <p>1 store to come here. We have grocery stores. 2 I understand, Ms. Hearing Examiner, you 3 have the findings that you must make, but I can 4 state emphatically it's not possible to make a 5 finding that this complies with the compliance 6 program, and I dare say it's not possible to find 7 that it even complies with the master plan. But 8 the Staff in its report to the Board, the Staff 9 whom I asked to notify me should this conditional 10 use come to them -- I was never notified, by the 11 way. That's not a matter for this hearing. But 12 had I been, I would have had at least something on 13 the record then asking the Staff themselves why 14 you didn't compare this to the compliance program, 15 and to state for a Board that was an ignorant 16 Board how on earth this particular use even comes 17 close to meeting the master plan provisions. 18 So today I'll reiterate, in conclusion, 19 this legal document is still legally binding. I 20 even met with the County Executive over it. And 21 if I need to, I'll have him subpoenaed. He agrees 22 with me. He was there on the Council when we were 23 directed to go off and do this thing in exchange 24 for relieving the stop-work order and stopping 25 violation hearings.</p>	<p>121</p> <p>1 MR. HARRIS: What is this document from? 2 MS. PRESLEY: Okay. Right here is the 3 website address. That's the URL. So this is my 4 commentary, which could be eliminated. 5 MR. HARRIS: This was a newspaper report? 6 MS. PRESLEY: No, this is -- it's still on 7 the web. This was an interview with Mr. Flanagan. 8 MR. HARRIS: Well, if it's on the web, it 9 must be accurate. 10 MS. PRESLEY: No. It's his words. 11 MR. HARRIS: I object. 12 MS. PRESLEY: Okay. I would object to the 13 objection because it is his voice. He introduces 14 himself. There's a picture of him in this 15 interview. If instead I could enter in an 16 electronic version, I would do that. But you 17 would recognize Mr. Flanagan. 18 MR. HARRIS: I don't know anything about 19 it. I doubt most of what I hear on the web. 20 MS. PRESLEY: Okay. Well, unfortunately, 21 this, as I said, is a live recording. This is a 22 live recording. He can be heard. And if the case 23 is necessary, then we could subpoena Mr. Flanagan 24 to see if he stated this. 25 HEARING EXAMINER SOKONI: And Mr. Flanagan</p>

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13 (122 to 125)

<p>122</p> <p>1 is with -- that's the -- is that with Third Try?</p> <p>2 MS. PRESLEY: Third Try, and now I guess</p> <p>3 they're calling themselves CTC Retail. He is</p> <p>4 directly responsible for the purchase from Newland</p> <p>5 when Newland failed on its obligations after many,</p> <p>6 many hearings and they were being threatened by</p> <p>7 the Board again with continued fines per day,</p> <p>8 should they not provide what was necessary in the</p> <p>9 Town Center. And --</p> <p>10 HEARING EXAMINER SOKONI: May I take a</p> <p>11 look at --</p> <p>12 MS. PRESLEY: Yes. This is my commentary,</p> <p>13 so that's not necessary. This is the URL, and</p> <p>14 this is the web where I drew this from.</p> <p>15 HEARING EXAMINER SOKONI: I will not admit</p> <p>16 it at this time. I would like an opportunity to</p> <p>17 review. I'll reserve.</p> <p>18 MS. PRESLEY: I appreciate that.</p> <p>19 HEARING EXAMINER SOKONI: I'll reserve</p> <p>20 ruling on this. I do have some hearsay concerns,</p> <p>21 but if -- maybe some modified -- let me reflect on</p> <p>22 this, and I'll get back to it before we close.</p> <p>23 MS. PRESLEY: I appreciate that.</p> <p>24 HEARING EXAMINER SOKONI: Yeah.</p> <p>25 Mr. Harris, your opportunity to reply to</p>	<p>124</p> <p>1 Board's interpretation and application of the plan</p> <p>2 of compliance over a 19-year period.</p> <p>3 The comments you just heard are very</p> <p>4 extensive, and I'm not going to bother to rebut</p> <p>5 most of them because I believe they're irrelevant.</p> <p>6 If you look at Exhibit 45 in the record,</p> <p>7 that is the plan of compliance. That is the</p> <p>8 controlling document, not news articles, not other</p> <p>9 peripheral things, not comments from Rose Crasnow,</p> <p>10 none of those other things. The plan of</p> <p>11 compliance, Exhibit 45, seven simple pages, if you</p> <p>12 turn to page six of that, it explains -- well,</p> <p>13 first of all, nothing in those six pages says</p> <p>14 anything that prohibits including gas pumps as an</p> <p>15 accessory to the grocery store.</p> <p>16 HEARING EXAMINER SOKONI: I just want to</p> <p>17 make sure we have the exhibit. Do we have it up?</p> <p>18 THE TECHNICIAN: 45?</p> <p>19 HEARING EXAMINER SOKONI: 45.</p> <p>20 MR. HARRIS: So Exhibit 45, the plan of</p> <p>21 compliance, says nothing that precludes gas pumps</p> <p>22 or even a full filling station there.</p> <p>23 Similarly, nothing in that plan of</p> <p>24 compliance says anything about the need for</p> <p>25 anything to be pedestrian friendly. Those words</p>
<p>123</p> <p>1 the motion.</p> <p>2 MR. HARRIS: Okay. 25 plus 15, 40</p> <p>3 minutes. I've never heard such rubbish. I'll be</p> <p>4 much briefer, and it won't be rubbish. I believe</p> <p>5 that our reply brief is very complete and very</p> <p>6 compelling, so I'm not going to regurgitate it.</p> <p>7 I will preface my comments by denying</p> <p>8 Ms. Powell's comment that I believe the plan of</p> <p>9 compliance, quote, is of no moment. I've never</p> <p>10 said that. I don't maintain that.</p> <p>11 HEARING EXAMINER SOKONI: I would just</p> <p>12 like to pause for a moment. I would urge counsel</p> <p>13 to not refer to any of the other parties'</p> <p>14 submissions as rubbish.</p> <p>15 MR. HARRIS: Okay. Irrelevant.</p> <p>16 HEARING EXAMINER SOKONI: Thank you.</p> <p>17 MR. HARRIS: Let's put it that way. But</p> <p>18 to make my point, I deny the characterization that</p> <p>19 I said the plan of compliance is of no moment.</p> <p>20 I've never said that. I don't believe that.</p> <p>21 What I do believe is that the opposition</p> <p>22 completely misreads the provisions of the plan of</p> <p>23 compliance, overlooks other provisions of the plan</p> <p>24 of compliance, and, perhaps most importantly,</p> <p>25 ignores the lengthy history of the Planning</p>	<p>125</p> <p>1 are not in there. I've read it many times. If</p> <p>2 someone finds those words in there, please inform</p> <p>3 me, but they're not in there.</p> <p>4 As I say, in addition to the four corners</p> <p>5 of that document not saying what the opposition</p> <p>6 wishes it might say, it gives the Planning Board</p> <p>7 the discretion. Specifically, the Board expressly</p> <p>8 reserves all lawful discretion to consider,</p> <p>9 approve, approve subject to conditions or</p> <p>10 disapprove any such future application and it goes</p> <p>11 on. They have shown that power over that 19-year</p> <p>12 period.</p> <p>13 In our reply brief, Exhibit -- what is our</p> <p>14 reply brief number? Excuse me. Exhibit 64,</p> <p>15 Exhibit 64 we attach Exhibit C as in cat. That is</p> <p>16 a matrix showing the various approvals that the</p> <p>17 Planning Board has adopted in the years since the</p> <p>18 plan of compliance was adopted. They're known as</p> <p>19 the B as in boy, the D as in dog amendments, and,</p> <p>20 most recently, the E amendments. Each of those</p> <p>21 was approved by the Board. Some of them are</p> <p>22 approvals that are in direct conflict with the</p> <p>23 express provisions in the plan of compliance.</p> <p>24 MS. POWELL: Excuse me. I'm sorry to</p> <p>25 interrupt you, but I do have an objection to</p>

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14 (126 to 129)

<p>126</p> <p>1 Exhibit C, and I don't know -- I want to make sure 2 it's preserved. I beg your pardon. 3 MR. HARRIS: May I finish my argument? 4 So, in any respect, that shows a number of 5 changes. The individual changes themselves that 6 are referenced there are in Exhibit 64 -- I'm 7 sorry -- in Exhibit 54 of the Hearing Examiner 8 exhibits. That's the E amendments. The B and the 9 D amendments, I think, are in there as another 10 exhibit. I'll see if I can find the number. So 11 the the summary of those exhibits that is at 12 Exhibit C, cat, to our reply brief is simply a 13 recitation of those other approvals that are 14 already in the record in order to simplify. 15 HEARING EXAMINER SOKONI: Sorry to 16 interrupt the flow of your presentation. 17 Ms. Powell, you raise an objection to 18 Mr. Harris's Exhibit C, the Exhibit C in his 19 motion papers? 20 MS. POWELL: I do. 21 HEARING EXAMINER SOKONI: What is the 22 basis for the objection? 23 MS. POWELL: It contains hearsay and 24 editorializing. It is not simply a recitation of 25 what occurred, but there are characterizations</p>	<p>128</p> <p>1 HEARING EXAMINER SOKONI: Okay. I was 2 asking whether there was any objection to any of 3 these exhibits being included in the record. So 4 are you now -- 5 MS. POWELL: Now I understand what you're 6 saying, but the objection -- even exhibits that 7 aren't admitted are still included in records, so 8 that's where my noggin was when you made that 9 statement. 10 HEARING EXAMINER SOKONI: Okay. Noted. 11 And I'll rule on that objection. Let me just get 12 to the right Exhibit C. 13 MR. HARRIS: In that respect, Madam 14 Examiner -- I did look at the other exhibits -- 15 that Exhibit C is a recitation of the formal 16 approvals that are in Exhibits 20 and 21 of the 17 Planning Board. The Planning Exhibit 20 is the 18 the amendments that the Planning Board adopted in 19 2008 shortly after the plan of compliance. 20 Exhibit 21 is the changes that they approved in 21 2015 that included elimination of the parking 22 garages, etcetera. 23 HEARING EXAMINER SOKONI: If you just 24 pause for a moment, who created this document? Is 25 that your -- is that a chronology created by</p>
<p>127</p> <p>1 that are inappropriate, and there is hearsay 2 within hearsay contained within the document, and 3 none of the communications are authenticated, and, 4 frankly, there's not even any indication of who 5 prepared Exhibit C. 6 HEARING EXAMINER SOKONI: Just give me one 7 moment so I can call it up here. So we're at 8 Exhibit -- sorry. 9 THE TECHNICIAN: Can we have the exhibit 10 number again? 11 HEARING EXAMINER SOKONI: 64. 12 THE TECHNICIAN: 64. 13 HEARING EXAMINER SOKONI: It's Exhibit 64 14 is Mr. Harris's reply brief, and within Exhibit 64 15 there's an Exhibit C, so you have to go to 64A and 16 then scroll down to C. 17 Now, Ms. Powell, I will say at the start 18 of the proceedings I asked if there were any 19 objections to any of the exhibits, and there were 20 none. 21 MS. POWELL: I did not believe that you 22 were ruling on their admissibility, because 23 they're contained in the record, but it doesn't 24 mean that they should be considered. And I'm 25 sorry that I misunderstood your point.</p>	<p>129</p> <p>1 yourself? 2 MR. HARRIS: By Ms. Kate Kubit. 3 HEARING EXAMINER SOKONI: Okay. 4 MR. HARRIS: Who has direct experience 5 with all of these approvals. 6 HEARING EXAMINER SOKONI: Since we're 7 arguing a motion at this time and this is 8 argument, as opposed to testimony, we'll leave it 9 in for now. Is Ms. Kubit one of your witnesses? 10 MR. HARRIS: If we -- 11 HEARING EXAMINER SOKONI: Is she -- 12 MR. HARRIS: -- sure. 13 HEARING EXAMINER SOKONI: Okay. 14 MR. HARRIS: We can do that. 15 HEARING EXAMINER SOKONI: I think -- 16 MR. HARRIS: It might be concise for me to 17 finish my reply -- 18 HEARING EXAMINER SOKONI: Absolutely. 19 MR. HARRIS: Yes. 20 HEARING EXAMINER SOKONI: My question was 21 whether when we get to the application proper is 22 Ms. Kubit going to -- is she going to take the 23 stand and testify under oath. 24 MR. HARRIS: Okay. Let me add that that 25 Exhibit C to our reply, again, the approvals there</p>

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15 (130 to 133)

<p>130</p> <p>1 are reflected as well in the two exhibits that I 2 mentioned a moment ago. What were they? 20 and 3 21. But also it's a summary of what is in Exhibit 4 53 and 54 of the -- and 47 that are already in the 5 record. Those are the official Planning Board 6 actions that that matrix is summarizing. So there 7 is every verification for them there, and the 8 opposition has had those other exhibits to review 9 for some time.</p> <p>10 HEARING EXAMINER SOKONI: So I will let it 11 in not as evidence, but as argument. And so 12 that's the -- whatever weight I -- it's no 13 different than, you know, the chronology, for 14 instance, that the other, you know, parties have 15 presented. I'm admitting it not as evidence, but 16 as argument.</p> <p>17 MR. HARRIS: That is fine. The other 18 exhibits that I spoke of speak for it as the 19 evidence, so it's just a shorthand summary to make 20 it easier to understand.</p> <p>21 So I lost my train of thought a moment 22 here. But, in any respect, you know, looking at 23 the plan of compliance, Exhibit 45, we don't see 24 any of what the opposition has said it says. What 25 it does say is that the Planning Board has</p>	<p>132</p> <p>1 the plan of compliance.</p> <p>2 Irrespective of that, we will show that 3 this shopping center, retail center with the gas 4 pumps is entirely pedestrian friendly. And I am 5 puzzled by the fact that the opposition would say 6 the fact that the gas pumps are not walkable has 7 anything to do with that. I don't walk to the gas 8 station. You know, I don't use gas. I drive to 9 the gas station. Okay. So I -- you know, I'm 10 just puzzled by that. But the retail center 11 within which this gas pump island is in there is 12 entirely walkable and our testimony will address 13 that.</p> <p>14 I think that's what I have to say. I 15 believe that our reply brief is 100 percent on 16 point and addresses all of the issues that are 17 relevant here. Thank you.</p> <p>18 HEARING EXAMINER SOKONI: Thank you.</p> <p>19 MS. PRESLEY: Ms. Examiner, I'd like to 20 make an objection on the record as to testimony 21 that Mr. Harris made projecting that the --</p> <p>22 HEARING EXAMINER SOKONI: Mr. Harris has 23 not testified. Motions are arguments.</p> <p>24 MS. PRESLEY: Okay.</p> <p>25 HEARING EXAMINER SOKONI: So both sides</p>
<p>131</p> <p>1 discretion to approve changes. Even where there 2 is an explicit requirement in the plan of 3 compliance, they have the discretion to approve 4 something different. And what we've just been 5 talking about is evidence of their repeatedly 6 doing that over the time.</p> <p>7 Here in this case, given that there's 8 nothing express in the plan of compliance about 9 the gas station, they didn't even need to waive it 10 or vary from it. They had the discretion to 11 approve it. There is nothing in any of these 12 documents, including the design concepts to which 13 both the opposition speakers spoke, that says 14 anything about the gas station either. It doesn't 15 even fully define how their retail center is going 16 to be designed, because nobody really knew that.</p> <p>17 The opposition talks repeatedly about the 18 goal of a walkable pedestrian environment. Again, 19 those words are not in the plan of compliance. In 20 all of these plan of compliance documents that 21 they have produced, I found that expression in one 22 Planning Staff Report, one time out of 350 pages. 23 It was hardly a critical element. It's at page 24 six of the Staff Report that's attached to their 25 plan of compliance, but it's not incorporated into</p>	<p>133</p> <p>1 have an opportunity to argue, make, you know, 2 legal arguments about -- we're actually going to 3 get to the next phase, which is the actual 4 application and then we'll have testimony.</p> <p>5 MS. PRESLEY: Okay. Thank you.</p> <p>6 HEARING EXAMINER SOKONI: But there's -- 7 yes, there has been no testimony from Mr. Harris. 8 Thank you so much for all the motion 9 arguments. I have some questions, if I may.</p> <p>10 MS. POWELL: Would you like me to do my 11 reply, or would you like to do your questions?</p> <p>12 HEARING EXAMINER SOKONI: I don't want to 13 preempt any of the arguments. So why don't you go 14 ahead do your reply, because maybe you will answer 15 my questions.</p> <p>16 MS. POWELL: One hopes. So if you look -- 17 I'd like to speak directly to -- well, putting 18 aside the rubbish -- that there is nothing in this 19 plan that says anything about the requirements 20 that it be, quote, pedestrian friendly, and that 21 is absolutely not true. And if you look at 22 Exhibit E to my motion --</p> <p>23 THE TECHNICIAN: On 64E?</p> <p>24 MS. POWELL: Yes. Section three, page 25 three. For the purpose of this resolution, the</p>

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134	<p>1 compliance program consists of the Staff 2 recommendations, Board modifications, certain 3 deadlines and certain waivers described in this 4 section. Subpart A, As set forth in the Staff 5 Report issued by memorandum dated June 1, 2006, 6 quote, the compliance program consists of and 7 expressly incorporates by reference each of the 8 elements, terms and conditions as contained in the 9 following documents. Item number two, underneath 10 that part A says the Staff Report without 11 attachments dated June 1, 2006 pages one through 12 16, and then it refers to additional pages that 13 are included or excluded. So the Staff Report, 14 the Staff recommendations are absolutely 15 incorporated into and are part of this resolution. 16 And if you go to the Staff Report, it is not once, 17 but it is over and over again where there are 18 references to the pedestrian scale and 19 orientation. That's at page four, and this would 20 be Exhibit C to my motion, maintain a pedestrian 21 scale and orientation. 22 Moving to page six, we say that the 23 transportation and mobility plan, the program -- 24 the plan of compliance retains the emphasis on 25 constructing sidewalks, bikeways and natural</p>	136	<p>1 accordance with the resolution. The Planning 2 Board says, The Planning Board recognizes that the 3 compliant -- and I'm at page seven of Exhibit E. 4 The Planning Board recognizes that the compliance 5 program is conceptual in nature, and that 6 additional review of more detailed plans may 7 involve modifications, except as otherwise 8 required by or relating to physical project 9 conditions unforeseen by the Board, or applicable 10 law or legal requirements. And I am paraphrasing 11 a little bit here. The Planning Board intends to 12 require only such modifications that are 13 reasonably consistent with the compliance program, 14 subject only to such unforeseen project 15 conditions, applicable law and regulations, 16 express terms of the resolution and the compliance 17 program, it reserves discretion, but it is subject 18 to these requirements, and these requirements 19 included the improvements and they include 20 maintaining the pedestrian-friendly nature of this 21 community. And plunking down the gas station 22 with, you know, the one off I don't know what 23 calling it open space in the middle of a parking 24 lot doesn't do it. 25 Thank you. I'm sorry. I hope I answered</p>
135	<p>1 surface trails, as proposed in the approved 2 project plan. 3 Then the -- there's more. I'm looking. I 4 had it a minute ago. But the point here is, is 5 that it was included. What Mr. Harris has said is 6 utterly and totally inaccurate, and the emphasis 7 was to maintain this sense. It will feature a 8 seating area, a trail connecting to the Town 9 Plaza. I mean, this is throughout these 10 documents. You don't just get to ignore them 11 because you don't feel like it. 12 And, you know, Mr. Harris's comment, which 13 was rather sarcastic, that, you know, he doesn't 14 walk to the gas station, he drives, frankly, 15 emphasizes the point. The addition of the gas 16 station reduces and goes against maintaining the 17 pedestrian-friendly nature that is required to be 18 maintained in the plan of compliance. 19 And the fact that, you know, the Planning 20 Board has completely failed to do its job doesn't 21 excuse future failures. It simply doesn't. 22 That's not the law, and there's no reason to do 23 so. The Planning Board's authority is, in fact, 24 reserved. However, in giving the Planning Board 25 the ability to proceed, it has to do so in</p>	137	<p>1 your questions. 2 HEARING EXAMINER SOKONI: So that was your 3 reply. 4 Ms. Presley, did you have a reply only to 5 what Mr. Harris said, you know, only to what 6 Mr. Harris said? 7 MS. PRESLEY: Ms. Powell covered most of 8 that. I was going to refer to the fact that the 9 Planning Board does state in the resolution some 10 of what Mr. Harris states, but he doesn't read the 11 full paragraph, nor give the context, which 12 Ms. Powell has now given. There were sets that 13 the public can read now as an exhibit of things 14 that were submitted to the Board that were 15 included, and they refer to specific elements that 16 must be provided. So I was going along the lines 17 of what Ms. Powell has stated, that, indeed, the 18 resolution was specific in restricting the Board's 19 ability as to the scope and limit of changes that 20 could be made. 21 HEARING EXAMINER SOKONI: Ms. Powell, I 22 have a question. 23 MS. POWELL: Yes. 24 HEARING EXAMINER SOKONI: Is a gas station 25 and a -- this is a zoning question. Is a gas</p>

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17 (138 to 141)

<p>138</p> <p>1 station an allowed use in this area?</p> <p>2 MS. POWELL: Not without a conditional use</p> <p>3 permit.</p> <p>4 HEARING EXAMINER SOKONI: So it's an</p> <p>5 allowed use with a conditional use.</p> <p>6 MS. POWELL: That is correct. So it's not</p> <p>7 just allowed. I mean, it would be a different</p> <p>8 issue, frankly, but it's -- a conditional use</p> <p>9 permit is required, but it's also -- I mean, the</p> <p>10 point that I've been trying to make is that the</p> <p>11 review also has to include an examination of</p> <p>12 whether it also meets the requirements of the plan</p> <p>13 of compliance, and the mixed-use core, including</p> <p>14 the retail center, in the plan of compliance says</p> <p>15 that the area will be substantially revised and</p> <p>16 improved. The majority of the retail will be</p> <p>17 located along pedestrian-friendly streets, instead</p> <p>18 of adjacent to a surface parking lot.</p> <p>19 HEARING EXAMINER SOKONI: I'll tell you</p> <p>20 the question I'm --</p> <p>21 MS. POWELL: Yes.</p> <p>22 HEARING EXAMINER SOKONI: -- I'm wrestling</p> <p>23 with a little bit.</p> <p>24 MS. POWELL: Sure.</p> <p>25 HEARING EXAMINER SOKONI: From a zoning</p>	<p>140</p> <p>1 you're saying no gas because you -- I heard you</p> <p>2 say earlier that, you know, the gas station</p> <p>3 wouldn't be pedestrian friendly.</p> <p>4 MS. POWELL: Right, I did say that.</p> <p>5 HEARING EXAMINER SOKONI: Okay. Are there</p> <p>6 any circumstances under which we can have any gas</p> <p>7 station?</p> <p>8 MS. POWELL: Not in the Town Center, no.</p> <p>9 HEARING EXAMINER SOKONI: Okay. Thank</p> <p>10 you.</p> <p>11 MS. PRESLEY: Ms. Sokoni, may I add to</p> <p>12 that answer of your question? I don't know if</p> <p>13 Ms. Powell is as familiar with the elements of the</p> <p>14 compliance program, but there are also specific</p> <p>15 references -- and, as she read, it's included by</p> <p>16 the Planning Board in its resolution. There are</p> <p>17 specific references in the Staff Report and with</p> <p>18 the attached drawings that were submitted to the</p> <p>19 requirement for the approach from Stringtown Road</p> <p>20 to be street-facing retail so as to hide parking.</p> <p>21 Nothing ever would have permitted based on the</p> <p>22 drawings. So they don't have to expressly exclude</p> <p>23 it, because it was expressly described that it was</p> <p>24 to be pedestrian-oriented, street-facing retail</p> <p>25 with parking hidden behind. So in this particular</p>
<p>139</p> <p>1 standpoint, I'm trying -- I just want to make sure</p> <p>2 that I follow your motion.</p> <p>3 MS. POWELL: Certainly.</p> <p>4 HEARING EXAMINER SOKONI: Are you arguing</p> <p>5 that you can't have any gas station, period, or</p> <p>6 are you saying you can have your gas station, just</p> <p>7 that your gas station should meet our plan of</p> <p>8 compliance?</p> <p>9 MS. POWELL: No. What I'm -- well, I'm</p> <p>10 arguing also that they don't meet the conditional</p> <p>11 use standards, but that's for later.</p> <p>12 HEARING EXAMINER SOKONI: Okay.</p> <p>13 MS. POWELL: But no, what I am arguing is</p> <p>14 that it's -- it was the requirement of the Board</p> <p>15 and also the requirement, respectfully, of you to</p> <p>16 evaluate this in the context of the plan of</p> <p>17 compliance, which says repeatedly pedestrian,</p> <p>18 pedestrian, pedestrian.</p> <p>19 HEARING EXAMINER SOKONI: Okay. So am I</p> <p>20 understanding correctly that your legal argument</p> <p>21 is sure you can have a condition -- it's possible</p> <p>22 to have a gas station, a conditional use approved</p> <p>23 as long as the gas station that you propose and</p> <p>24 your conditional use application meets the plan of</p> <p>25 compliance? I'm trying to understand whether</p>	<p>141</p> <p>1 presentation and where the Applicant is proposing</p> <p>2 that's what would not only be visible, instead of</p> <p>3 the Town Center, which was designed in mediation</p> <p>4 to change and become a notable Town Center. Now</p> <p>5 the first approach would be a gas station. So I</p> <p>6 would argue that the compliance program would</p> <p>7 prohibit any visible gas station from that</p> <p>8 perspective, and also any gas station within the</p> <p>9 square footage that was redeveloped and projected</p> <p>10 to be street-activated, pedestrian-activated</p> <p>11 gathering space on a small scale like a town</p> <p>12 square, pedestrian oriented. All of those things</p> <p>13 are contained, those specific words, in the</p> <p>14 compliance program.</p> <p>15 MR. HARRIS: Madam Examiner, may I briefly</p> <p>16 respond? When the Planning Board approved the</p> <p>17 retail center layout last February, Exhibits 54</p> <p>18 and 55, you will see in there that that is exactly</p> <p>19 what Ms. Presley is talking about, street-oriented</p> <p>20 retail with the parking behind, pedestrian</p> <p>21 friendly. They made all of those findings. This</p> <p>22 does not change that at all.</p> <p>23 HEARING EXAMINER SOKONI: My other</p> <p>24 question is, we have before us -- OZAH has before</p> <p>25 OZAH a conditional use application. After</p>

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18 (142 to 145)

<p>142</p> <p>1 assuming -- let's say if the application was 2 successful and approved. What would have to 3 happen before the gas station actually showed up? 4 Site plan, right? 5 MS. POWELL: Hm-hm. 6 HEARING EXAMINER SOKONI: Would they have 7 to go for site plan? 8 MS. POWELL: I believe so, because it's 9 not on the plan. 10 MR. HARRIS: I can answer that. The 11 Planning Board's recommendation of approval for 12 the gas pumps said that we would have to come in 13 and amend the preliminary plan, I believe. That's 14 it. 15 HEARING EXAMINER SOKONI: So you'd have to 16 go back to have the preliminary plan -- 17 MR. HARRIS: Oh, I'm sorry. I've been 18 corrected. And site plan. 19 MS. POWELL: Yeah. 20 HEARING EXAMINER SOKONI: And what I'm 21 wondering is are some of these -- because this is 22 a conditional use application, is there an 23 opportunity at site plan to have the visual 24 aspects of this addressed? 25 MR. HARRIS: Yes.</p>	<p>144</p> <p>1 this may -- if we have to go all day, you know, 2 but I'm -- we had a late start. I'm happy to -- 3 if people need five minutes to regroup so we can 4 move to the application stage, that's fine. Can 5 we maybe -- let's say a five-minute recess just so 6 people can regroup, and then let's jump right into 7 the conditional use application. 8 MR. HARRIS: Thank you. 9 MS. POWELL: Thank you. 10 (A recess was taken.) 11 HEARING EXAMINER SOKONI: We did go a 12 little over five minutes, but that's because I had 13 some objections to research so I can rule on 14 those. I did want to -- there was the request 15 from Ms. Presley to introduce something from a 16 podcast. Unfortunately, I have to -- I do have to 17 keep that out, reason being we do have a 18 requirement to -- so a couple of things. I will 19 not allow it introduced today. Let's see how the 20 day progresses, because if we are going to -- if 21 we're going to adjourn to a subsequent date, then 22 what I will request is -- OZAH only has ability 23 to -- we can not take websites. If you are able 24 to upload it to a YouTube channel, if you can give 25 us a link to a YouTube link and then it can be</p>
<p>143</p> <p>1 MS. POWELL: Well, that may be true, but 2 it still doesn't -- it still has to meet the 3 hurdle of the compliance plan -- 4 HEARING EXAMINER SOKONI: Correct. 5 MS. POWELL: -- which does not include 6 this. And, in fact, it is not a change that is 7 contemplated within the scope of the compliance 8 plan. So the suggestion that, well -- and 9 honestly speaking, Staff is not or the Board 10 haven't -- they don't know about this, apparently, 11 but they haven't analyzed -- 12 HEARING EXAMINER SOKONI: They don't know 13 about what? 14 MS. POWELL: The compliance plan, because 15 they have not analyzed previous site plans in 16 conjunction with the compliance plan, and that 17 matters. So we have a problem. 18 MR. HARRIS: We disagree with that. They 19 have analyzed it every time. 20 HEARING EXAMINER SOKONI: Okay. I have -- 21 thank you so much for your extensive motion papers 22 and the, you know, fruitful argument. I will 23 reserve -- like I said, I will reserve ruling on 24 the motion. 25 I would like us to proceed. You know,</p>	<p>145</p> <p>1 uploaded to our website, both sides have to have 2 the opportunity to review it and object. At this 3 point Mr. Harris has not had an opportunity to 4 look at whatever this -- we can not go and search 5 for a podcast. So I'll keep this out for now. If 6 we do adjourn to a subsequent date and you are 7 able to provide a YouTube link, then we'll have a 8 further discussion at the next hearing about 9 whether there are objections. 10 MS. PRESLEY: Thank you. 11 HEARING EXAMINER SOKONI: The second one 12 was on Exhibit C in Mr. Harris's motion reply 13 papers, and that was a document created by 14 Ms. Kubit. That one stays in not as evidence, but 15 as argument. And then if the witness who prepared 16 the document takes the stand, they can be 17 questioned about it. But it's no different from 18 anyone making argument about the chronology of a 19 project. 20 MS. POWELL: Understood. Thank you. 21 HEARING EXAMINER SOKONI: Okay. And so 22 we're done with motion arguments. 23 Let's turn now to the substantive 24 application, the conditional use application. And 25 the Applicant's counsel, Mr. Harris, you may start</p>

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<p>146</p> <p>1 with your argument in chief. A reminder that 2 before we -- both sides have the opportunity for 3 an opening statement. Mr. Harris, are you -- I'm 4 assuming you'll be doing an opening statement 5 before you get into your case in chief. 6 MR. HARRIS: I had not prepared one, but 7 I'll be very brief. 8 HEARING EXAMINER SOKONI: It's optional. 9 You can pass. You don't have to -- 10 MR. HARRIS: I'll be very brief. We 11 believe this grocery store is important to the 12 community. We will testify that the gas pumps are 13 important for the grocery store. We will explain 14 how the proposal is consistent with the master 15 plan, the zoning, the plan of compliance, how it 16 retains any pedestrian-friendly goals that there 17 are for the community and how it meets all of the 18 standards for conditional use. It's as simple as 19 that. 20 HEARING EXAMINER SOKONI: Thank you. 21 Does the opposition have an opening 22 statement? 23 MS. POWELL: Just briefly. We obviously 24 disagree that it's consistent with the compliance 25 plan or the master plan, and believe that the</p>	<p>148</p> <p>1 application should be denied. Thank you. 2 HEARING EXAMINER SOKONI: Thank you, 3 Ms. Powell. 4 Ms. Presley, did you have an opening 5 statement? 6 MS. PRESLEY: I can rest on the statement 7 I've already made. 8 HEARING EXAMINER SOKONI: Thank you. 9 We'll turn to the Applicant's case in 10 chief. 11 MR. HARRIS: Yes, ma'am. We're prepared 12 to proceed. We'd like to call first Kevin Foster 13 as the first witness. 14 HEARING EXAMINER SOKONI: Yes, please. 15 MR. HARRIS: Yes. Okay. Do you want us 16 to swear him in? 17 HEARING EXAMINER SOKONI: Yes. 18 Absolutely. Let me just get situated. 19 Okay. Mr. Foster, if you could kindly 20 raise your right hand. 21 (The witness was sworn.) 22 HEARING EXAMINER SOKONI: Thank you. 23 You may proceed. 24 KEVIN FOSTER, 25 having been first duly sworn or affirmed, was</p>
<p>147</p> <p>1 analysis is subject to the issues that we just 2 argued. But in addition to that, we don't know 3 that it's necessary for a grocery store, and 4 simply saying that this one particular entity 5 won't be there unless we get a gas station isn't a 6 reason to approve it. In the original plan of 7 compliance, there are references to a grocery 8 store, but there are no references to a grocery 9 store and a gas station. And the evidence will 10 show that there are plenty of grocery stores 11 without gas stations. And I believe that the 12 evidence will also show that there are very few 13 town centers with gas stations in the middle of 14 them simply because it doesn't go to the feel of a 15 gas station. But in addition to all that, the 16 Applicant has to prove that there is a need for a 17 gas station, for another gas station. And the 18 evidence will show that there is not, and that the 19 review and the report submitted by -- I'm not sure 20 what the name of the entity is at this time, but I 21 think it's Steere. 22 MR. HARRIS: Ed Steere, yes. 23 MS. POWELL: Steere doesn't take into 24 account several material components in analyzing 25 need, and so for that reason as well the</p>	<p>149</p> <p>1 examined and testified as follows: 2 DIRECT EXAMINATION BY COUNSEL FOR THE APPLICANT 3 BY MR. HARRIS: 4 Q Kevin, would you state your name and 5 position for the record, please? 6 A My name is Kevin Foster. I'm a principal 7 with -- I'm sorry. My name is Kevin Foster, and 8 I'm a principal with the firm of Gutschick, Little 9 and Weber. We're located at 3909 National Drive 10 in Burtonsville. 11 Q And what is your position with GLW? 12 A I'm a principal, and I'm the director of 13 planning and landscape architecture. 14 MR. HARRIS: And, Madam Examiner, the 15 Exhibit 15A is a copy of Mr. Foster's resume. 16 We're going to ask that he'd be admitted as an 17 expert in land planning. I can ask him additional 18 questions about that, but I think the resume and 19 his past testimony speaks for that but -- 20 HEARING EXAMINER SOKONI: Just give me one 21 second. 22 Mr. Foster, have you testified before 23 before any public bodies? 24 THE WITNESS: I've testified in front of a 25 hearing examiner in a number of cases, court of</p>

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<p>150</p> <p>1 appeals, the Planning Board many, many times in 2 Montgomery County, Prince George's County, Howard 3 County. 4 HEARING EXAMINER SOKONI: Okay. I'm 5 looking at your resume here, and you have, indeed, 6 cited a number of cases before this body, and 7 therefore I'll take judicial notice of that and 8 admit you and recognize you as an expert witness 9 on this basis. 10 THE WITNESS: Thank you. 11 HEARING EXAMINER SOKONI: No need for -- 12 no need for any foundational questions. 13 MR. HARRIS: Thank you. 14 BY MR. HARRIS: 15 Q Okay. Mr. Foster, can you give us a 16 little bit of an overview of Clarksburg and, you 17 know, how the planning picture presents itself 18 there? 19 A Sure. 20 THE WITNESS: Can you pull up Exhibit 63A? 21 A This is a -- I'm now referencing the plan 22 on the screen, and this is an overhead or aerial 23 view of Clarksburg generally. Running diagonally 24 across the viewer from lower right to upper left 25 is 270. Parallel to that is Route 355. Running</p>	<p>152</p> <p>1 out there. 2 We've superimposed the plan of Clarksburg 3 Town Center Retail Center in the middle. That's 4 the area that's currently not built. The 5 remaining areas of Clarksburg Town Center have all 6 been built to this time. 7 THE WITNESS: Can you pull up Exhibit 59? 8 A So zooming in a little bit, just to try to 9 orient everybody, this is -- the majority of what 10 is shown on this rendering is Clarksburg Town 11 Center development itself. Just to orient you, 12 this is just a little bit angled from what we 13 previously looked at. The road on the far left 14 side is 355, and right in the middle of that is 15 basically the Historic District. The road running 16 across the bottom of the site is Stringtown Road, 17 and the road running diagonally from left to right 18 on the north side is Clarksburg Road and Snowden 19 Farm Parkway is on the right side. 20 So Clarksburg Town Center was a 21 neo-traditional community designed 30 some years 22 ago, and it's, you know, taken that long to 23 evolve. But it was really a community design 24 around the pedestrian zone and the pedestrian 25 scale of streets where buildings are right up on</p>
<p>151</p> <p>1 perpendicular to that across the other direction 2 from lower left to upper right is Stringtown Road. 3 And the road running pretty much north and south 4 in the middle of the plan is Clarksburg Road. So 5 this is generally the Clarksburg area. 6 The Historic District is generally at the 7 confluences of Clarksburg Road and 355. It 8 stretches up and down in certain areas almost all 9 the way down to Stringtown Road. That's kind of 10 the Historic District. 11 And then the new Clarksburg Town Center 12 was designed behind that along Clarksburg Road and 13 up toward what the loop road is, the newer road 14 around -- circular road around Clarksburg, Snowden 15 Farm Parkway. So Clarksburg Town Center is kind 16 of in the middle, and there's a number of other 17 developments around it. To the lower left is 18 Clarksburg Village. Excuse me. Lower right is 19 Clarksburg Village. You can just barely see down 20 at the corner of 270 and Stringtown Road just the 21 beginnings of what is Cabin Branch, and currently 22 that is the Prime Outlet -- Prime Outlets there at 23 the intersection. And then the circle that's on 24 the plan in red, that's just a one-mile radius 25 just to get a sense of scale of what's actually</p>	<p>153</p> <p>1 the street, you have sidewalk zones, building 2 zones, vehicular zones, a very intimate scale of a 3 street to make a pedestrian feel comfortable 4 walking. So it's a very walkable community. All 5 of -- if you notice, all of the houses are 6 basically right up lined on the streets, and 7 there's an interplay of many, many open spaces 8 within the community. 9 There's a larger greenway that cuts across 10 the middle of the site north, south, connects up 11 to the elementary school and Kings Local Park 12 where the pond is. And there's also a regional 13 bike trail that's built along that that the 14 Applicant built. The large green area on the 15 right side of the plan is Piedmont Woods Park. 16 That's a park that the Applicant built and has now 17 turned over to the Parks Department. So there's a 18 lot of facilities that were built there as part of 19 this plan. 20 The center of really the developed area, 21 there's a rec center that there's been some 22 discussion about with a pool, and recently a few 23 years back we added an additional building and 24 more parking to that as -- you know, as part of 25 basically the plan of compliance.</p>

<p>154</p> <p>1 There's a -- the road that's kind of 2 running north, south in the center of the plan, 3 that was Overlook Park Drive originally, and it 4 connected all the way through. As the plan 5 developed, that has kind of changed a bit, but 6 it's all still part of the commercial Town Center 7 itself. And the greenway trail runs right along 8 basically where Overlook Park used to used to be. 9 The commercial Town Center itself, which 10 is shown in white, is the area that's not 11 completed yet, and that is basically organized 12 around a single road, which is called Saint Clair 13 Road, with commercial buildings lining the street, 14 wide pedestrian sidewalks, lots of different 15 materials, brick, concrete, all kinds of, you 16 know, details at the pedestrian zone, benches. 17 There's an urban plaza, a splash fountain. So 18 there's a very intricate pattern of development 19 that is what portrays that pedestrian zone. And 20 then that connects up to the corner of basically 21 Saint Clair and Clarksburg Square Road, which runs 22 east, west through the middle of the development, 23 and that's where there's an amphitheater, and 24 that's where the library was supposed to go, 25 although the County has moved the library to</p>	<p>156</p> <p>1 over that period of time? 2 A Well, we were -- I wasn't directly 3 involved in the plan of compliance development. 4 We were -- I was kind of on the sideline watching 5 it. There was an architectural firm that handled 6 most of the development of it. We've basically 7 been the ones who have had to implement it all. 8 And through the multiple site plans that have been 9 approved since then, they were really implementing 10 that vision, the plan of compliance. Obviously, 11 the plan of compliance was a concept plan. There 12 was no engineering done back then. And, you know, 13 things evolve as, you know, the rubber meets the 14 road and you actually have to make them real. 15 Things evolve, but the plan of compliance was used 16 to really inform what has been developed today. 17 Q Okay. The approval of a conditional use 18 requires a number of findings. Can you walk us 19 through the various findings that are required and 20 how this application meets those? 21 A Sure. Now, there's two sets of findings 22 that have to be made; one of the specific findings 23 for a filling station use, and then the other set 24 of findings are the general findings for any 25 conditional use.</p>
<p>155</p> <p>1 another site. But that open space is still there. 2 And then as part of the retail center, the 3 larger white box is the grocery store. And in 4 front of that and behind all of the retail 5 buildings are where all the parking is included. 6 Whether it's on the south side or the north side, 7 all the parking was put behind the buildings, not 8 part of the pedestrian zone. And that's part of 9 the plan, and part of what makes it more of a 10 neo-traditional kind of community. You're really 11 trying to separate some of those vehicular uses 12 from the pedestrian uses to make that pedestrian 13 zone comfortable and walkable. 14 Q Mr. Foster, can you tell us how long you 15 have been involved in the planning and development 16 of Clarksburg Town Center? 17 A I first got involved with Clarksburg Town 18 Center back in 2003, so going over on 20 years 19 now. We got involved right after what has been 20 discussed about a lot of the issues out there with 21 height and what was built. My firm was brought in 22 to take over and clean that up and implement what 23 has all been done since then. 24 Q And to what extent then are you familiar 25 with the implementation of the plan of compliance</p>	<p>157</p> <p>1 And I would like to point out that all of 2 these findings were also in the Staff Report from 3 the Planning Board's conditional use hearing, and 4 they also issued a letter that's part of the 5 record, which is Exhibit 55. I just wanted to 6 read a section of that. It says in the Staff 7 Report dated December 9, 2024, Technical Staff 8 recommended approval of the conditional use with 9 conditions. Planning Board concurred with these 10 findings and recommendations of the Staff Report. 11 Planning Board agreed with Staff conclusions that 12 this use is consistent with the recommendations of 13 the '94 Clarksburg Master Plan. The application 14 satisfies the applicable requirements and 15 regulations of the approval of a conditional use 16 for a filling station. The Applicant has also met 17 the burden of proof by showing that these 18 operations use -- operating uses at this location 19 will not be a detriment to the neighborhood and 20 will not adversely affect the public interest. So 21 I just wanted to make sure that everyone is aware 22 what the recommendation letter said coming from 23 the Planning Board. 24 Q And do you agree with that conclusion? 25 A Yes, I do.</p>

<p>158</p> <p>1 Q Okay. Go ahead.</p> <p>2 A The first set -- the first findings for</p> <p>3 specific uses are found under Section 59.3.5.1 --</p> <p>4 excuse me -- 3.5.13.C2, filling station use</p> <p>5 standards. And where filling station is allowed</p> <p>6 as a conditional use, it may be permitted by the</p> <p>7 Hearing Examiner under Section 7.31 conditional</p> <p>8 use and the following standards.</p> <p>9 The first one, A, is access to the site</p> <p>10 from a street with a residential classification is</p> <p>11 prohibited. The gas station here is not accessed</p> <p>12 from a public road. It's accessed from actually a</p> <p>13 private road, which is Saint Clair. Those both</p> <p>14 connect into roads that -- Stringtown Road and</p> <p>15 Clarksburg Square Road, which both have Town</p> <p>16 Center boulevard classifications. Clarksburg</p> <p>17 Square Road has a, yes, Town Center</p> <p>18 classification. So the road that the gas station</p> <p>19 connects to does not have a residential</p> <p>20 classification, and so this would not apply.</p> <p>21 Q And there are other commercial uses on</p> <p>22 that road?</p> <p>23 A All of the -- not all, but the majority of</p> <p>24 the commercial uses as part of Town Center front</p> <p>25 on that street. The only one that doesn't</p>	<p>160</p> <p>1 would be less than --</p> <p>2 THE WITNESS: Less than 3.6 million</p> <p>3 gallons per year.</p> <p>4 HEARING EXAMINER SOKONI: Thank you.</p> <p>5 A D, product displays, parked vehicles and</p> <p>6 other obstructions that adversely affect</p> <p>7 visibility at intersections to the station</p> <p>8 driveways are prohibited. This filling station is</p> <p>9 not located on a street, so that -- it's located</p> <p>10 within a parking lot of the grocery store, so it</p> <p>11 will have no adverse impacts to the intersecting</p> <p>12 driveways. The filling station and kiosk are</p> <p>13 almost 300 feet away from any driveway entrance to</p> <p>14 the parking lot.</p> <p>15 E, when any use occupies a corner lot, the</p> <p>16 driveways must be located at a minimum of 20 feet</p> <p>17 from the intersection of the right of ways and</p> <p>18 must not exceed 30 feet in width. This is not a</p> <p>19 corner lot in the development, so this section</p> <p>20 would not apply.</p> <p>21 Each gasoline pump or other service</p> <p>22 appliance must be located on a lot a minimum of 10</p> <p>23 feet behind the setback line, and all service</p> <p>24 storage or similar access in connection with the</p> <p>25 use must be conducted entirely within the</p>
<p>159</p> <p>1 directly front on that street is the grocery</p> <p>2 store, which fronts on an internal parking lot.</p> <p>3 B, site lighting is a maximum of .1</p> <p>4 footcandles at the lot line when the subject lot</p> <p>5 abuts a residential zone. The Applicant submitted</p> <p>6 a lighting plan with this application.</p> <p>7 Photometric plan shows the lighting reduced to</p> <p>8 zero footcandles 10 feet before reaching the</p> <p>9 property line. There's a number of internal</p> <p>10 property lines to this property, so the actual lot</p> <p>11 this use will reside on does not front any</p> <p>12 residentially-zoned property. It's all surrounded</p> <p>13 by CRT property.</p> <p>14 C, any filling station facility designed</p> <p>15 to dispense a minimum of 3.6 million gallons a</p> <p>16 year must be located at least 500 feet from a lot</p> <p>17 line of any land with a dwelling unit, public or</p> <p>18 private school, park, playground, daycare, whether</p> <p>19 outdoor use or civic use. This gas station will</p> <p>20 not -- will be pumping less than 3.6 million</p> <p>21 gallons a year of fuel; therefore, this section</p> <p>22 does not apply.</p> <p>23 HEARING EXAMINER SOKONI: Could you kindly</p> <p>24 repeat the -- sorry. Could you kindly repeat the</p> <p>25 projected volume that will be pumped? You said it</p>	<p>161</p> <p>1 building, except for car share spaces. The</p> <p>2 minimum side rear setbacks for the CRT zone in</p> <p>3 which this is located are zero feet. The pumps</p> <p>4 and kiosk proposed are roughly 65 feet away from</p> <p>5 the east property line, approximately 98 feet from</p> <p>6 the rear property line, so they are, therefore,</p> <p>7 more than 10 feet behind the setback lines, as</p> <p>8 required.</p> <p>9 HEARING EXAMINER SOKONI: Could you just</p> <p>10 help orient me? Those provisions around setbacks,</p> <p>11 is it lot line to lot line, or what's the setback</p> <p>12 from?</p> <p>13 THE WITNESS: Well, in the CRT zone, the</p> <p>14 setbacks are from the front, sides or rears.</p> <p>15 HEARING EXAMINER SOKONI: Okay.</p> <p>16 THE WITNESS: So it's from any abutting</p> <p>17 lot, and the orientation of that lot would dictate</p> <p>18 what's a front, what's a side and what's a rear.</p> <p>19 So it would be from any property line.</p> <p>20 HEARING EXAMINER SOKONI: Thank you.</p> <p>21 A H, vehicle parking --</p> <p>22 Q You skipped G.</p> <p>23 A My apologies. G, there must be a minimum</p> <p>24 of 20 feet between driveways on each street. Each</p> <p>25 driveway must be perpendicular to the curve of the</p>

<p>162</p> <p>1 street line. The Hearing Examiner may waive the 2 perpendicular driveway requirement DOT deems it 3 safe. As established previously in the 4 previously-approved preliminary plan, the site 5 plan, there are two driveways for ingress and 6 egress to this parking lot where the pumps will be 7 located, and those driveways are over 400 feet 8 apart from each other and both driveways are 9 perpendicular to the curb at the street line, so 10 they meet this requirement. 11 H, vehicle parking that overhangs public 12 right of way is prohibited. There's no vehicle -- 13 there are no vehicle overhangs proposed with this 14 development, so there are no vehicle overhangs of 15 the public right of way. 16 If the filling station includes a car 17 wash, the following must apply. There is no car 18 wash being proposed, so Section I would not apply. 19 J, the Hearing Examiner must find that 20 there is adequate parking for all accessory uses. 21 The filling station is a proposed accessory use to 22 the grocery store, and on site the grocery store 23 is providing 558 parking spaces, which includes 24 the two filling stations -- the two parking spaces 25 that would be required for a filling station. All</p>	<p>164</p> <p>1 conditional use were to be approved. 2 B, satisfy the requirements of the zone 3 use standards under 59.3, and to the extent the 4 Hearing Examiner finds to ensure compatibility, 5 meeting the intent of the general requirements 6 under 59.6. 7 THE WITNESS: Can you pull up Exhibit -- 8 Let's see. What is the conditional use cover 9 sheet? 9A. Can you zoom into the chart on the 10 upper left corner of that plan? Any chance it can 11 get any bigger than that? 12 A Okay. So these are the standards of the 13 CRT zone. Now, just to be clear, the Clarksburg 14 Town Center plans, overall plan, overall site plan 15 and overall preliminary plan were approved under 16 the previous Zoning Code, which in the previous 17 zoning classifications Clarksburg Town Center is 18 zones RMX2. Okay. 19 Now, since this is a new application for a 20 new use on the property, it has to be reviewed 21 under the new Zoning Code, and that classification 22 is CRT. So the standards here are just for the 23 gas gas station or filling station use, the CRT 24 zone that apply to that use. 25 The principal setbacks -- well, we'll</p>
<p>163</p> <p>1 the parking has previously been approved by the 2 Planning Board as part of the preliminary plan and 3 site plan. 4 Q So those were the specific gas station 5 findings that are required? 6 A Correct. 7 Q You spoke about more general findings for 8 special exceptions as well. Can you explain 9 those? 10 A Sure. There's a number of general 11 findings required to find approval of any 12 conditional use, and those are found under Section 13 59.7.3.1.E, the necessary findings. It says, To 14 approve a conditional use application, the Hearing 15 Examiner must find that the proposed development, 16 A, satisfies the applicable previous approvals on 17 the subject site, or, if not, the previous 18 approvals must be amended. This site was 19 recently -- had a recently-approved preliminary 20 plan and site plan and forest conservation plan, 21 and all of the three previously-mentioned plans 22 show a potential development area for a filling 23 station at this proposed location. I think it was 24 previously stated the Applicant will need to amend 25 the preliminary plan and site plan if this</p>	<p>165</p> <p>1 start at the top. Building height max is 35 feet. 2 We will be less than 35 feet. 3 Open space, 10 percent minimum required. 4 We're providing the required open space for the 5 use area, for the conditional use area as required 6 in the CRT zone. The RMX zone has a separate open 7 space requirement for the rest of the subdivision. 8 The minimum lot coverage does not apply, 9 and the minimum lot area does not apply. 10 THE WITNESS: If you can scroll down a 11 little bit just so I can -- 12 A The setbacks in the CRT zone for front, 13 side and rear are zero for all three, so we comply 14 with those. The rear alley setback is four feet. 15 It doesn't apply because we do not have an alley 16 abutting this use. Parking setbacks for the 17 surface parking lot must be behind the front 18 building line. Well, these are behind the 19 buildings that front on Saint Clair. That's the 20 whole point of where this parking lot is. It's 21 behind the buildings and not in the pedestrian 22 zone. 23 There are build-to areas that do not apply 24 since this is not built up on a public street. 25 It's a private Street.</p>

<p>166</p> <p>1 And then there are a number of</p> <p>2 transparency requirements in the CRT zone for the</p> <p>3 ground floor, front and rear of the buildings.</p> <p>4 And the architectural plans that were submitted to</p> <p>5 meet those standards. There is no upper story, so</p> <p>6 that does not apply. And we also meet the blank</p> <p>7 wall requirements for the front and rear.</p> <p>8 Requirements for the building orientation</p> <p>9 that front a street or an open space, in this case</p> <p>10 that front's a drive off. So those are the</p> <p>11 development standards of the CRT zone that the use</p> <p>12 would apply.</p> <p>13 Now I can -- I will also go through the</p> <p>14 general requirements of Article 59.6, as required</p> <p>15 in B. 59.6 are the general development standards.</p> <p>16 Subject property's in the CRT zone, which allow</p> <p>17 filling stations. Projects must comply with all</p> <p>18 development standards in the CRT zone as shown on</p> <p>19 the cover sheet that I've just gone through.</p> <p>20 Under general requirements, one under</p> <p>21 59.6.1 is access. Access to the overall site is</p> <p>22 unchanged from the preliminary plan and the site</p> <p>23 plan. The proposed fueling station shares all</p> <p>24 access points that have previously been approved</p> <p>25 with the grocery store. This design is compliant</p>	<p>168</p> <p>1 footcandles at the property line closest to the</p> <p>2 filling station.</p> <p>3 Section 59.6.5, screening, screening is</p> <p>4 not required for this application. Doesn't meet</p> <p>5 the requirements.</p> <p>6 Outdoor display and storage, 59.6.6, this</p> <p>7 Applicant is not proposing any outdoor displays or</p> <p>8 storage with this application.</p> <p>9 And signage, 59.6.7, the Applicant is not</p> <p>10 proposing any signage with this application. The</p> <p>11 signage will be included with the Weis grocery</p> <p>12 store as part of the site plan previously approved</p> <p>13 and it will have to be updated.</p> <p>14 So then we get back into the general</p> <p>15 requirements, and under C that the application</p> <p>16 substantially conforms to the recommendations of</p> <p>17 the applicable master plan. And again I'll remind</p> <p>18 everyone that all of these findings were also in</p> <p>19 the Staff Report and approved for -- recommended</p> <p>20 for approval by the Staff.</p> <p>21 I would like to go through a couple of</p> <p>22 sections of the master plan that I think apply.</p> <p>23 This is the 1994 Clarksburg Master Plan and</p> <p>24 Hyattstown Special Study Area. So that was the</p> <p>25 master plan that was developed for the development</p>
<p>167</p> <p>1 with Section 59.1.4, driveway access.</p> <p>2 Two, parking, queuing and loading under</p> <p>3 59.6.2, the fueling station requires one parking</p> <p>4 space per thousand square feet of gross floor</p> <p>5 area. The project proposes a maximum of 500</p> <p>6 square feet of gross floor area, which would</p> <p>7 require two additional -- two required parking</p> <p>8 spaces. The grocery store site area proposed 558</p> <p>9 parking spaces to be shared by all the retail</p> <p>10 uses, and that was approved on the previous site</p> <p>11 plan. This 558 parking spaces exceeds the minimum</p> <p>12 number of spaces required for the proposed use, so</p> <p>13 the filling station parking requirements are</p> <p>14 already included in the parking that's previously</p> <p>15 been approved.</p> <p>16 59.6.4, landscape and outdoor lighting,</p> <p>17 area around the conditional use contains proposed</p> <p>18 landscaping per section 6.4 under the</p> <p>19 previously-approved site plan. All of the</p> <p>20 previously-approved landscaping will not be</p> <p>21 affected by this application.</p> <p>22 As required by section 59.6.4.4D, the</p> <p>23 photometric plan, as I previously mentioned, was</p> <p>24 submitted and would not exceed .5 footcandles at</p> <p>25 the property lines. This plan indicates zero</p>	<p>169</p> <p>1 of Clarksburg Town Center itself and the</p> <p>2 surrounding villages. The master plan itself</p> <p>3 didn't get specific into development of the retail</p> <p>4 centers. This master plan is, you know, more of a</p> <p>5 higher-level document. So there are a number of</p> <p>6 general requirements that we do have to abide by,</p> <p>7 although there are a couple of recommendations in</p> <p>8 here that I think are important.</p> <p>9 On page six, talking about the proposed</p> <p>10 concept plan for Clarksburg, it says, This plan</p> <p>11 proposes a transit-oriented multiuse Town Center,</p> <p>12 which is compatible with the scale and character</p> <p>13 of Clarksburg Historic District. And I think</p> <p>14 Clarksburg Town Center as it's been built out</p> <p>15 certainly meets a lot of those criteria and help</p> <p>16 to fulfill a lot of that.</p> <p>17 I will mention one of the things that it</p> <p>18 talks about a lot in the master plans is about</p> <p>19 transit, and that's probably one of the glaring</p> <p>20 things about Clarksburg that has not occurred over</p> <p>21 the last 30 years is bringing transit to</p> <p>22 Clarksburg. So, consequently, you know, that was</p> <p>23 envisioned as a major part of Clarksburg being a</p> <p>24 very walkable community, transit oriented and</p> <p>25 where people could work and live and walk. Well,</p>

<p>170</p> <p>1 transit in this area is decades away. And so 2 Clarksburg, along with a lot of other communities 3 along the 270 corridor, are satellite communities, 4 or what's called bedroom communities. Everybody 5 lives, shops, you know, plays in a very walkable 6 urban, you know, neo-traditional community, but at 7 the end of the day they still have to drive to 8 work. It's still -- a car is still part of the 9 experience of living in Clarksburg, and part of 10 that experience is having gas for your car because 11 you need it to get to work. That is, you know, 12 part of what Clarksburg is.</p> <p>13 On page 26, under policy six, the Town 14 Center Clarksburg was divided into a number of 15 districts or areas, and Clarksburg Town Center, 16 obviously, was in the Town Center district. 17 Again, it says the plan proposes transit-oriented 18 multiuse Town Center with compatible scale and 19 character to the Historic District, provides a 20 concentration of civic uses, library, post office, 21 elementary school to help define the Town Center 22 as a focal point of public activity, provides a 23 street system which facilitates pedestrian as well 24 as automobile movements. Clarksburg Town Center, 25 you know, certainly was originally planned to have</p>	<p>172</p> <p>1 really hasn't evolved because office uses haven't 2 evolved. It's really kind of going in the other 3 direction right now. Many office buildings are 4 being converted to residential. And in this case 5 that's really what happened to Clarksburg Town 6 Center, that the office buildings that were 7 originally approved previously under the original 8 site plans after the plan of compliance, there are 9 office buildings downtown, down in the -- but 10 those have now been converted to residential 11 because there is no office use for that use in the 12 Town Center, and to fill that void multifamily 13 residential was incorporated there instead.</p> <p>14 And, finally, on page 46 talking about the 15 Town Center itself as well said, This plan 16 recognizes retail uses critical activity and 17 vitality of the Town Center. A grocery store is 18 particularly important, since this type of use can 19 serve as a magnet for other commercial operations.</p> <p>20 A retail center designation is proposed 21 east of the Historic District as part of the 22 large-scale mixed-use neighborhood. By 23 incorporating a retail center proposed into a 24 larger plan development, there will be greater 25 opportunity to ensure a strong integration of the</p>
<p>171</p> <p>1 the library, although the County Council saw fit 2 to move it to another area. But it also does have 3 an elementary school. It has parks. So it has a 4 lot of those civic uses as planned in the master 5 plan. And the development of the street system as 6 a pedestrian-friendly street system but still 7 allowing vehicular activity is evident, I think, 8 in what's been built so far.</p> <p>9 Under land use plan recommendations, under 10 page 46, it says, This plan proposes residential, 11 retail and office uses within the Town Center of 12 equal importance so that the plan recommends civic 13 and public uses also be concentrated. Again, the 14 plan really, really wanted to see a multiuse Town 15 Center with retail and office and residential, all 16 of those uses in one area. But as one of the 17 other discussion items about the master plan, 18 which not just this master plan, but many areas of 19 the county that have been affected over the last 20 few decades, especially with the pandemic, are the 21 office uses. Fewer and fewer offices are needed 22 these days. Office buildings aren't being built. 23 Although the master plan originally envisioned 24 office as a major component to not only Clarksburg 25 but other districts in the master plan, that</p>	<p>173</p> <p>1 retail center to adjoining residential and public 2 uses and ensure compatibility with the Historic 3 District. So the plan recognized back then how 4 important a grocery store was to the Town Center, 5 and that, in fact, is the major reason why it 6 hasn't been built to date.</p> <p>7 MS. POWELL: I'm going to interpose an 8 objection. We're not here on a grocery store. 9 We're here on a conditional use for a gasoline 10 station.</p> <p>11 MR. HARRIS: He's explaining the plans -- 12 the project's compliance with that. The gas 13 station is a critical part of the grocery store. 14 They're interrelated.</p> <p>15 MS. POWELL: Objection; there's no 16 evidence supporting that statement.</p> <p>17 MR. HARRIS: Well, Ms. Presley testified a 18 little earlier that she doesn't think a grocery's 19 necessary.</p> <p>20 MS. POWELL: That does not go to my -- 21 MS. PRESLEY: That's not what I said. 22 MR. HARRIS: That is what you said. 23 MS. POWELL: This does not go to my 24 objection. My objection is that all this 25 discussion that we've heard for the last few</p>

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<p>174</p> <p>1 minutes relates to a grocery store. We are not 2 here on a grocery store. We are here on a 3 conditional use application for a gasoline 4 station, and the grocery store testimony has 5 nothing to do with the gasoline station. 6 HEARING EXAMINER SOKONI: Could you tie 7 the -- what's the relevance of the -- 8 MR. HARRIS: He was trying to explain how 9 this proposal is consistent with the master plan. 10 You can't do that unless you read what the master 11 plan says. He's agreeing that it complies with 12 all of these provisions. 13 MS. POWELL: Objection; that's not what he 14 was testifying to. 15 HEARING EXAMINER SOKONI: Okay. 16 MR. HARRIS: He was reading the master 17 plan. 18 MS. POWELL: Which says -- 19 HEARING EXAMINER SOKONI: In this context 20 that's overruled. I'll let you continue the flow 21 of your testimony. 22 MS. PRESLEY: I object on another ground. 23 I object on the grounds that Mr. Harris himself 24 stated that, relative to the compliance program, 25 that there was no recommendation for or opposed to</p>	<p>176</p> <p>1 area, there are a number of communities, whether 2 it's Columbia in Howard County, one of the oldest 3 planned communities around, Montgomery Village, 4 King Farm, Kentlands the -- probably the most 5 recognized neo-traditional community in the 6 country and most award winning, and what does it 7 have in its Town Center, its retail core, it has a 8 gas station. King Farm has a gas station. 9 Montgomery Village has gas stations in their 10 retail core. All eight village centers in 11 Columbia have gas stations. They're a vital part 12 of a community, and they're recommended as a 13 retail use. That can be anything, and, in my 14 opinion, a gas station is one of them. 15 Okay. Let's see. Under D of the general 16 findings is harmonious with and will now alter the 17 character of the surrounding neighborhood in a 18 manner inconsistent with the plan. The location 19 of the proposed pumps, the gas pumps, the 20 topography of the site, the landscaping previously 21 approved on the site plan for these three pumps 22 will make these pumps unobtrusive to the rest of 23 the retail area. The gas pumps will be limited to 24 a very small portion of the overall retail area 25 and will be located in a parking lot away from any</p>
<p>175</p> <p>1 a gas station. And then I would say this same 2 reasoning applies to the master plan. You can't, 3 therefore, turn around and use that to support -- 4 HEARING EXAMINER SOKONI: Ms. Presley, you 5 will -- there'll be opportunity to cross-examine 6 witnesses, and so let's -- you can reserve your 7 questions for cross-examination. 8 You may proceed. 9 THE WITNESS: Well, I was at the end of my 10 discussion of the master plan, but it did 11 recognize that, you know, all of these uses, 12 retail uses, the office uses, which obviously 13 didn't come about, the residential uses were an 14 important part of what was in the Town Center. 15 And as the master plan talks about things 16 generally, it talks about retail uses and they can 17 be a multitude of things. 18 HEARING EXAMINER SOKONI: And how does 19 that tie in with the gas station? 20 THE WITNESS: Well, a gas station is a 21 retail use. And as I explained, because of 22 Clarksburg's relation to where it sits in a 23 transportation corridor, gas is a needed use in a 24 community and part of a use. I would think if you 25 just looked at all the relevant history in our</p>	<p>177</p> <p>1 residential use and street-oriented retail on 2 Clarksburg Road. 3 Can I get you to pull up Exhibit probably 4 59 -- is it 59B? I think it is. Yeah, 59B. Oh, 5 sorry. No, that's -- one of the last ones we put 6 in. 7 MR. HARRIS: 63? 8 THE WITNESS: Oh, yeah. It's probably 9 63B. Yeah, that's it. 10 If you could zoom in on that a little bit, 11 not a whole lot, a little bit. 12 So this exhibit is a close -- a little bit 13 of a close-up aerial from what was previously 14 submitted, and shows the retail center plan 15 superimposed on that since it's not built yet. 16 But in the center of the plan there's a -- where 17 the gas pumps are located in basically the lower 18 right-hand side of the parking lot, there are a 19 number of arrows that give dimensions to the 20 closest residential, 830 feet to the north, 902 21 feet to the northwest, 748 feet to the west, 963 22 feet to the southwest, 500 feet to the south and 23 859 feet to the southeast. I think you could 24 hardly find a place in Clarksburg that is any 25 further from residential in this one spot. I</p>

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<p>178</p> <p>1 mean, it was put there for a reason. The whole 2 design of Clarksburg Town Center is about the 3 pedestrian experience along the street. That's 4 with the buildings up along the street, and, you 5 know, lots of amenities and urban parks and open 6 spaces. 7 So yes, if that -- if that gas station 8 were placed right on the street, it would have an 9 impact on the residential, but we specifically and 10 intentionally took it off of the street so it 11 would not have an impact on the pedestrian zone 12 and put it in a parking lot that is not intended 13 to be part of the pedestrian experience. And this 14 really shows how we specifically put it where we 15 thought it would have the least impact, not only 16 on the surrounding residences, but the pedestrian 17 system that has already been created in 18 Clarksburg. 19 E, will not, when evaluated in conjunction 20 with existing improved conditional uses in any 21 neighboring residential detached zone, increase 22 the number, intensity or scope of conditional uses 23 sufficient to affect the area adversely, alter the 24 predominant residential nature of the area. A 25 conditional use application that substantially</p>	<p>180</p> <p>1 be served by adequate public facilities. As we 2 previously mentioned, we will be filing a 3 preliminary plan amendment if this were to be 4 approved. 5 A retail center up to 150,000 square feet 6 was originally approved under the original project 7 plan, (indiscernible) land plan and site plan. 8 The most recent amendments to those plans have 9 reduced that down to just over 100,000 square 10 feet. And the previous review of adequate public 11 facilities showed that they were adequate. APF 12 was reviewed at the time of preliminary plan 13 previously, which would, in fact, include the area 14 of the future filling station and no further 15 review is required. Staff of Park and Planning 16 found that public safety, police and fire for the 17 entire Clarksburg Town Center is in excellent 18 condition, and there's a new firehouse recently 19 opened in Clarksburg Town Center. Adequacy of 20 public roads, those are going to be discussed by 21 the traffic engineer later. Water and sewer, once 22 again, the site is served by a complete water and 23 sewer complex that has been constructed for the 24 residential neighborhoods and is already in the 25 ground for the commercial center.</p>
<p>179</p> <p>1 conforms with the recommendations of the master 2 plan does not alter the nature of that area. The 3 nature of the core of the Town Center is that 4 there are no other conditional uses in this 5 neighborhood, and there are no abutting or 6 confronting residential detached houses with this 7 application. Since there are no other conditional 8 uses or special exception in the neighborhood, 9 there would be no overall adverse impact, and 10 there would be no increase in intensity of scope 11 of conditional uses in the neighborhood. 12 F, Will be served adequately by public 13 services and facilities, including schools, 14 police, fire, water, sanitary, sewer, public 15 roads, storm drainage or other public facilities. 16 If an approved adequate public facilities test is 17 current and valid, and the impact of the 18 conditional use is equal or less than what was 19 approved, the new adequate public facilities test 20 is not required. An adequate public facilities 21 test -- oh, it says, If an adequate public 22 facilities test is required, then the following. 23 If a preliminary plan of subdivision is not filed 24 concurrently or required subsequently, the Hearing 25 Examiner must find the proposed development will</p>	<p>181</p> <p>1 BY MR. HARRIS: 2 Q You mentioned earlier a number of 3 mixed-use communities, Columbia -- 4 HEARING EXAMINER SOKONI: Your microphone. 5 MR. HARRIS: I beg your pardon. 6 Q You mentioned earlier a number of 7 mixed-use communities ranging from Columbia many 8 years ago and Montgomery Village to Kentlands and 9 King Farm and more recent ones. Do you consider 10 those communities to be pedestrian friendly and 11 walkable? 12 A Yes, I do. 13 MS. POWELL: Objection; lack of 14 foundation. 15 HEARING EXAMINER SOKONI: Sustained. 16 MR. HARRIS: So I don't understand the 17 objection. Whether those communities are 18 walkable -- 19 MS. POWELL: There's no foundation. 20 There's no foundation for this testimony. 21 HEARING EXAMINER SOKONI: What she's 22 saying is you're -- my understanding of the 23 objection is that you're reviewing other 24 communities, not the particular one we're 25 discussing here.</p>

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<p>182</p> <p>1 MR. HARRIS: During the arguments earlier</p> <p>2 today, opposition said that other communities do</p> <p>3 not have gas stations and that they -- and I'm</p> <p>4 trying to explain that that is a misunderstanding.</p> <p>5 HEARING EXAMINER SOKONI: That is relevant</p> <p>6 if --</p> <p>7 MS. POWELL: Well, but that was not the</p> <p>8 point. The point went to the fact that there are</p> <p>9 undeniably other communities that do not have gas</p> <p>10 stations attached to their grocery stores.</p> <p>11 MR. HARRIS: But they have gas stations.</p> <p>12 MS. POWELL: Well, no.</p> <p>13 MR. HARRIS: Columbia does -- Columbia</p> <p>14 have gas stations?</p> <p>15 MS. POWELL: That's not the Town Center,</p> <p>16 and it's not subject to a compliance plan.</p> <p>17 HEARING EXAMINER SOKONI: I see the</p> <p>18 relevance that -- you know, there's a context</p> <p>19 being in terms of walkability -- you can proceed.</p> <p>20 MS. POWELL: There's also no basis for his</p> <p>21 testimony. I don't know why he knows this.</p> <p>22 MR. HARRIS: Why I know that?</p> <p>23 MS. POWELL: No, not Mr. Harris. He's not</p> <p>24 supposed to be testifying. I'm talking about the</p> <p>25 witness.</p>	<p>184</p> <p>1 A Absolutely.</p> <p>2 Q And are you aware of whether those</p> <p>3 projects have gasoline stations in them?</p> <p>4 A Yes, I am.</p> <p>5 Q Okay. And do you believe that those</p> <p>6 communities are walkable communities?</p> <p>7 A Absolutely.</p> <p>8 Q And do you believe that the gas stations</p> <p>9 preclude or prevent that walkability?</p> <p>10 A They do not.</p> <p>11 Q In terms of the retail here, you mentioned</p> <p>12 the grocery and I think -- did you say how many</p> <p>13 parking spaces are there?</p> <p>14 A For the retail core is 558.</p> <p>15 Q And do you believe that the parking for</p> <p>16 558 cars adversely affects the walkability of</p> <p>17 Clarksburg Town Center?</p> <p>18 A It does not.</p> <p>19 Q And if they had included the additional</p> <p>20 office space -- I forget what amount of office</p> <p>21 space you said. Was it 200,000 square feet?</p> <p>22 A I don't remember. I'd have to go back and</p> <p>23 look at the plan.</p> <p>24 Q Was there a substantial amount of office</p> <p>25 space planned for?</p>
<p>183</p> <p>1 HEARING EXAMINER SOKONI: So Ms. Powell is</p> <p>2 raising an issue for foundation. Are you</p> <p>3 familiar --</p> <p>4 I guess you need to set the foundation for</p> <p>5 familiarity with those other communities.</p> <p>6 BY MR. HARRIS:</p> <p>7 Q How long have you been working in the land</p> <p>8 planning field?</p> <p>9 A Almost 40 years.</p> <p>10 Q Have you worked on other planned community</p> <p>11 projects?</p> <p>12 A Yes, I have.</p> <p>13 Q And in that process, have you studied</p> <p>14 other planned communities on which you may not</p> <p>15 have worked?</p> <p>16 A Yes.</p> <p>17 Q And have you used those other planned</p> <p>18 communities as guidance in terms of your planning</p> <p>19 for the projects on which you are working?</p> <p>20 A Yes.</p> <p>21 Q And is Columbia among them?</p> <p>22 A Yes, it is. And I've, in fact, worked on</p> <p>23 some of the village centers in Columbia.</p> <p>24 Q And have you used projects such as the</p> <p>25 Kentlands as models for designing projects?</p>	<p>185</p> <p>1 A Yes, there were two buildings.</p> <p>2 Q Okay. And would they have generated a</p> <p>3 large amount of automobile traffic?</p> <p>4 MS. POWELL: I'm going to object again.</p> <p>5 He's not a traffic engineer.</p> <p>6 MR. HARRIS: You don't need to be a</p> <p>7 traffic engineer to know whether an office</p> <p>8 building generates a large amount of traffic.</p> <p>9 Q Can you answer the question?</p> <p>10 A Yes.</p> <p>11 Q They did -- they would?</p> <p>12 A Yes, they do create traffic.</p> <p>13 Q And those buildings have been eliminated I</p> <p>14 think you said, right?</p> <p>15 A Yes, they have.</p> <p>16 Q So that means there's been a reduction in</p> <p>17 the automobile traffic planned here?</p> <p>18 A That is my understanding. Yes.</p> <p>19 Q And that would be true even if the gas</p> <p>20 station, the gas pumps are approved?</p> <p>21 A Correct.</p> <p>22 Q Is it your -- do you have an opinion on</p> <p>23 whether this --</p> <p>24 Let me back up. Are you familiar with the</p> <p>25 plan of compliance?</p>

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<p>186</p> <p>1 A I am.</p> <p>2 Q And do you have an opinion as to whether</p> <p>3 the approval of this gas station, these gas pumps,</p> <p>4 is consistent with the plan of compliance?</p> <p>5 A Yes. I think it is.</p> <p>6 MR. HARRIS: We have no further questions.</p> <p>7 MS. POWELL: I'm going to object because</p> <p>8 you need to provide a basis for that --</p> <p>9 HEARING EXAMINER SOKONI: I think it's a</p> <p>10 legitimate question. What is the basis for that</p> <p>11 conclusion?</p> <p>12 Q Does the plan of compliance, Exhibit --</p> <p>13 let me show you Exhibit 54 I think it is. No, not</p> <p>14 54. I beg your pardon.</p> <p>15 HEARING EXAMINER SOKONI: I mean, I think</p> <p>16 you've said you think it's consistent with the</p> <p>17 plan of compliance, but it would be helpful to</p> <p>18 know why you think that.</p> <p>19 THE WITNESS: All right. So I need two</p> <p>20 exhibits brought up, and we're going to split --</p> <p>21 we talked about split screening earlier. We can</p> <p>22 do it now. Let's see. The plan of compliance --</p> <p>23 MR. HARRIS: You want it? It's Exhibit 54</p> <p>24 or 45.</p> <p>25 THE WITNESS: No. The actual concept plan</p>	<p>188</p> <p>1 HEARING EXAMINER SOKONI: If you could</p> <p>2 kindly, just for the record, explain what exhibits</p> <p>3 have been superimposed on the screen.</p> <p>4 THE WITNESS: So the exhibit on the left</p> <p>5 is Exhibit 44, page seven. Correct. And we've</p> <p>6 zoomed in to the retail core area.</p> <p>7 The exhibit on the right is Exhibit 59,</p> <p>8 which is a rendering of Clarksburg Town Center as</p> <p>9 a whole, and again we've zoomed in to the retail</p> <p>10 core area.</p> <p>11 HEARING EXAMINER SOKONI: Thank you.</p> <p>12 THE WITNESS: So I'd like to -- if you</p> <p>13 look at the plan of compliance --</p> <p>14 HEARING EXAMINER SOKONI: And, Mr. Foster,</p> <p>15 you're welcome to -- if it's helpful, you're</p> <p>16 welcome to actually walk up to the screen.</p> <p>17 THE WITNESS: It's hard not to be able to</p> <p>18 point at things.</p> <p>19 HEARING EXAMINER SOKONI: Yes, please.</p> <p>20 Please.</p> <p>21 THE WITNESS: Okay. So running left to</p> <p>22 right on the screen, this is Clarksburg Square</p> <p>23 Road. That's the land bridge. This was civic</p> <p>24 uses, open space. This was the retail core. That</p> <p>25 same road exists on the proposed end build plan</p>
<p>187</p> <p>1 itself.</p> <p>2 MR. HARRIS: The concept plans, okay.</p> <p>3 THE WITNESS: Not the plan of compliance.</p> <p>4 It's Exhibit 44, and it's going to be page -- I</p> <p>5 don't know what it is. I think -- let's see.</p> <p>6 This is a multipage document. Can you scroll</p> <p>7 through that a little bit? Oh, that -- go back</p> <p>8 one. That plan will work great.</p> <p>9 And then I need the rendering that we had</p> <p>10 in the record, which was --</p> <p>11 HEARING EXAMINER SOKONI: What page of the</p> <p>12 PDF is this?</p> <p>13 THE TECHNICIAN: Page seven.</p> <p>14 HEARING EXAMINER SOKONI: Page seven of</p> <p>15 the PDF. All right.</p> <p>16 THE WITNESS: 59.</p> <p>17 THE TECHNICIAN: Exhibit 59?</p> <p>18 THE WITNESS: Yes. All right. So either</p> <p>19 one of those two. Can you scroll in to the, or</p> <p>20 zoom in to the, yeah, the Town Center area.</p> <p>21 Great. Right, right there. Okay.</p> <p>22 HEARING EXAMINER SOKONI: So just so</p> <p>23 it's -- I'll be going back to read the transcript,</p> <p>24 so I would like to be able to follow where we are.</p> <p>25 THE WITNESS: Yes.</p>	<p>189</p> <p>1 and the land bridge exists. The retail -- the</p> <p>2 residential up here matches almost exactly.</p> <p>3 You'll notice there was a single main road, which</p> <p>4 was Public House, that came down, connected</p> <p>5 Clarksburg Square Road to Stringtown Road on plan</p> <p>6 of compliance. And lining that were resident -- I</p> <p>7 mean retail uses lining that street there. Those</p> <p>8 uses were going to create that active streetscape</p> <p>9 for this pedestrian core. So you notice all of</p> <p>10 these buildings fronting the street activating</p> <p>11 that streetscape. And then internal to all of</p> <p>12 these were the parking. Back then they were</p> <p>13 parking garages, and I'll go into that a little</p> <p>14 bit. And then there were around the perimeter</p> <p>15 what were called liner townhouses.</p> <p>16 Okay. As the plan has evolved, that road</p> <p>17 is still there. There's still the same road</p> <p>18 alignment. The same road plan is there. The</p> <p>19 grocery store is almost in the exact same</p> <p>20 location. Retail lines the street just like it</p> <p>21 did before. All of the residential, these liner</p> <p>22 townhouses, that's not something that we found out</p> <p>23 anybody built. We couldn't find anybody to build</p> <p>24 liner townhouses. The residential now has been</p> <p>25 incorporated into two multifamily buildings. They</p>

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<p>190</p> <p>1 still create the same streetscape, the same 2 pedestrian activity. Here the urban plaza was on 3 the right side of the street. Here it's now moved 4 to the left side. So there's a lot of 5 similarities between the plan of compliance and 6 today's plan. 7 MR. HARRIS: Excuse me. I'm sorry. 8 BY MR. HARRIS: 9 Q When you refer to today's plan, has that 10 plan been approved by the Planning Board, the plan 11 on the right? 12 A Yes, it has. 13 MR. HARRIS: Okay. 14 THE WITNESS: And one of the key 15 components to the plan of compliance was that, 16 instead of a grocery store with parking right up 17 on the street, big parking lots like you see in 18 normal, you know, suburban areas, all the parking 19 was to be contained inside not fronting the 20 street, but internal to the development. That is 21 still the case. It's internal to the development. 22 And where better to put a vehicular use like a gas 23 station where it should be, where the vehicular 24 uses are contained off of the street and into the 25 vehicular zone. And that's really where -- well,</p>	<p>192</p> <p>1 to go. So now the big discussion is what happens 2 to this space, does it turn to green again. 3 That's to be decided. 4 But I think the overall elements of this 5 plan, the plan of compliance are still here, and 6 that's why I think the plan that exists today 7 conforms to the plan of compliance. 8 MR. HARRIS: I think that may be all I 9 have. I think that's it. 10 HEARING EXAMINER SOKONI: So there will be 11 an opportunity for cross-examination by the 12 opposing side. I want to just check the 13 temperature in the room about -- I know we're now 14 plowing through lunch. It's about 12:47. Did 15 people want to break for lunch? Do you want to -- 16 or should we -- we can do cross-examination and 17 then take a lunch break. I would like us to go as 18 much as we can in the interest of time. 19 MS. PRESLEY: It also makes sense 20 regarding keeping the context with what's being 21 stated. 22 HEARING EXAMINER SOKONI: Correct. So are 23 you comfortable with -- 24 MR. HARRIS: Yes. 25 HEARING EXAMINER SOKONI: Okay. Let's at</p>
<p>191</p> <p>1 you know -- you know, that's just where a 2 vehicular use would want to be in these plans. 3 Now, the parking garages went away mostly 4 because the Zoning Code changed and we no longer 5 required the massive number of parking spaces that 6 were required back then. The old Zoning Code had 7 a very antiquated parking requirement, and parking 8 garages were the only way to fit. We have all of 9 these uses that work today under today's zoning 10 standard, which has a much reduced parking 11 standard, which is why the garages are not 12 required. 13 But my whole point of this is to show how 14 similar the plans are, the plan approved by the 15 Planning Board and the plan of compliance. Yes, 16 things change, but that's because this was not an 17 engineered plan. It was a concept. The realities 18 are what we ended up having to build or are 19 proposing to build, something that you can 20 actually build still holding to the premise of all 21 of these spaces being pedestrian. 22 You know, the space across the street from 23 the Town Center was supposed to be civic and open 24 space. Well, it's still there. We have an 25 amphitheater. That's where the library was going</p>	<p>193</p> <p>1 least get through cross-examination with 2 Mr. Foster. 3 CROSS-EXAMINATION BY THE OPPOSITION 4 BY MS. PRESLEY: 5 Q Mr. Foster, would you mind going back up 6 to the plan again so that we can have a 7 comparison? Could you please point out on the 8 concept plan, which you have acknowledged is part 9 of the compliance program, the uses that you 10 detailed at the bottom, the ones that are actually 11 facing Stringtown Road? 12 A Facing Stringtown? 13 Q Uh-huh. The whole plan. 14 A Stringtown's down here. 15 Q Right. But what is visible from 16 Stringtown Road on the compliance program? I 17 remember because I was there when we did them. 18 But see the yellow? I think you call them 19 liner -- 20 A What's visible is a stream valley. 21 Q I'm talking about the -- specifically, 22 what are the buildings that are between the 23 grocery store and what's now Saint Clair Road, 24 those yellow buildings? 25 A Residential.</p>

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<p>194</p> <p>1 Q Okay, residential. And so that's removed. 2 And what's on the current plan today right there 3 where the residential was? 4 HEARING EXAMINER SOKONI: Ms. Presley, 5 just a reminder, on cross-examination you can 6 question Mr. Foster about anything he testified 7 about. You can question him -- 8 MS. PRESLEY: Okay. 9 HEARING EXAMINER SOKONI: -- about his 10 testimony. 11 MS. PRESLEY: Okay. I will go back then 12 and start with the parking. 13 BY MS. PRESLEY: 14 Q You mentioned that now people -- because 15 the transit didn't come, everybody's sort of 16 getting on 270, right? Can you tell me what, if 17 any, analysis you have, or any numbers showing how 18 many people are actually -- 19 A Well, that's not what I was saying. 20 Q -- home or not at home? 21 A What I said was, in context of the master 22 plan, wanting this to be a transit-oriented 23 community that that has not occurred and people 24 still have to drive to work. 25 Q I just --</p>	<p>196</p> <p>1 understand if there was a direct and connected gas 2 station to the grocer where you're talking about. 3 A As far as I know, there are no gas 4 stations in the village centers that I've worked 5 in that were part of the grocery store. 6 Q Okay. The other question I had was you 7 mentioned that the garages were removed because 8 there was no -- because of a zoning change? 9 A No. I said the garages were not needed 10 now. 11 Q Okay. 12 A There was obviously a lot of other 13 discussion. 14 Q I think you said they were eliminated 15 because they weren't needed. 16 A Well, they're not needed now because 17 parking doesn't require them. 18 Q I understand they're not needed now, but 19 that's not -- I wanted to make sure you weren't 20 stating that's why they were removed. 21 A No. 22 Q Okay. 23 A I understand that's why they're not there 24 today. 25 Q Okay. Also, you stated that, you know, a</p>
<p>195</p> <p>1 A -- bus service, but there is no transit 2 way that was planned. It might become bus rapid 3 transit, but that's even decades away at this 4 point. 5 Q So you don't have any numbers as to how 6 many people, like since COVID, are actually 7 staying at home, working from home, not -- 8 A I don't. 9 Q -- actually getting on the -- 10 Okay. Thank you. Regarding the other 11 communities that you mentioned -- and I'm very 12 familiar with Columbia too. Can you tell me since 13 there were -- you mentioned some of the village 14 centers have gas stations. 15 A No. All of the village centers have gas 16 stations. 17 Q Can you tell me how any of those layouts 18 compared to this? I mean, were you talking about 19 a gas station that is directly related to a 20 grocery store? Do all the grocery stores have a 21 gas station? 22 A Well, so in Colombia -- are you 23 specifically asking about Colombia, or -- 24 Q I'm specifically asking about Colombia, 25 and then in that question I just want to</p>	<p>197</p> <p>1 lot of people you said are getting on 270 and 2 needing gas. Are you suggesting that without this 3 they can't get gas in the community? 4 A No, I'm not suggesting that. 5 Q Okay. And then you stated that the master 6 plan -- that it fulfills the master plan, and one 7 of the things you mentioned was the grocery store. 8 To your knowledge, was there other references 9 within the master plan about why the grocery store 10 was important for the Town Center? 11 A I think I read that. 12 Q I mean in terms of phasing. Was the Town 13 Center not required to go first in terms of retail 14 development in the phasing? 15 A That I don't know. 16 MS. PRESLEY: Okay. I would -- I'm not 17 testifying now, but I wanted to know if you had 18 knowledge of that. 19 For now that's all I have. I might have 20 more. I have yet to go through my notes. Thanks. 21 HEARING EXAMINER SOKONI: Thank you. 22 CROSS-EXAMINATION BY COUNSEL FOR THE OPPOSITION 23 BY MS. POWELL: 24 Q Mr. Foster, were you asked to review this 25 in the context of the compliance plan when you</p>

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32 (198 to 201)

<p>198</p> <p>1 were retained to work on this project?</p> <p>2 A 30 years ago?</p> <p>3 Q No. Today.</p> <p>4 A Not specifically, no.</p> <p>5 Q And I believe you testified that there was</p> <p>6 an amphitheater. There is none; isn't there?</p> <p>7 A No. We've built one.</p> <p>8 Q Hmm. That's interesting.</p> <p>9 A It's at the corner Public House and</p> <p>10 Clarksburg Square Road.</p> <p>11 Q Was that a relocated amphitheater?</p> <p>12 A No.</p> <p>13 Q Okay. But we can agree that there was no</p> <p>14 amphitheater that was required at Seneca</p> <p>15 (phonetic) Square?</p> <p>16 A Based on -- was not required where?</p> <p>17 Q At Seneca Square.</p> <p>18 MS. PRESLEY: Sinequa.</p> <p>19 A Sequoia?</p> <p>20 Q Sorry for my pronunciation.</p> <p>21 A I think there probably was one in the plan</p> <p>22 of compliance.</p> <p>23 Q But it's not there now?</p> <p>24 A No.</p> <p>25 Q And since you weren't asked to review this</p>	<p>200</p> <p>1 consistent with the plan of compliance was his</p> <p>2 testimony.</p> <p>3 MS. PRESLEY: What Mrs. Powell is asking I</p> <p>4 would also like to know and that is they're not</p> <p>5 the same thing. It's --</p> <p>6 HEARING EXAMINER SOKONI: Ms. Presley,</p> <p>7 you've had your opportunity for cross-examination.</p> <p>8 Ms. Powell is doing cross-examination. The</p> <p>9 witness has answered the question. He was not</p> <p>10 engaged specifically to --</p> <p>11 Am I understanding correctly? You were</p> <p>12 not specifically engaged to review it in the</p> <p>13 context of the plan of compliance?</p> <p>14 THE WITNESS: Correct.</p> <p>15 BY MS. POWELL:</p> <p>16 Q And when you appeared before the Planning</p> <p>17 Commission, or -- excuse me -- before the Planning</p> <p>18 Board, you did not provide any testimony in</p> <p>19 support of any comparison with its fulfillment of</p> <p>20 the goals set forth in the plan of compliance?</p> <p>21 A Was that a question?</p> <p>22 Q Yeah.</p> <p>23 A I don't -- could you restate it? I didn't</p> <p>24 understand what you were asking.</p> <p>25 Q When this application was presented to the</p>
<p>199</p> <p>1 in the context of the compliance plan, you didn't</p> <p>2 undertake any investigation to determine how this</p> <p>3 furthered the goal of the compliance plan; did</p> <p>4 you?</p> <p>5 MR. HARRIS: Objection. He answered that</p> <p>6 it was consistent with the plan of compliance.</p> <p>7 MS. POWELL: Wait a minute. He just</p> <p>8 testified he was not asked to review this in the</p> <p>9 context of the plan of compliance, and so now</p> <p>10 we've got two different versions.</p> <p>11 MR. HARRIS: No. I asked him whether it</p> <p>12 was consistent with the plan of compliance. He</p> <p>13 said so. Whether he had been asked to review that</p> <p>14 a year ago or 10 years ago is irrelevant.</p> <p>15 MS. POWELL: Well, I didn't ask him that</p> <p>16 question. I said in the context of the current</p> <p>17 investigation, the current application.</p> <p>18 MR. HARRIS: That's what we're talking</p> <p>19 about is the current application.</p> <p>20 MS. POWELL: And his testimony was no, he</p> <p>21 was not asked to do that.</p> <p>22 MR. HARRIS: His testimony was that it is</p> <p>23 consistent with the plan of compliance.</p> <p>24 MS. POWELL: That's not my question.</p> <p>25 MR. HARRIS: The current application is</p>	<p>201</p> <p>1 Board, you did not testify in any way that this</p> <p>2 comported with the plan of compliance; is that</p> <p>3 fair to say?</p> <p>4 A I did not.</p> <p>5 Q Okay. And the Board didn't ask you any</p> <p>6 questions about whether or not it comported with</p> <p>7 the plan of compliance?</p> <p>8 A Correct.</p> <p>9 Q And we can agree that the gas station was</p> <p>10 not included in the plan of compliance?</p> <p>11 A Specifically, no.</p> <p>12 Q Can you show us on that map where the</p> <p>13 apartment buildings are going in relation to the</p> <p>14 proposed gas station model?</p> <p>15 A Gas station's here. Apartment buildings</p> <p>16 are here.</p> <p>17 Q And we can agree that the traffic from</p> <p>18 apartment buildings is going to be significant,</p> <p>19 correct?</p> <p>20 MR. HARRIS: Objection.</p> <p>21 A I'm not a traffic engineer.</p> <p>22 MS. POWELL: Well, he was allowed to</p> <p>23 testify before.</p> <p>24 MR. HARRIS: You questioned whether he</p> <p>25 could say that the office was going to generate</p>

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<p>202</p> <p>1 significant traffic. We agreed that he said it 2 would generate traffic, and the same is true for 3 the residential. No one's denying that. 4 MS. POWELL: I'm allowed to present my -- 5 do my cross-examination, Madam Sokoni? 6 HEARING EXAMINER SOKONI: Yes, you may. 7 You may continue. 8 Q So just as an office building would create 9 traffic, so, too, do apartment buildings, correct? 10 A Correct. 11 Q Okay. And how big are these apartment 12 buildings? 13 A How? 14 Q How many units? 15 A 190. 16 Q In both? 17 A Total. 18 Q Total, okay. And I got a little confused 19 about your testimony with respect to the impact of 20 COVID and people no longer driving to work with 21 your testimony saying, well, people still have to 22 drive to work. Is it fair to say you did not do 23 any analysis and you are not qualified to do any 24 analysis with respect to those statements? 25 A I did not do any analysis.</p>	<p>204</p> <p>1 subject to a plan of compliance; are they? 2 A No idea. 3 MS. POWELL: Okay. Thank you. 4 HEARING EXAMINER SOKONI: Do we have 5 anyone on the Zoom call who wishes -- do we have 6 any parties on the Zoom who wish to cross-examine 7 Mr. Foster? I hear none. 8 Zoom is working, right? 9 THE TECHNICIAN: Yeah, it's working. 10 MS. IALACCI: Hello. This is Tabatha 11 Ialacci. One moment. I'm pulling up my video. 12 Okay. 13 THE TECHNICIAN: One second, ma'am. 14 You may proceed. 15 MS. IALACCI: Hello. This is Tabatha 16 Ialacci speaking. I'm the last individual -- 17 HEARING EXAMINER SOKONI: Are you able to 18 kindly put on your video? To testify, we need to 19 be able to see you. 20 MS. IALACCI: Certainly. I think I have 21 it on. 22 THE TECHNICIAN: No. 23 HEARING EXAMINER SOKONI: No. 24 MS. IALACCI: All right. One moment. 25 Okay?</p>
<p>203</p> <p>1 Q Is it fair to say that the gasoline 2 station does not enhance pedestrian walkability? 3 A It depends on where it is. 4 Q Well, the entire community was designed to 5 be walkable; was it not? 6 A Correct. 7 Q Okay. So how does the gasoline station 8 promote walkability, or does it? 9 A It doesn't negatively affect the 10 walkability. 11 Q So your entire analysis is whether or 12 not -- not whether it furthers the goal of the 13 plan of compliance, but simply that, well, it's -- 14 A No. 15 Q -- it doesn't matter? 16 A No. You're asking whether a car use 17 enhances a pedestrian use. 18 Q Right. 19 A And the two -- that's two different 20 things. 21 Q That's correct. 22 A That's why we have the car uses where the 23 car uses are. 24 Q And the other communities that you 25 testified about, it's fair to say that they're not</p>	<p>205</p> <p>1 HEARING EXAMINER SOKONI: Yes. Thank you. 2 MS. IALACCI: This is Tabatha Ialacci. 3 The last individual -- 4 HEARING EXAMINER SOKONI: Please could 5 you -- do we have the name? The last name was -- 6 THE REPORTER: I have it. 7 HEARING EXAMINER SOKONI: Okay. 8 MS. IALACCI: Yeah. 9 HEARING EXAMINER SOKONI: Thank you very 10 much. 11 CROSS-EXAMINATION 12 BY MS. IALACCI: 13 Q The last individual just had inquired with 14 you, sir, in regards to the gas station enhancing 15 the walkability of the Town Center. Would you say 16 that a road in the middle -- a road increases the 17 walkability of the Town Center? 18 A Again, that's a very specific detail. I 19 mean, a road in the context of what? 20 Q That vehicles have to travel down. It 21 does not increase, enhance the walkability of the 22 Town Center, though, correct? 23 A Pedestrian walkability with vehicles on 24 them there -- we design things specifically to 25 make -- a street has cars on it.</p>

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34 (206 to 209)

<p>206</p> <p>1 Q Correct.</p> <p>2 A If it doesn't have cars on it, then it's</p> <p>3 not a street.</p> <p>4 Q So a road doesn't necessarily increase the</p> <p>5 walkability of a neighborhood, but it's a vital</p> <p>6 necessity of the neighborhood. And you take</p> <p>7 elements to ensure that pedestrians can safely</p> <p>8 traverse it, and in this case --</p> <p>9 MS. POWELL: I'm going to object. This is</p> <p>10 not a question. She's testifying.</p> <p>11 THE WITNESS: I'm not sure what --</p> <p>12 HEARING EXAMINER SOKONI: Do you have a</p> <p>13 question about something specifically that</p> <p>14 Mr. Foster testified about?</p> <p>15 MS. IALACCI: Just the questioning of the</p> <p>16 last individual was alluding to the fact that the</p> <p>17 gas station being in the location it is decreases</p> <p>18 the walkability.</p> <p>19 MS. POWELL: That actually is not what the</p> <p>20 question was, and my questions were questions.</p> <p>21 They weren't testimony. But that was not my</p> <p>22 question.</p> <p>23 HEARING EXAMINER SOKONI: It sounds like</p> <p>24 you're questioning something that the last, you</p> <p>25 know -- that Ms. Powell, a question she raised.</p>	<p>208</p> <p>1 this particular witness has the expertise to even</p> <p>2 talk about walking across a car lot.</p> <p>3 HEARING EXAMINER SOKONI: The question has</p> <p>4 been asked. If he doesn't know the answer, he</p> <p>5 will let us know.</p> <p>6 THE WITNESS: I don't know.</p> <p>7 MR. FEATHER: Thank you.</p> <p>8 HEARING EXAMINER SOKONI: I'm not hearing</p> <p>9 any further requests for cross-examination of</p> <p>10 Mr. Foster, so he may stand down.</p> <p>11 MR. HARRIS: May I have a couple of</p> <p>12 redirect questions, please?</p> <p>13 HEARING EXAMINER SOKONI: Sure.</p> <p>14 MR. HARRIS: Thank you.</p> <p>15 Can you pull up Exhibit 18?</p> <p>16 REDIRECT EXAMINATION BY COUNSEL FOR THE APPLICANT</p> <p>17 BY MR. HARRIS:</p> <p>18 Q Mr. Foster, can you describe what Exhibit</p> <p>19 18 is?</p> <p>20 A It's a circulation plan created by my</p> <p>21 office.</p> <p>22 Q And does it show a pedestrian system?</p> <p>23 A It shows private sidewalks, public</p> <p>24 sidewalks, trails, all pedestrian systems within</p> <p>25 Clarksburg Town Center.</p>
<p>207</p> <p>1 If you could just focus on if you have any</p> <p>2 questions with regard to anything Mr. Foster</p> <p>3 testified, that would be helpful.</p> <p>4 BY MS. IALACCI:</p> <p>5 Q Okay. Was consideration given to the</p> <p>6 location of the gas station to ensure that the</p> <p>7 walkability of the neighborhood was still</p> <p>8 sustained?</p> <p>9 A Yes, it was.</p> <p>10 MS. IALACCI: Okay. No further questions.</p> <p>11 HEARING EXAMINER SOKONI: Thank you.</p> <p>12 Anyone else on the Zoom who wishes to</p> <p>13 cross-examine Mr. Foster on his testimony?</p> <p>14 MR. FEATHER: Steve Feather.</p> <p>15 HEARING EXAMINER SOKONI: You may. You</p> <p>16 may cross-examine Mr. Foster.</p> <p>17 CROSS-EXAMINATION</p> <p>18 BY MR. FEATHER:</p> <p>19 Q So the proposed new plan for the</p> <p>20 Clarksburg Town Center, would it -- if I had a can</p> <p>21 that I want to fill it up with gas, does it safely</p> <p>22 promote me walking with that can to fill it up at</p> <p>23 the gas station?</p> <p>24 MS. POWELL: I'm going to object. That's</p> <p>25 way beyond the scope, and I don't even know that</p>	<p>209</p> <p>1 Q And does it show those facilities in the</p> <p>2 vicinity of the grocery store and the retail?</p> <p>3 A It does.</p> <p>4 Q And in your opinion, does that show a</p> <p>5 walkable environment?</p> <p>6 A Yes.</p> <p>7 Q Mr. Foster, you were asked whether the</p> <p>8 plan of compliance included a gas station, and I</p> <p>9 believe your answer was no. May I ask you the</p> <p>10 reverse of that, did the plan of compliance</p> <p>11 preclude a gas station?</p> <p>12 A It did not.</p> <p>13 Q Did the plan of compliance recommend</p> <p>14 restaurants, a coffee shop, a gift store or other</p> <p>15 retail uses?</p> <p>16 A Not specifically.</p> <p>17 Q Would it be your opinion that those uses</p> <p>18 are permitted, even though they were not?</p> <p>19 A Yes. They come under retail.</p> <p>20 MR. HARRIS: Thank you.</p> <p>21 MS. POWELL: May I cross on that response?</p> <p>22 HEARING EXAMINER SOKONI: No. That was</p> <p>23 redirect. But --</p> <p>24 MS. POWELL: Actually, it was outside the</p> <p>25 scope of cross, and it's also wrong.</p>

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35 (210 to 213)

<p>210</p> <p>1 HEARING EXAMINER SOKONI: Mr. Foster, I</p> <p>2 have a question for you. You're here as an expert</p> <p>3 witness, and the term walkability has been thrown</p> <p>4 out. So to a layperson like me, how -- what's the</p> <p>5 definition of walkability? What is walkability?</p> <p>6 THE WITNESS: Walkability is two things.</p> <p>7 One is context of distance, so that you have a lot</p> <p>8 of things you want to do within a walkable</p> <p>9 distance, quarter a mile, half a mile, so that you</p> <p>10 have a library you can walk to, you know, a park</p> <p>11 you can walk to, you have retail uses you can walk</p> <p>12 to. So one is that it's in the neighborhood, in</p> <p>13 the area and you would get there easily. So</p> <p>14 that's one component.</p> <p>15 The second component is comfortability,</p> <p>16 how comfortable is the pedestrian walking on the</p> <p>17 street. And so when you're talking about</p> <p>18 walkability, it's about creating that pedestrian</p> <p>19 zone where cars are driving slow. You've got a</p> <p>20 big landscaped buffer between the pedestrian and</p> <p>21 the cars. There's furniture, there's street</p> <p>22 trees, there's activity on the street.</p> <p>23 So it's all of those elements together,</p> <p>24 proximity and then comfort. When you put those</p> <p>25 two together, it creates a walkable, comfortable</p>	<p>212</p> <p>1 MR. HARRIS: Yes. Thank you. Just as a</p> <p>2 prefatory matter, I don't know -- I'm not the tech</p> <p>3 person. These guys are. I want to make sure if</p> <p>4 anybody dropped off the call that they're not in</p> <p>5 the waiting room to get back in now. Okay. Fine.</p> <p>6 Thank you.</p> <p>7 THE TECHNICIAN: Nobody in the queue.</p> <p>8 MR. HARRIS: Thank you. Okay. So next</p> <p>9 witness I'd like to call is Kate Kubit with the</p> <p>10 Applicant. Kate were you sworn in before?</p> <p>11 THE WITNESS: I don't remember.</p> <p>12 MR. HARRIS: Yeah. Okay.</p> <p>13 HEARING EXAMINER SOKONI: If you could</p> <p>14 raise your right hand and I will. Okay. Please</p> <p>15 raise your right hand.</p> <p>16 (The witness was sworn.)</p> <p>17 HEARING EXAMINER SOKONI: Thank you.</p> <p>18 KATE KUBIT,</p> <p>19 having been first duly sworn or affirmed, was</p> <p>20 examined and testified as follows:</p> <p>21 DIRECT EXAMINATION BY COUNSEL FOR THE APPLICANT</p> <p>22 BY MR. HARRIS:</p> <p>23 Q Would you state your name and position for</p> <p>24 the record, please?</p> <p>25 A Yes. My name is Kate Kubit, and I am a</p>
<p>211</p> <p>1 community or street.</p> <p>2 HEARING EXAMINER SOKONI: Thank you.</p> <p>3 That's helpful. I believe at this point</p> <p>4 Mr. Foster has completed his testimony, and so he</p> <p>5 can stand down?</p> <p>6 MR. HARRIS: Yes, that's correct. We have</p> <p>7 other witnesses, obviously.</p> <p>8 HEARING EXAMINER SOKONI: Sure. Of</p> <p>9 course. Of course. Would folks like to break off</p> <p>10 for a short lunch break, or are we ready to</p> <p>11 continue?</p> <p>12 MS. POWELL: I need a bathroom break.</p> <p>13 MR. HARRIS: We're okay to go if others --</p> <p>14 HEARING EXAMINER SOKONI: Why don't we --</p> <p>15 I think, in fairness, it's 1:10. Let's take a</p> <p>16 break. Let's take a lunch break and reconvene at</p> <p>17 1:45.</p> <p>18 MR. HARRIS: 1:45?</p> <p>19 HEARING EXAMINER SOKONI: Yes.</p> <p>20 MR. HARRIS: Thank you.</p> <p>21 (A luncheon recess was taken.)</p> <p>22 HEARING EXAMINER SOKONI: Reconvening for</p> <p>23 the rest of the, you know, continuation of the</p> <p>24 public hearing. So, Mr. Harris, you can call</p> <p>25 your -- you can continue with the presentation.</p>	<p>213</p> <p>1 Vice President with Elm Street Development.</p> <p>2 Q Would you explain a little bit about what</p> <p>3 your role is and has been for Elm Street?</p> <p>4 A Sure. My role at Elm Street is I do a lot</p> <p>5 of project management for development projects.</p> <p>6 And I started Elm Street about 18 years ago and</p> <p>7 that capacity, that's expanded over the years. In</p> <p>8 that role, I have done most of my work in</p> <p>9 Clarksburg, first across the street at a PUD</p> <p>10 called Clarksburg Village and then now in</p> <p>11 Clarksburg Town Center. I do other projects in</p> <p>12 the county, but that is where the bulk of my focus</p> <p>13 has been over the last 18 years.</p> <p>14 Q And just for clarification, CTC Retail and</p> <p>15 Third Try, are they affiliates, I guess, of Elm</p> <p>16 Street, or how's the relationship?</p> <p>17 A Elm Street Development is the name of the</p> <p>18 company. They are -- the ESDC2 is the S corp,</p> <p>19 which runs the overhead of the company, so all of</p> <p>20 the rent, payment of the salaries, all that sort</p> <p>21 of stuff. So that's all Elm Street Development.</p> <p>22 I'm an employee of Elm Street Development. By</p> <p>23 rule in general, in general, most developers, in</p> <p>24 order to minimize risk, take and have separate</p> <p>25 entities for the development projects. So Third</p>

<p style="text-align: right;">214</p> <p>1 Try, LC and CTC Development are both entities 2 created by folks at Elm Street to help limit risk 3 in development projects. 4 Q And are you authorized here to speak on 5 behalf of all of the above entities? 6 A I am. 7 Q Okay. So tell us a little bit about your 8 experience with Clarksburg Town Center. 9 A All right. So Clarksburg Town Center -- 10 let me just look at my notes. I just want to make 11 sure I don't miss anything. So Clarksburg Town 12 Center was a project that we picked -- that we 13 picked up from the previous developer back in 14 2011, and it's been a long-delayed project at the 15 time. As was previously mentioned, over 700 units 16 at the time had been built and occupied. So you 17 had a community with 700 families living in it. 18 And although the project plan was approved back in 19 1995 and development started in the late Nineties 20 or early 2000s, you had 700 families in a 21 community that was unfinished. So at the time 22 when we were asked to get involved in 2011, there 23 was many things that were not complete by the 24 previous developer, and the community felt 25 unfinished. Roads were not topped. Sediment</p>	<p style="text-align: right;">216</p> <p>1 there was a small amendment for some manor homes 2 that were converted from manor homes to townhouses 3 that we were also the lead on. 4 Q The exhibit that we talked about earlier, 5 that matrix -- let me see if I can figure out what 6 exhibit number that was. It's attached to our 7 reply. Exhibit 64C as in cat was that matrix of 8 various development approvals. Do you remember 9 the discussion we had about that? 10 A I do. 11 Q Okay. Did you prepare that exhibit? 12 A I did. 13 Q And did you base it on any particular 14 Planning Board decisions? 15 A I did. The decisions are listed in the 16 far right-hand column that this document was 17 predicated on. 18 Q And does it accurately portray the changes 19 that the Planning Board approved during -- over 20 that period of time? 21 A From my point of view, yes. 22 MS. POWELL: Objection. From her point of 23 view? 24 Q Okay. Does it reflect changes that the 25 Planning Board made?</p>
<p style="text-align: right;">215</p> <p>1 control facilities, which are used during 2 development, were not converted to stormwater 3 management facilities, which are post development. 4 There was not vehicular or pedestrian connections 5 internal to the community that were made. And in 6 general, there was a high level of frustration in 7 the community because other projects in the area 8 were finished, or in the process of finishing and 9 Town Center was not moving forward. 10 Q Are you aware of any approvals, Planning 11 Board approvals that have occurred with respect to 12 Town Center since 2000 -- since you got involved 13 really? 14 A Since we were involved, there was an 15 approval -- There was a couple approvals that were 16 done by -- or there was at least one approval that 17 I'm aware of that was done by Miller and Smith, 18 and that had to address some of their units and 19 I'm not exactly sure of the contents of that. 20 In addition, there are approvals that we 21 were directly involved in. There was an approval 22 in 2015, which amended the 2008 plan, which was a 23 site plan that came out of the plan of compliance. 24 We amended that plan in 2008. That plan was 25 amended again in 2024. And in addition in 2022</p>	<p style="text-align: right;">217</p> <p>1 A Sure. 2 Q And are those changes in some cases 3 inconsistent with specific provisions that had 4 previously been included in the plan of 5 compliance? 6 A Yes. 7 Q Let's move forward since 2012, you know, 8 and the retail plan. Can you tell us a little bit 9 about what's been going on since then? 10 A Sure. So in late -- very late 2011, we 11 bought the project from Newland. And since 2012 12 we have worked, and I've spent a good portion of 13 my professional life literally working thousands 14 of hours with stakeholders in the community. So 15 the community itself, and then other stakeholders, 16 Park and Planning, Department of Transportation, 17 the Parks Department, Department of Libraries, 18 Clarksburg Historic Society, the presence of the 19 Clarksburg United Methodist Church. And we had 20 three main goals, because at the time when we 21 picked up the project in 2012, the project was 22 stagnant. There was not anything happening, and, 23 as I mentioned earlier, people were frustrated. 24 So we had three main goals. We wanted to fulfill 25 the vision of the master plan, we wanted to make</p>

<p>218</p> <p>1 the plan financially feasible and we wanted to get 2 the plan built. 3 And so starting in 2012, we had several 4 meetings with the community where we invited 5 everybody in the -- everybody in the community to 6 these meetings. And I count -- I've counted over 7 two dozen of these meetings where we invited the 8 entire community. And the purpose of these 9 meetings were to figure out a path forward for 10 Clarksburg Town Center, which had been stagnant 11 for so many years prior. These meetings were 12 extremely well attended. People were engaged, and 13 we brainstormed, exchanged ideas and created just 14 working collaborations so that way the project 15 could move forward. 16 As the result of our efforts and some of 17 the things we talked about previously, we did 18 amend the 2008 and 2009 development plans that 19 were constraining the development in the 20 community. 21 And since then we got a site plan 22 amendment done that was approved in 2015. And 23 that amendment allowed the following things in the 24 community to happen, which were not happening 25 prior. We built two public parks and dedicated 66</p>	<p>220</p> <p>1 the community are not part of the test for a 2 conditional use application. 3 MR. HARRIS: I withdraw the question. 4 Q Let's talk about the retail core and what 5 your effort has been in that respect. 6 A So since we got our -- since we started in 7 the community in 2012, we've set expectations that 8 in the master -- as acknowledged in the master 9 plan, that a grocery-anchored retail core is 10 integral to the success of this Clarksburg Town 11 Center retail core. No grocery store, there's no 12 retail core because there's not -- you need the 13 grocery store to pull in the traffic. 14 And so once we got our approval in 2015, 15 we started talking with grocers, and we've had 16 several conversations with several grocers. And, 17 you know, the feedback that we got is the 18 population at first was not -- there were not 19 enough rooftops out here to support an additional 20 grocery store, and it's not the best grocery store 21 location. The other feedback that we got was 22 there was a lot more competition that was 23 envisioned in the 1994 master plan that just got 24 exacerbated since the pandemic with grocery 25 delivery becoming more commonplace. So we talked</p>
<p>219</p> <p>1 acres of land to the Parks Department. We built 2 integral connections within the community, both 3 vehicular and pedestrian, including the land 4 bridge which connects the east side of the 5 community, which was partially built, with the 6 west side of the community, which was partially 7 built. And we built many community amenities, 8 including the clubhouse addition, the amphitheater 9 that Mr. Harris had talked about earlier. We 10 built the Greenway Trail along Overlook Park 11 Drive. We were the participant in the 12 construction of two master plan roadways in the 13 Clarksburg community that were not built. We 14 built approximately 240 homes. We collaborated 15 with the Clarksburg Historic Society on the Clark 16 Memorial. We dedicate -- we developed and 17 dedicated the library parcel and parking lot, 18 provided a schematic design of a library building 19 to the Library Department and to the community. 20 And we had -- we built some other amenities as 21 well. 22 Q What reaction have you gotten from the 23 community for those efforts? 24 MS. POWELL: I'm going to object that the 25 relevance of this testimony is not -- reactions of</p>	<p>221</p> <p>1 to several grocers, and finally in 2024 we were 2 able to sign a purchase agreement with Weis -- 3 it's an actual agreement. It's not a letter of 4 intent -- to buy the grocery store parcel and 5 build a grocery store in Clarksburg Town Center. 6 Weis has a terrific track record of success, and 7 they're definitely committed to this community. 8 Q In your discussions with them, has the 9 issue of gas pumps come up, and in what degree? 10 A Gas pumps were a big part of our 11 conversations, and have been. It's been a big 12 part of our planning effort. There's a lot of 13 coordination that we have to do with the the 14 grocery store. And so, initially, when first -- 15 when the conversation of gas pumps first came up, 16 the initial thought is, where can we locate these 17 if we needed -- if we need them, so that it 18 doesn't detract from the pedestrian experience 19 that we worked so hard to design in Clarksburg 20 Town Center. And so we identified the location 21 that we're putting forth today. 22 And the second, then the other part of 23 that conversation is Weis made it clear, and it's 24 a contractual obligation -- 25 MS. POWELL: I'm going to object.</p>

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38 (222 to 225)

<p>222</p> <p>1 A -- precedent to closing --</p> <p>2 MS. POWELL: Objection. We were precluded</p> <p>3 from looking at the contract, which I understand,</p> <p>4 but the testimony should be restricted to what</p> <p>5 Ms. Kubit knows, not what other people have said.</p> <p>6 And if she's going to refer to the contract, it</p> <p>7 should have been produced.</p> <p>8 HEARING EXAMINER SOKONI: Response?</p> <p>9 MR. HARRIS: We agreed in the discussion</p> <p>10 on Tuesday that Ms. Kubit would testify as to the</p> <p>11 requirements of that purchase and sale agreement</p> <p>12 with respect to the gas. That's what she's trying</p> <p>13 to do.</p> <p>14 MS. POWELL: There was no agreement. You</p> <p>15 were there. I mean, he said -- he proffered what</p> <p>16 she would testify to, but that doesn't make it</p> <p>17 admissible and it doesn't mean that there was any</p> <p>18 agreement with respect to that.</p> <p>19 HEARING EXAMINER SOKONI: Ms. Kubit is</p> <p>20 a -- she's an employee of the company, and to the</p> <p>21 extent --</p> <p>22 MS. POWELL: She's an employee of Elm</p> <p>23 Street.</p> <p>24 HEARING EXAMINER SOKONI: Of the</p> <p>25 developer.</p>	<p>224</p> <p>1 A Yes.</p> <p>2 MS. POWELL: I would like to just have a</p> <p>3 continuing objection here with respect to any</p> <p>4 discussion regarding what's in the contract.</p> <p>5 MR. HARRIS: The opposition is doubting</p> <p>6 whether that's an obligation. Ms. Kubit has</p> <p>7 firsthand knowledge. She negotiated the contract.</p> <p>8 She is testifying that that is a requirement. I</p> <p>9 don't understand why that's irrelevant.</p> <p>10 MS. POWELL: I didn't say it was</p> <p>11 irrelevant. I said she doesn't have the</p> <p>12 foundation for --</p> <p>13 HEARING EXAMINER SOKONI: So let's stay</p> <p>14 away from whether it was a requirement or not.</p> <p>15 Was there a contract -- there's a contract for</p> <p>16 them to do this with a gas station?</p> <p>17 MR. HARRIS: Yeah, that's what she's</p> <p>18 testifying.</p> <p>19 HEARING EXAMINER SOKONI: I think that's</p> <p>20 the extent of the testimony that will be allowed.</p> <p>21 MR. HARRIS: Fine.</p> <p>22 Q Have you explored the -- Well, never mind.</p> <p>23 Let's turn to the master plan. Does the</p> <p>24 master plan prohibit gas pumps?</p> <p>25 A No.</p>
<p>223</p> <p>1 MS. POWELL: Right, of Elm Street.</p> <p>2 HEARING EXAMINER SOKONI: Yes.</p> <p>3 MS. POWELL: Not CTC.</p> <p>4 HEARING EXAMINER SOKONI: But are we</p> <p>5 talking about the contract between the developer</p> <p>6 and her employer?</p> <p>7 MS. POWELL: No, we're talking about the</p> <p>8 contract between Weis Markets and the developer.</p> <p>9 That is what I believe the subject of the current</p> <p>10 examination is.</p> <p>11 MR. HARRIS: And she was involved in</p> <p>12 negotiating that contract. She has firsthand</p> <p>13 knowledge of that.</p> <p>14 HEARING EXAMINER SOKONI: To the extent</p> <p>15 that she's testifying about firsthand knowledge, I</p> <p>16 think it's relevant.</p> <p>17 MS. POWELL: Right. Well, the best</p> <p>18 evidence, however, is the contract, which we're</p> <p>19 precluded from looking at. And to the extent she</p> <p>20 testifies with respect to anything regarding Weis,</p> <p>21 that is hearsay.</p> <p>22 HEARING EXAMINER SOKONI: Sustained.</p> <p>23 BY MR. HARRIS:</p> <p>24 Q Does the contract with Weis require a gas</p> <p>25 station for Weis to go forward?</p>	<p>225</p> <p>1 Q Does the plan of compliance prohibit gas</p> <p>2 pumps?</p> <p>3 A No.</p> <p>4 Q Does the master plan acknowledge the</p> <p>5 importance of a grocery anchor for the retail?</p> <p>6 A Yes, it does. On page 46 of the master</p> <p>7 plan, This plan recognized that retail uses are</p> <p>8 critical to the vitality of the Clarksburg Town</p> <p>9 Center. A grocery store is particularly</p> <p>10 important, since this type of use can serve as a</p> <p>11 magnet for other commercial operations.</p> <p>12 Q Does your plan for the grocery and the gas</p> <p>13 pumps conform with the master plan?</p> <p>14 MS. POWELL: Objection. She's not -- I</p> <p>15 don't know what the basis for this is, the basis</p> <p>16 for her --</p> <p>17 MR. HARRIS: One of the findings required</p> <p>18 for approval of the conditional use is substantial</p> <p>19 consistency with the master plan. We want to</p> <p>20 prove that this is substantially consistent with</p> <p>21 the master plan.</p> <p>22 HEARING EXAMINER SOKONI: You may proceed.</p> <p>23 THE WITNESS: Repeat your question,</p> <p>24 please.</p> <p>25 Q Is the proposal you have for the grocery</p>

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39 (226 to 229)

<p>226</p> <p>1 store with the gas pumps substantially consistent 2 with the Clarksburg Master Plan? 3 A Yes. 4 HEARING EXAMINER SOKONI: Could you 5 explain why? 6 THE WITNESS: Because there are several 7 elements in the Clarksburg Master Plan, many of 8 which were covered by Mr. Foster, but we feel that 9 the grocery store is needed to complete the 10 Clarksburg Town Center retail core. Without the 11 grocer, there is no core. And as previously 12 indicated, the gas pumps are an integral component 13 to the grocery store. 14 MS. POWELL: Objection. 15 THE WITNESS: And so, therefore, you need 16 them both in order to have a vital Clarksburg Town 17 Center. 18 HEARING EXAMINER SOKONI: Ms. Powell, I've 19 noted your objections. This is a fact witness 20 from -- 21 MS. POWELL: Understood. 22 HEARING EXAMINER SOKONI: -- so the 23 context is actually helpful for the conditional 24 use, and these are the -- we have -- it's not 25 unusual for the employee of, you know, the</p>	<p>228</p> <p>1 pumps. 2 MS. POWELL: Objection. 3 HEARING EXAMINER SOKONI: Overruled. 4 MS. POWELL: Well, she's talking about 5 their contract. 6 THE WITNESS: The gas pumps are -- 7 HEARING EXAMINER SOKONI: Ms. Powell, when 8 I issued an order yesterday declining the subpoena 9 for the contract because we don't need to know all 10 the financial terms, we don't need to know -- 11 MS. POWELL: And I didn't ask for those, 12 but what she is talking about is what's required, 13 and you had previously just ruled that that's off 14 limits because the contract was not produced. 15 MR. HARRIS: I don't believe that was your 16 ruling, Ms. Sokoni. I believe the ruling was that 17 we did not have to produce the contract, but not 18 that the requirement for gas pumps by the Weis 19 contract was irrelevant or inappropriate. I think 20 it's essential here. I recognize that the 21 opposition wish it weren't true, but we're having 22 a witness testify under oath that it is true, that 23 these gas pumps are required for Weis to -- 24 MS. POWELL: Objection; Mr. Harris is 25 testifying.</p>
<p>227</p> <p>1 developer or the contractual -- the context is 2 helpful for us. 3 MS. POWELL: Understood. 4 HEARING EXAMINER SOKONI: And it's 5 relevant. I mean, I don't think we can just say 6 you can't bring in anything about the -- so I do 7 think it's -- I'm not seeing anything 8 objectionable about the testimony. You may 9 proceed. 10 THE WITNESS: So as I previously stated, a 11 grocery anchor is integral to the completion of 12 this retail core. We literally have completed 13 every other part of this community, and we've been 14 waiting since 2015 for a grocer to show up to 15 complete the retail core. We finally have a 16 grocer, Weis. They are committed to this 17 community. They are a full-size grocer. They're 18 going to help bring success to this Clarksburg 19 Town Center retail core, because the last thing we 20 want to do is to build a retail core and then have 21 it fail. That would be disastrous. So it's very 22 important that you have a strong anchor, and we 23 believe that Weis is a strong anchor. In order 24 for Weis to be successful, they have indicated 25 through their contract that they need to have gas</p>	<p>229</p> <p>1 MR. HARRIS: I'm repeating what was 2 testified -- 3 HEARING EXAMINER SOKONI: I think, in 4 fairness, it would be -- I would find it helpful 5 to understand the context of why we have this gas 6 station, so you can go ahead and you can proceed. 7 THE WITNESS: So Weis has told us that 8 they need gas pumps, and as you look -- so, if you 9 look back in the 1994 master plan, when that 10 master plan was written there's discussion in the 11 master plan about the integration like the new 12 integration of pharmacies into grocery stores. So 13 prior to that point, pharmacies were not part of 14 a -- typically part of a grocery store. And 15 grocery stores, like the rest of our lives, 16 continue to evolve. And so more and more you will 17 see that grocery stores either partner with gas 18 stations or need gas pumps in order to be 19 successful -- 20 MS. POWELL: I'm going to object again. 21 THE WITNESS: -- in their business. 22 MS. POWELL: This is outside the scope of 23 her expertise. She's talking about what grocery 24 stores need and gas stations, and the evidence in 25 the record that over two-thirds of the Weis</p>

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40 (230 to 233)

<p>230</p> <p>1 Markets grocery stores do not have -- 2 HEARING EXAMINER SOKONI: What's the basis 3 for your -- what's the basis for that statement? 4 THE WITNESS: I've worked for the last -- 5 I've worked since 2012 on this project. I've had 6 conversations with grocery stores, with retail 7 developers, with retail brokers, and through these 8 conversations you learn. You just learn things. 9 This is -- this is my business. This is what I do 10 for a living. And so as part of that, you know, 11 you just -- by being around these conversations 12 and these discussions and getting information, 13 this is just all part of what you learn as you go 14 through a project like this one. 15 MS. POWELL: She was not -- excuse me. 16 She was not proffered as an expert. 17 MR. HARRIS: She's not offering it as an 18 expert. She's offering it as fact, that it's not 19 opinion. She is saying what she has found, in an 20 effort to build a successful shopping center what 21 is required. 22 MS. POWELL: And I suggest that that is 23 far outside the scope of her testimony, and that 24 is, in fact, expert testimony. 25 HEARING EXAMINER SOKONI: So her firsthand</p>	<p>232</p> <p>1 legitimate objection, because this is happening -- 2 so she's purely a fact witness. 3 MR. HARRIS: Fine. 4 HEARING EXAMINER SOKONI: So she can 5 proceed only as a fact witness. 6 MR. HARRIS: Fine. She's speaking about 7 the facts. By the same token, then, I presume 8 that Mr. Patel is not an expert either and will 9 not be testifying as an expert. 10 MS. POWELL: Mr. Patel is going to testify 11 based on his experience with his own gas stations, 12 just as Ms. Kubit has already gotten plenty of 13 evidence into the record based on her experience 14 as a developer. 15 HEARING EXAMINER SOKONI: Are you 16 objecting -- 17 MS. POWELL: I don't even know what we're 18 talking about now, why we're talking about 19 Mr. Patel because he's not -- he's not even here, 20 and we're trying to examine Ms. Kubit. 21 HEARING EXAMINER SOKONI: The question is 22 can Ms. Kubit continue to testify about her 23 personal experience with this particular project, 24 or -- 25 MS. POWELL: We don't oppose that.</p>
<p>231</p> <p>1 testimony that she's met with various -- 2 MS. POWELL: But that's not what 3 Mr. Harris just said. Mr. Harris -- 4 HEARING EXAMINER SOKONI: I heard 5 Ms. Kubit say she's spoken to multiple -- in the 6 course of her work, she's describing the 7 conversations she's had. 8 MS. POWELL: Right. But they're asking 9 you to consider it as universally true across the 10 board, and that -- I mean, that's why they're 11 offering it. 12 MR. HARRIS: I don't think she was saying 13 it's universally true. I think she's saying 14 that's her experience. And if we want to qualify 15 her as an expert in development, we can do that, 16 if that's -- if Ms. Powell wants her expert 17 opinion, I would offer her as an expert in retail 18 development. She's got, how many years did -- 19 yeah, 18 years doing this. 20 HEARING EXAMINER SOKONI: Why would we -- 21 why don't you go ahead and try to qualify her as 22 an expert. 23 MS. POWELL: I will object, because she 24 was not identified as an expert as you are -- 25 HEARING EXAMINER SOKONI: That's a</p>	<p>233</p> <p>1 HEARING EXAMINER SOKONI: -- without 2 her -- okay. So she can -- 3 MS. POWELL: That's not -- that wasn't the 4 basis for my objection. 5 HEARING EXAMINER SOKONI: I just want to 6 be clear. What are you objecting to? 7 MS. POWELL: At this point what I'm 8 objecting to is the idea that you can't have a 9 successful grocery store without a gas station, 10 because that is what she has testified to. She's 11 saying -- she talked about, well, now we have 12 pharmacies and now we have this. I mean, the next 13 thing you know, it's going to be, well, you know, 14 we should have a nuclear reactor as part of the 15 grocery store. That's not appropriate testimony. 16 That's not personal knowledge testimony. Personal 17 knowledge testimony relates to this specific 18 application. 19 HEARING EXAMINER SOKONI: But I heard her 20 say she had a lot of conversations with various -- 21 MS. POWELL: Right, with people who are 22 not here. 23 MR. HARRIS: I don't think we need to 24 belabor this. Jack O'Hara with Weis Markets will 25 testify as well. I think Ms. Kubit has already</p>

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<p>234</p> <p>1 made it clear that the contract with Weis Markets 2 requires a gas station for Weis to locate there. 3 That's not opinion. That doesn't require expert 4 advice. It's her testimony under oath. 5 HEARING EXAMINER SOKONI: And I believe, 6 Ms. Powell, in the conference, we did discuss the 7 fact that I was not going to allow the contract 8 in, but there was an indication that she would 9 testify under oath to that. 10 MS. POWELL: Yes, there was, but I didn't 11 agree to it. And Mr. Harris previously 12 represented that I agreed. And the best evidence 13 rule means you get the document. 14 MS. PRESLEY: May I ask, since I was not a 15 part of that -- not being an attorney, I didn't 16 attend that hearing. I understand Ms. Powell's 17 objection. May I ask why it wasn't ruled or it 18 wasn't possible to get a redacted contract minus 19 financials that would corroborate what Ms. Kubit's 20 saying about requirements between Weis and -- 21 HEARING EXAMINER SOKONI: Because the 22 terms of that contract were not something that 23 fell within the findings that the Hearing Examiner 24 has to make. 25 MS. PRESLEY: But that was being testified</p>	<p>236</p> <p>1 appropriate for Ms. Kubit to say that the contract 2 with Weis says that there has to be a gas station 3 there or no Weis, and she is perfectly qualified 4 to testify to that. We spent a good part of the 5 morning hearing both opposition speakers here talk 6 about what the plan of compliance includes. I 7 don't see this as anywhere nearly as diluted as 8 that. This is a specific contract. She's 9 testifying under oath what it says explicitly, not 10 what it intended, but what it says. 11 MS. PRESLEY: But the plan of compliance 12 goes towards the finding requirements where this 13 doesn't go towards finding requirements. 14 HEARING EXAMINER SOKONI: So the standard 15 of proof in this kind of proceeding is not beyond 16 a reasonable doubt. It's a preponderance of the 17 evidence, and, therefore, I will let Ms. Kubit 18 testify with regard to her personal -- only with 19 regard to your personal knowledge about your 20 knowledge of this particular project. 21 BY MR. HARRIS: 22 Q So can you reiterate what you've been 23 saying then? 24 THE WITNESS: So can I talk about the 25 contract, or can I not talk about the contract?</p>
<p>235</p> <p>1 to. 2 HEARING EXAMINER SOKONI: So why don't we 3 cut that line of questioning then and just let 4 Ms. Kubit testify to personal knowledge -- 5 MS. IALACCI: Madam Chair, this is Tabatha 6 Ialacci on Zoom. I have a question as well. If 7 Ms. Kubit is a proctor of the developer and the 8 contract is between the developer and a grocery 9 store, why is she not authorized to speak on the 10 validity of that contract if she's a proctor for 11 one of the two entities in the contract? 12 MS. POWELL: The overarching point, Madam 13 Examiner, is that that's not the test for this 14 conditional use. The test for this conditional 15 use was outlined by Mr. Foster, and that's the 16 beginning and the end of the analysis. And it's 17 the analysis that has to be undertaken with 18 respect to your code requirements as well as the 19 plan of compliance. 20 HEARING EXAMINER SOKONI: Mr. Harris, 21 could you explain what -- what additional 22 testimony are you hoping that Ms. Kubit will give 23 with regard to the application? 24 MR. HARRIS: I don't think we really have 25 much more, but I think it is critical and</p>	<p>237</p> <p>1 HEARING EXAMINER SOKONI: Yes, you may. 2 Yes, you may. 3 A Okay. So there's a contract between CTC 4 Retail, who is the developer of the ground, and 5 Weis that specifically says that if the gas pumps 6 are not approved as part of the conditional use 7 application or the site plan, then Weis does not 8 have to close on the property. And if Weis does 9 not close on the property, this piece of property, 10 this grocery anchored -- 11 MS. POWELL: I'm going to object now. 12 HEARING EXAMINER SOKONI: Mr. Harris, if 13 Ms. Kubit is an employee of -- I think you said 14 you have a witness from Weis? 15 MR. HARRIS: From Weis, yes, ma'am. 16 HEARING EXAMINER SOKONI: Why don't we 17 reserve the rest of this testimony for them? 18 MR. HARRIS: Fine. 19 HEARING EXAMINER SOKONI: Because if 20 Ms. Kubit is an employee of -- 21 MR. HARRIS: CTC and Third Try and Elm. 22 HEARING EXAMINER SOKONI: Yes. I don't 23 want us to tread in the area of hearsay. So why 24 don't we let -- let's let the Weis witness testify 25 to that.</p>

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<p>238</p> <p>1 MR. HARRIS: With one question, 2 Ms. Sokoni. I'm puzzled that they're questioning 3 her testimony about a fact with which she's 4 perfectly familiar. I'm fearful that when we put 5 on Mr. O'Hara they're going to say, Oh, he can't 6 testify to that contract, and I want to make it 7 clear that Mr. O'Hara will be allowed to testify 8 that the contract says what Ms. Kubit just said it 9 says. Are we in agreement on that? 10 MS. POWELL: Respectfully, the issue here 11 is that this has nothing to do with the analysis 12 that is required with respect to whether or not 13 gasoline station should be a permitted use. And 14 the reason we went through the plan of compliance 15 was because it had a whole lot of requirements 16 that were contained within it that also have to be 17 met and there's a very limited scope of what can 18 be changed. And so, you know, without that link, 19 I mean -- and, actually, what she said, Well, they 20 don't have to close. She didn't say that they 21 would just walk away. We don't know. But one of 22 the points, it doesn't matter. It's not germane 23 to this -- 24 HEARING EXAMINER SOKONI: Mr. Harris, 25 here's one of my questions. The testimony about</p>	<p>240</p> <p>1 analysis that was submitted by Applicant's expert 2 goes to the need, the supposed need for the 3 gasoline station. And when you look at the 4 conditional use requirements of your code, it is 5 the conditional use that has to have a 6 demonstrated need. And we're not talking about 7 the conditional use. We're talking about 8 something else altogether. 9 MR. HARRIS: I think we are talking about 10 the conditional use of the gas pumps. I'm saying, 11 as Ms. Kubit is saying, that the gas pumps are 12 needed for the grocery store, and the grocery 13 store is important for the community. To me, 14 that's a public need. We'll address the issue of 15 what public need is, or need in future sessions, 16 but it's much broader than what the opponents 17 believe it is. 18 HEARING EXAMINER SOKONI: Okay. In the 19 interest of efficiency here, why don't you 20 conclude your testimony, restrict it to personal 21 knowledge and connect for me how it ties into any 22 of the findings. 23 MR. HARRIS: Okay. Do you want Ms. Kubit 24 to say that? Is that what you're asking? 25 HEARING EXAMINER SOKONI: Yes.</p>
<p>239</p> <p>1 the importance of a gas station for Weis to 2 proceed, which of the findings -- in 59.7.3.1, 3 which of the findings hinges on that? 4 MR. HARRIS: Excellent question. We 5 haven't yet talked about the issue of need. 6 Although, in opening comments a month ago, that 7 issue was brought up. We recognize that the 8 Zoning Ordinance for a filling station does 9 require proof of need. Need can be demonstrated 10 in various ways, and we're going to provide a 11 needs expert on that. But one of the ways to need 12 is, is the gas -- the grocery store is needed for 13 the community. The gas station is needed for the 14 grocer. Therefore, there is a need for the gas 15 station. And so that's the finding that we're 16 attempting to address here. 17 MS. PRESLEY: I attempted that Mr. Harris, 18 because the needs analysis specifically in the 19 finding requirement is that by a preponderance of 20 the evidence there's a need for that specific use, 21 not that there's a need for an attached use, that 22 there's a need for that specific use. 23 MR. HARRIS: It doesn't use the word 24 specific. 25 MS. POWELL: Respectfully, the entire</p>	<p>241</p> <p>1 MR. HARRIS: Okay. 2 BY MR. HARRIS: 3 Q So can you summarize what I think we've 4 been saying here? 5 A So, in summary, I've been working in 6 Clarksburg for 18 years. I have knowledge of the 7 Clarksburg area because of my work there for the 8 past 18 years. I've been working in Clarksburg 9 Town Center for 13 years now, and I have worked 10 very hard in that community to get the community 11 completed. The last piece of what needs to get 12 completed is the Clarksburg Town Center retail 13 core, which includes a grocery store, which, per 14 the Clarksburg Master Plan, has indicated it's an 15 integral component to the Clarksburg Town Center. 16 And so, as part of that grocery store, the gas 17 pumps are an integral component to the grocery 18 store. So I hope I didn't overstep my bounds, but 19 that's basically the gist of what I'm trying to 20 say is, in my experience, this is a very important 21 thing in the community. Based on the people that 22 have not been asked to be on the call today, but 23 are on the call today, it's very important to the 24 community to get this finished as well. 25 MS. POWELL: I'm going to object --</p>

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<p>242</p> <p>1 HEARING EXAMINER SOKONI: Ms. Powell, I'll 2 tell you, when we -- when we hear lots of types of 3 cases. 4 MS. POWELL: Sure. 5 HEARING EXAMINER SOKONI: The last one I 6 sat and heard here was for a self storage, right? 7 And so whether there's demand for self storage, or 8 whether this is -- whether this is something 9 that's important to the community is usually a 10 relevant -- you know, it's usually -- 11 contextually, it's a helpful thing to know. 12 MS. POWELL: I understand that, but I'm 13 concerned that we are going very far afield, 14 because what Ms. Kubit did not answer was your 15 question, which is which of the findings does this 16 relate to. 17 MR. HARRIS: I think I answered that. The 18 need. 19 MS. POWELL: She posed it to Ms. Kubit. 20 MR. HARRIS: Okay. 21 MS. POWELL: And the need issue goes to 22 the gasoline station. It doesn't go to the 23 grocery store. 24 MR. HARRIS: They're interconnected. 25 MS. POWELL: Only because they've made it</p>	<p>244</p> <p>1 retail developers and grocery stores and there 2 were no offers that were made. Newland had wanted 3 the community to be finished. The community, as 4 you know, was pretty stagnant at the time, and so 5 they reached out to Elm Street, because, A, we had 6 success in Clarksburg Village across the street, 7 and, B, because we were a local developer that had 8 been around for a long time, to see if there would 9 be any interest in trying to finish a project that 10 was problematic at the time. So Newland reached 11 out to us. 12 Q I want to keep it relative to that 13 question, because I'm not trying to ask you 14 something new, but you had the understanding at 15 the time it was an encumbered project, it was a 16 problem project? 17 A That was well known throughout the county. 18 Q Okay. I just want to make sure that's 19 clear. Regarding the master plan and the need for 20 the grocery store, was that specific -- when the 21 master plan was written, do you find that to have 22 been specific to the Town Center, or was that to 23 the master plan in general? 24 A The master plan identified three of the 25 neighborhoods in Clarksburg Town -- in Clarksburg</p>
<p>243</p> <p>1 so. 2 HEARING EXAMINER SOKONI: You can argue, 3 make your legal arguments in closing. 4 MR. HARRIS: I think I've heard them, and 5 you've heard us and then -- and the evidence is in 6 the record, and we'll -- you know, if we need to 7 call Ms. Kubit back later to address anything 8 that's still unresolved, we'll do that, but I'd 9 like to keep the hearing moving and let Mr. O'Hara 10 speak. Of course they can cross-examine 11 Ms. Kubit. 12 HEARING EXAMINER SOKONI: Yes. Is there 13 cross-examination of Ms. Kubit restricted only to 14 the questions that she answered to her testimony? 15 CROSS-EXAMINATION BY THE OPPOSITION 16 BY MS. PRESLEY: 17 Q Ms. Kubit. One of the things you 18 mentioned was -- I'm sorry. One of the things you 19 mentioned that you were asked to get involved with 20 the project. Are you stating that -- can you 21 describe who asked that? Because it was my 22 understanding that it was offered to be bought. 23 A Yeah. So Newland had put the property on 24 the market, and the property was on the market for 25 a while, and it had been looked at by several</p>	<p>245</p> <p>1 as being mixed-use grocery-anchored retail center. 2 Clarksburg Village was one, Town Center as a 3 second and Cabin Branch was the third. 4 Q Did the phasing indicate that Clarksburg 5 Town Center was supposed to go first? 6 A It sure did. 7 Q And did that happen? 8 A No. 9 Q So does that then change the perspective 10 on how needed the grocery stores in the Town 11 Center when that was to have been the first, but 12 now there's a grocery store? 13 A There still was -- the phasing was 14 because -- it's my understanding that the phasing 15 was that Clarksburg Town Center should go first 16 because at the time the thought was Clarksburg 17 Town Center would set an example for the rest of 18 the community, and there was no way that that was 19 going to happen if there was no grocers or retail 20 developers at the time. 21 Q So then when you mentioned you had several 22 meetings with the community, I attended some of 23 those, so I have personal knowledge of those as 24 well. Was it presented to the community from the 25 beginning that there were obligations that the</p>

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<p>246</p> <p>1 developer had under the compliance program?</p> <p>2 MR. HARRIS: Beyond the testimony of</p> <p>3 her --</p> <p>4 MS. POWELL: Mr. Harris, I respectfully</p> <p>5 request that since things that you have stated</p> <p>6 that were objected to this does have relevance for</p> <p>7 context.</p> <p>8 MR. HARRIS: She did not testify about</p> <p>9 that. You're going beyond the scope of the direct</p> <p>10 testimony.</p> <p>11 HEARING EXAMINER SOKONI: She may ask the</p> <p>12 question.</p> <p>13 A So please repeat your question.</p> <p>14 Q Did you or Mr. Flanagan at any time</p> <p>15 acknowledge to the community that you were still</p> <p>16 responsible for the elements under the compliance</p> <p>17 program?</p> <p>18 A We specifically talked about and went</p> <p>19 through each of the -- not each one, but several</p> <p>20 of the elements, the Clark Memorial Grand</p> <p>21 Staircase and explained and worked with everybody</p> <p>22 to come up with alternative solutions for them.</p> <p>23 So to the extent that our plans were amended, that</p> <p>24 is the extent of the plan of compliance elements</p> <p>25 that were included.</p>	<p>248</p> <p>1 that Weis specifically could come into the Town</p> <p>2 Center?</p> <p>3 A I don't understand your question.</p> <p>4 MR. HARRIS: Neither did I.</p> <p>5 Q I don't want to explain using something</p> <p>6 that's not something you said. Did you ever --</p> <p>7 did the company ever offer more than one way to</p> <p>8 entice a grocery store, such as one year free</p> <p>9 rent, because we now aren't paying \$8 million to</p> <p>10 parking structures or anything along those lines?</p> <p>11 Or was there only one narrowly-defined contract</p> <p>12 offer?</p> <p>13 MR. HARRIS: Objection.</p> <p>14 HEARING EXAMINER SOKONI: Your microphone,</p> <p>15 please, Mr. Harris.</p> <p>16 MR. HARRIS: I'm sorry. The contract</p> <p>17 negotiations and what might have been included or</p> <p>18 not included are irrelevant. We have a contract</p> <p>19 today. That's what's relevant.</p> <p>20 MS. PRESLEY: But not in -- consistent</p> <p>21 with what both you and Ms. Kubit represented, that</p> <p>22 it's the only way to get a grocery store and</p> <p>23 grocery store need this, then the question would</p> <p>24 be has everything been done -- she had the</p> <p>25 dealings directly about the contract. I'm simply</p>
<p>247</p> <p>1 Q I'm saving my testimony for testimony.</p> <p>2 Just based on what you had stated about the</p> <p>3 community has been waiting and the community wants</p> <p>4 this and they're not going to get it, weren't</p> <p>5 those statements made to the community on more</p> <p>6 than one occasion --</p> <p>7 A Yes.</p> <p>8 Q -- if you don't get a gas station, you're</p> <p>9 not going to have a grocery store?</p> <p>10 A At the time it was a grocery store.</p> <p>11 Q Okay. Was there at any time -- well, you</p> <p>12 didn't testify to the parking garage, so I'm not</p> <p>13 going to ask that. But since you were alluding to</p> <p>14 the contract and requirements, I'll ask you if</p> <p>15 during your negotiations with the contract</p> <p>16 requirements --</p> <p>17 MS. PRESLEY: That's off the table now, to</p> <p>18 ask a question about what she personally --</p> <p>19 HEARING EXAMINER SOKONI: Not --</p> <p>20 Q I wanted to make sure that -- you</p> <p>21 mentioned it was a need, but I have to ask on the</p> <p>22 other perspective was there any discussion of any</p> <p>23 allowances in that developer's have been given in</p> <p>24 terms of money, lots of financial obligations?</p> <p>25 Was there ever any discussion of more than one way</p>	<p>249</p> <p>1 asking if there was only one position offered to a</p> <p>2 grocer, because that is relevant based on her</p> <p>3 testimony and yours.</p> <p>4 MR. HARRIS: I don't think she testified</p> <p>5 that that was her position. She testified that</p> <p>6 that's what the grocer said. There's only one</p> <p>7 grocer interested. They said, We need a gas</p> <p>8 station.</p> <p>9 MS. PRESLEY: Okay. I'll move on to</p> <p>10 something else. You can save that for your --</p> <p>11 Q Ms. Kubit, you did answer when Mr. Harris</p> <p>12 asked you whether the master plan specifically</p> <p>13 states that gas pumps are not allowed, and whether</p> <p>14 the compliance program states that they're</p> <p>15 specifically not allowed and you answered no to</p> <p>16 both of those questions, correct? So now I want</p> <p>17 to ask you in the positive. Does either one of</p> <p>18 those state that a gas pump is acceptable?</p> <p>19 A Well, insofar as gas pumps are retail and</p> <p>20 a retail use, then both the master plan and the</p> <p>21 plan of compliance are looking for retail users to</p> <p>22 be in the Clarksburg Town Center retail core.</p> <p>23 Q Can you tell me the definitions that</p> <p>24 you're referring to in the plan of compliance?</p> <p>25 Because it actually differentiates between types</p>

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<p>250</p> <p>1 of retail. So are you referring to the specific 2 types it differentiates? It specifically states 3 restaurants, retail -- 4 MR. HARRIS: Excuse me. Can we pull up 5 the plan of compliance? Because I don't recall 6 that. 7 MS. PRESLEY: Please do. And also it's 8 not just in the plan of compliance, but I'm sure 9 you're familiar with the plan of compliance design 10 concepts that Mr. Foster referred to as being 11 appropriate. They state that as well. 12 Q So I guess what I'm asking is, if you're 13 stating in the negative that -- 14 MR. HARRIS: Can we pull up Exhibit 45, 15 the plan of compliance and can you show us in 16 Exhibit 45 where it says what type of retail? 17 MS. PRESLEY: No, it won't be in Exhibit 18 45, but it -- 19 MR. HARRIS: You said it was in the plan 20 of compliance. 21 MS. PRESLEY: It is. 22 MR. HARRIS: That's the plan of 23 compliance. 24 MS. PRESLEY: Mr. Harris, I'm not going to 25 raise my voice. If you look at the plan of</p>	<p>252</p> <p>1 51,000-square foot grocery store lined by the 2 grocery store. Lined by, not a gas station, 3 additional core retail and residences to maintain 4 the pedestrian scale and orientation of the town 5 square area. And then it goes on to state 6 everything else. Nowhere here does it mention or 7 propose a specific use of retail as gas station, 8 but it does subdivide uses. 9 THE WITNESS: It only says restaurants, 10 though. It doesn't say anything else in terms of 11 retail use. 12 BY MS. PRESLEY: 13 Q It doesn't say gas station. That's for 14 certain. 15 A It doesn't say anything else. 16 Q It does say live-work too, which are, as 17 we know, were since eliminated. There are many 18 places within this drawing where it indicates the 19 type of retail. There are perspectives that is on 20 page five, the conceptual perspective of the town 21 plaza. It's -- 22 HEARING EXAMINER SOKONI: Are we still on 23 the cross-examination? 24 MS. PRESLEY: Yes. 25 HEARING EXAMINER SOKONI: Okay.</p>
<p>251</p> <p>1 compliance, direct yourself to the area that 2 states what's a part of it. The Planning Board 3 specifically stated in its resolution what was to 4 be included. One of those things that's included 5 as the plan of compliance is the Staff Report and 6 also its associated things, which your own witness 7 testified to the plan of compliance design 8 concepts as being relevant. 9 MR. HARRIS: And so where in that does it 10 say what retail should or shouldn't be included? 11 MS. PRESLEY: Situated among shops, 12 live-work units, restaurant space, two parking 13 garages, a square, a grocery store. It mentions 14 the grocery store. It doesn't mention a gas 15 station. 16 MR. HARRIS: What page are you on? 17 MS. PRESLEY: This is on page two, three 18 of your -- 19 MR. HARRIS: Three, okay. 20 MS. PRESLEY: Okay. Starting at paragraph 21 one, situated -- it's descriptive of exactly 22 what's being presented to the Board that was 23 adopted by the Board. Situated among shops, 24 live-work units, restaurant space. It doesn't 25 generalize retail. Two parking garages and a</p>	<p>253</p> <p>1 MS. PRESLEY: Yes. But, Mr. Harris, you 2 asked me to go to this page. 3 MR. HARRIS: Okay. 4 MS. PRESLEY: So all I was trying to -- 5 MR. HARRIS: I'm not finding the same what 6 you said it says. 7 MS. PRESLEY: Well, I can underline it for 8 you, but what I'm stating is that -- 9 MR. HARRIS: -- ask her a question. 10 MS. PRESLEY: I am. I'm stating that what 11 I asked of Ms. Kubit is, yes or no, does it say 12 anywhere in any of these that a gas station is 13 permitted. You asked her if it's not, if it says 14 it's prohibited. Neither does it say -- Ms. Kubit 15 can answer. 16 Q Does it say that it's permitted or 17 indicated? 18 A It doesn't say coffee shops are permitted. 19 It doesn't say liquor stores are permitted. 20 Q Does it say -- 21 A -- are permitted. 22 Q Does it say they're forbidden? 23 A No, but the point is it doesn't -- it says 24 restaurants. It doesn't say any other kind of 25 retail. There's a lot of different kind of retail</p>

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<p>254</p> <p>1 users that are not restaurants. That's all I'm 2 saying. 3 Q That's correct, but those aren't listed in 4 the compliance -- 5 THE TECHNICIAN: Ma'am, your microphone. 6 Q -- the master plan, since you stated that 7 it doesn't prohibit them, it doesn't permit 8 specifically either. That's my point. And I 9 wanted to know if you agree with that, because I 10 didn't find any reference that would specifically 11 permit a gas station. 12 MR. HARRIS: Are you referring to -- you 13 mentioned just now the master plan. Are you 14 referring to the master plan or -- 15 MS. PRESLEY: Ms. Kubit stated when you 16 asked her both questions, does the master plan 17 state gas pumps, she said no. Does the compliance 18 plan state gas pumps, she said no. So according 19 to the theory of retail, if it's going to flip the 20 other way, she should have said yes. 21 Q So I'm asking the question, does the 22 master plan specifically approve gas pumps? 23 A The master plan acknowledges that there is 24 an automotive and a pedestrian component to the 25 Clarksburg Town Center. It does --</p>	<p>256</p> <p>1 President of Legal Affairs and Real Estate for 2 Weis Markets. 3 Q And how long have you been in that 4 position? 5 A I've been with Weis Markets for about 19 6 years. I've been in my current position for just 7 over a year. Prior to that I was vice president 8 of legal affairs in real estate for about 12, and 9 held various positions in the real estate 10 department, legal department since beginning my 11 tenure there. 12 MR. HARRIS: I would like to offer 13 Mr. O'Hara as an expert in the development of 14 grocery stores. 15 HEARING EXAMINER SOKONI: Do we have -- 16 MR. HARRIS: We do not have a resume for 17 him. I apologize, but we could have you tell us 18 about your educational history maybe. 19 MS. POWELL: I don't believe he was 20 identified as an expert. I mean, he can certainly 21 testify as to what Weis does, but I don't think he 22 was identified as an expert. 23 MR. HARRIS: I don't recall. 24 MS. POWELL: Yeah. I just have 25 Mr. Foster, Mr. Samba and Mr. Steere.</p>
<p>255</p> <p>1 MS. PRESLEY: Okay. I just didn't 2 understand why it's not a straight yes or no 3 answer for both. That's all I have on that 4 question. I'm finished with that. 5 HEARING EXAMINER SOKONI: Ms. Powell, do 6 you have any cross-examination? 7 MS. POWELL: No, I don't. 8 MR. HARRIS: Okay. Thank you. 9 THE TECHNICIAN: Sir, your microphone 10 again. 11 MR. HARRIS: I'm bad on that, so thank 12 you. Okay. I think we'll continue with Jack 13 O'Hara. 14 HEARING EXAMINER SOKONI: The witness may 15 you kindly raise your right hand? 16 (The witness was sworn.) 17 HEARING EXAMINER SOKONI: Thank you. 18 JACK O'HARA, 19 having been first duly sworn or affirmed, was 20 examined and testified as follows: 21 DIRECT EXAMINATION BY COUNSEL FOR THE APPLICANT 22 BY MR. HARRIS: 23 Q Would you state your name and position for 24 the record, please? 25 A My name's Jack O'Hara. I'm Senior Vice</p>	<p>257</p> <p>1 MR. HARRIS: Okay. It doesn't really 2 matter. He can testify as a fact witness. 3 HEARING EXAMINER SOKONI: As a fact 4 witness, okay. 5 Q Okay. So tell us about your 6 responsibilities with Weis? 7 A I'm responsible for all the general legal 8 affairs and real estate development for Weis. 9 Just to give you a little information about the 10 company, we're a 200-store chain in the 11 Midatlantic region, primarily grocery stores. We 12 have, again, 200 grocery stores. Actually, 198. 13 We operate pharmacies, about 120. And we operate 14 fuel facilities, 64 currently. We just opened one 15 last week. So 64 of our stores have gas and go or 16 fuel facilities. 17 So as part of my responsibilities, I 18 identify new locations, negotiate the transaction 19 or the terms of deals and ultimately assist in the 20 final development and construction of the stores. 21 We do -- sometimes I do a ground-up development. 22 Other times we'll do a joint development of sorts, 23 as we are here with Elm Street or CTC. We also 24 lease stores. 25 A typical new store is around 60,000</p>

<p>258</p> <p>1 square feet. Currently, we have four of them 2 under construction. All four have gas stations 3 for what it's worth. 4 What else do we do? We -- in addition to 5 managing, obviously, our portfolio, we're always 6 looking to grow the chain. I can continue about 7 our business. Or how do you want to -- 8 Q Can you explain a little bit for us about 9 the evolution of supermarkets over your career? 10 A Sure. A supermarket, as most of you have 11 seen -- it's been alluded to earlier that years 12 ago supermarkets didn't have pharmacies. 13 MS. POWELL: We're back in expert land. 14 (Crosstalk.) 15 HEARING EXAMINER SOKONI: Overruled. 16 MS. POWELL: Thank you. 17 A In my experience in the supermarket 18 business, it's been 19 years. It's evolved. You 19 know we -- at one point in time we were putting 20 banks in, and so the use changes and the needs 21 changed. We've added pharmacies in a number of 22 our stores. And for many years, we've added fuel 23 facilities. So the typical supermarket use isn't 24 a -- it's not -- it's not -- it's not limited to 25 selling groceries. Okay. A grocery store,</p>	<p>260</p> <p>1 ago when first started the company, and we 2 considered that site. However, Harris Teeter made 3 a better deal with the developer. So we did 4 consider it back then. But anyway, so the 5 competition is one of the things we look at. 6 And so we also look at -- and this is not 7 as important here, but the dollar stores are out 8 there. We see them as competition, whether it's 9 Dollar General, Family Dollar, Dollar Tree. And 10 then, it was alluded to earlier, the electronic or 11 not -- sorry -- the internet, if you will, the 12 Amazons and the other online shoppers. 13 The other challenge at this site is that 14 it's not on a main -- it's not on 355, if you 15 will, which is the main road there, but it's 16 slightly off. However, it is very close to a 17 significant population base, which is Clarksburg 18 Center, which we find it a very -- you know, we 19 look at that as a positive. 20 So, again, we could continue on. So 21 that's a -- it's situated in an area with the 22 significant competition, and then the general 23 location of it indicates that we want to put our 24 best -- our -- how to put it -- our best foot 25 forward in order to make the store a profitable</p>
<p>259</p> <p>1 supermarket has many departments, which include 2 the -- as we all may know, the meat department, a 3 deli department, dairy, a pharmacy department, a 4 fuel -- a fuel department. So we look at fuel as 5 a integral part of our offering today. 6 Q Can you explain some of the challenges 7 that you encountered when looking at this 8 particular site? 9 A There are a number, and it's generally -- 10 I'll give general, then specific. Generally the 11 challenges are the competition that are in the 12 area. We have supermarkets to the south, 13 obviously, Harris Teeter. Going further south 14 towards Germantown, you have Giant, Wegmans, 15 Walmart. They are -- they are the largest grocer 16 in the country, so they are truly supermarket 17 competition. Aldi's down that way. I'm not sure 18 if Legal (phonetic) is. I think there's a Safeway 19 down that way. Up to the north, we have a Giant 20 up in Urbana. I think that's the closest one to 21 the north. So there's significant supermarket 22 competition. There's also big-box competition, 23 which we look at and that's a challenge here. I 24 can -- anecdotally, if I may, I looked at the 25 Harris Teeter location 20 years ago, 19, 18 years</p>	<p>261</p> <p>1 and successful location. And in order to do that, 2 we will need to put fuel in the -- in that 3 location. 4 Q Can you explain a little bit about your 5 observations with respect to fuel at grocery -- in 6 connection with grocery stores, as you've said, as 7 a department -- 8 A It's a significant department for us. 9 It's about five percent of our overall sales. 10 We're a \$5 billion company, just shy of \$5 11 billion. It's five percent of our overall 12 business. I think it would suggest -- I heard 13 somewhere that it's in about a third of our 14 locations, which is true. Our average store where 15 we have a fuel facility is around 10 percent of 16 the business. Fuel gives us a competitive 17 advantage in many locations, because when -- we 18 have a rewards program, so we -- it encourages 19 customers to shop us, which help by rewarding 20 them, if you will, by offering incentives. If 21 they buy groceries, they -- we give them a 22 discount on gas, and we find that we drive our 23 grocery sales and our gas sales by promoting -- by 24 promoting that program. 25 Q Is Weis retrofitting existing grocery</p>

<p>262</p> <p>1 stores with gas pumps at all?</p> <p>2 A We are. Actually, of the 64 we have, 54</p> <p>3 were put into existing locations. The other -- if</p> <p>4 I did the math right, 16 were in new store</p> <p>5 developments.</p> <p>6 Q And would you classify the gas as an</p> <p>7 important component of your operations?</p> <p>8 A It's a very important component of</p> <p>9 operation, and it's extremely important.</p> <p>10 Actually, it's imperative here in Clarksburg.</p> <p>11 Without it, we won't do the deal.</p> <p>12 Q Explain a little bit about how the gas</p> <p>13 sales relate to grocery customers and how</p> <p>14 they're -- well, how they're related. Do you --</p> <p>15 is there a customer appreciation or loyalty</p> <p>16 component, or what can --</p> <p>17 A Yeah. Absolutely. We have a rewards</p> <p>18 program or a loyalty program, and, basically, to</p> <p>19 the extent you spend \$100 in groceries, you'll</p> <p>20 get -- you're eligible for a 10-percent reduction</p> <p>21 a gallon when you purchase gas.</p> <p>22 Q So to what degree does that bring in</p> <p>23 customers or retain customers for the grocery?</p> <p>24 A It is a -- it's a strong bulk, if you</p> <p>25 will. One, it keeps us competitive price-wise</p>	<p>264</p> <p>1 certain situations where we'd open a store without</p> <p>2 gas. This is one based on, one, the competitive</p> <p>3 nature of the area and our observations, we think</p> <p>4 that we need gas here. I can clearly say that it</p> <p>5 is imperative for us to have gas here or it won't</p> <p>6 happen. We look at -- we look at gasoline as part</p> <p>7 of the grocery use. It's part of our business, as</p> <p>8 it is with many other grocers. I mean,</p> <p>9 everybody's heard of Kroger and Albertsons, their</p> <p>10 merger that recently pulled off. Kroger had -- I</p> <p>11 think they have 2,700 stores. I know they have</p> <p>12 2,700 plus. Of the amount of 2,700, about 1,400</p> <p>13 have gas stations. Safeway or Albertsons, they</p> <p>14 had, I think, 2,200 stores and 400 have gas</p> <p>15 stations. So it is -- it's not an unusual use for</p> <p>16 gas. Actually, I would say it is a very common</p> <p>17 use. Oftentimes, when we do put gas in the</p> <p>18 station that we -- or in stores we already have,</p> <p>19 we will get them approved as an accessory use to</p> <p>20 the operation. So it is a -- it is a use that is</p> <p>21 part of the supermarket business, or the grocery</p> <p>22 use.</p> <p>23 MR. HARRIS: I think that covers what I</p> <p>24 would like to ask Mr. O'Hara.</p> <p>25 HEARING EXAMINER SOKONI: Is there any</p>
<p>263</p> <p>1 because there's so much -- only so many dollars to</p> <p>2 spend. And if you're spending on groceries, we</p> <p>3 can -- you can spend a little less on gas. So it</p> <p>4 is an integral part, as I said before, of our</p> <p>5 program.</p> <p>6 Q Do you find -- to what extent do you find</p> <p>7 that grocery customers combine a trip for</p> <p>8 groceries with gas purchase?</p> <p>9 A We've had studies where up to 50 percent</p> <p>10 will be -- will combine trips where they'll come</p> <p>11 in and shop either for groceries before they get</p> <p>12 gas, or get gas and then get groceries. And</p> <p>13 oftentimes that's in connection with the</p> <p>14 redemption of their points.</p> <p>15 Q You heard a lot of comment earlier from</p> <p>16 Ms. Kubit about the requirement for gas pumps here</p> <p>17 for the deal to go forward. Can you explain that?</p> <p>18 A Yes. Getting approval to have gas here is</p> <p>19 a contingency in the contract, and it is a</p> <p>20 condition for closing. If we -- without it, we</p> <p>21 will not close, and I can -- and it would</p> <p>22 suggested here -- I heard somebody say was there</p> <p>23 anything else you could do to incent them to not</p> <p>24 have gas, and the answer is, in this situation, we</p> <p>25 would not do the deal without gas. There are</p>	<p>265</p> <p>1 cross-examination?</p> <p>2 MS. POWELL: Yeah, I do have some</p> <p>3 questions.</p> <p>4 CROSS-EXAMINATION BY COUNSEL FOR THE OPPOSITION</p> <p>5 BY MS. POWELL:</p> <p>6 Q So you indicated you have a 200-store</p> <p>7 chain?</p> <p>8 A Just under. 198 stores.</p> <p>9 Q Just under?</p> <p>10 A Yeah.</p> <p>11 Q Okay. So your stations or -- excuse me.</p> <p>12 Your stations, now I'm talking about them as gas</p> <p>13 stations. Your grocery stores with gas stations</p> <p>14 only comprise 32 percent of your portfolio?</p> <p>15 A Approximately, yes.</p> <p>16 Q Okay. And with respect to the remaining</p> <p>17 68 percent, is it your testimony that those aren't</p> <p>18 profitable?</p> <p>19 A That's not what I said.</p> <p>20 Q Okay. Good. And aren't several of those</p> <p>21 other grocery stores within proximity to other</p> <p>22 grocery stores?</p> <p>23 A They are.</p> <p>24 Q Okay. And they still don't have gas</p> <p>25 stations?</p>

<p>266</p> <p>1 A That's correct.</p> <p>2 Q And they're still not losing money?</p> <p>3 A This isn't about losing money.</p> <p>4 Q It's about making money; isn't it?</p> <p>5 A Yes.</p> <p>6 Q When you talked about this in the grocery</p> <p>7 store as being part of -- you know, like a bank or</p> <p>8 a pharmacy, isn't it fair to say that those are</p> <p>9 actually within the banks, and the pharmacies are</p> <p>10 actually within the store itself?</p> <p>11 A Oftentimes, yes. Most of the times a bank</p> <p>12 would be -- if it's an in-store bank, it would be</p> <p>13 within the four walls.</p> <p>14 Q And the pharmacy would as well?</p> <p>15 A Typically, yes.</p> <p>16 Q And I think it's also fair to say that</p> <p>17 when somebody says they're going to the grocery</p> <p>18 store, it doesn't really mean they're going to the</p> <p>19 gasoline station?</p> <p>20 A I don't know that.</p> <p>21 Q You don't know that?</p> <p>22 A No.</p> <p>23 Q What percentage of profit is allocable to</p> <p>24 your gasoline stations?</p> <p>25 MR. HARRIS: I believe he testified to</p>	<p>268</p> <p>1 A Hold on. If I may, I testified that in</p> <p>2 order for us to move forward with a supermarket in</p> <p>3 Clarksburg, okay, it is essential that we have a</p> <p>4 gas station. As to our internal analysis,</p> <p>5 that's -- I don't -- I don't think -- I'm not</p> <p>6 going to discuss our internal analysis with you.</p> <p>7 I will tell you that it is a requirement for us to</p> <p>8 go forward that we have gas at this location, and</p> <p>9 I don't -- and that's where I will leave it.</p> <p>10 Q So that's a choice that's being made by</p> <p>11 Weis?</p> <p>12 A Absolutely.</p> <p>13 Q Okay. And your testimony is that the</p> <p>14 other Weis locations that don't have gas stations</p> <p>15 are, in fact -- they're not going out of business,</p> <p>16 right? They're viable?</p> <p>17 A We have 197 stores, yeah.</p> <p>18 Q Okay.</p> <p>19 A The vast majority of them are viable,</p> <p>20 yeah. They're all viable. They're still</p> <p>21 operating.</p> <p>22 MS. POWELL: Thank you. No more</p> <p>23 questions.</p> <p>24 HEARING EXAMINER SOKONI: Ms. Presley, do</p> <p>25 you have cross-examination?</p>
<p>267</p> <p>1 that.</p> <p>2 A I testified to sales, and that's what</p> <p>3 you'll get out of me.</p> <p>4 Q So --</p> <p>5 A I'm not -- I'm not going to break down</p> <p>6 profitability by department.</p> <p>7 Q Okay. Well, you've testified that it's</p> <p>8 absolutely critical to have --</p> <p>9 A I did.</p> <p>10 Q But you're not willing to testify with</p> <p>11 respect to the amount of profit that would yield?</p> <p>12 A If I might, I don't know that -- the issue</p> <p>13 here is if I'm going to make money or not, with</p> <p>14 the profitability. The issue with the</p> <p>15 profitability of my gas station is I don't</p> <p>16 believe.</p> <p>17 Q But you're not willing to share that?</p> <p>18 A No.</p> <p>19 Q But it's not your testimony that a gas</p> <p>20 station is absolutely required?</p> <p>21 A My testimony is that a gas station at</p> <p>22 Clarksburg is absolutely required.</p> <p>23 Q I thought you just got done telling me it</p> <p>24 was about how much money you were going to make,</p> <p>25 not --</p>	<p>269</p> <p>1 MS. PRESLEY: Mr. Harris is going to be</p> <p>2 presenting someone relative to the needs analysis,</p> <p>3 correct?</p> <p>4 MR. HARRIS: Yes, that's correct.</p> <p>5 CROSS-EXAMINATION BY THE OPPOSITION</p> <p>6 BY MS. PRESLEY:</p> <p>7 Q I really just only had one question then</p> <p>8 for Mr. O'Hara, and that was you had mentioned,</p> <p>9 you know, the competition. You consider Harris</p> <p>10 Teeter, Giant, even Wegmans as far out as that.</p> <p>11 Do you consider the gas stations in those areas as</p> <p>12 competition as well to a potential gas station for</p> <p>13 you?</p> <p>14 A No.</p> <p>15 Q So the people who are going to that</p> <p>16 grocery store, in your opinion, wouldn't be going</p> <p>17 to get gas and groceries?</p> <p>18 A I thought you said --</p> <p>19 Q Well, there's gas stations adjacent.</p> <p>20 A I'm sorry. I misunderstood your question.</p> <p>21 Let me tell you what I think I asked and tell me</p> <p>22 if that was correct, or you asked me. I thought</p> <p>23 you asked me if I considered gas stations as</p> <p>24 competition.</p> <p>25 Q The gas stations that are close to,</p>

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<p>270</p> <p>1 adjacent to these other grocery stores, if you 2 would also consider them potential competition to 3 a future gas station at Weis. You're saying these 4 grocers are competition in your opinion. So are 5 adjacent gas stations for these grocers 6 competitive to what you would have as a gas 7 station? That's what I was asking, if you 8 considered those areas also to be competitive for 9 their gas offerings. 10 A We consider the existence of other gas 11 offerings, okay, but we look at our gas station as 12 part of our store. We don't -- we don't consider 13 the gas station, per se, competition to our 14 supermarket. 15 Q No. I'm talking about gas stations -- in 16 other words, if you're relying on -- you know that 17 you have competition for your grocer, but you're 18 saying that you're going to rely on five percent I 19 believe is what you stated, five percent of sales 20 is what you expect from a gas station. What I'm 21 asking is, since you've named these other specific 22 areas as competitors -- I know, because I shop at 23 all of them, there are gas stations right there, 24 too. I've gone to them. So what I'm asking is, 25 do you not consider -- do you consider the gas</p>	<p>272</p> <p>1 prepared with other witnesses today, I am 2 determined to get this case finished. It's 3 dragged on longer than I anticipated, and I'm 4 hoping that we can fix some hearing dates to the 5 Zoom. We have two more witnesses, I think, the 6 traffic expert and the needs expert. The traffic 7 expert, I believe, will be very brief. The needs 8 expert not so much. I think that, you know, 9 between his testimony and the cross-examination, 10 that will take an hour or two. 11 HEARING EXAMINER SOKONI: Okay. Well, I 12 had warned everybody that I was hoping we could, 13 you know, go all day if we had to because, now 14 that I'm looking at the time, it's possible we 15 might have concluded today. But under these 16 circumstances, I guess we do -- well, because -- 17 MS. PRESLEY: None of -- no folks can 18 testify remotely? They have to be present? I'm 19 asking that because it's -- I make a special 20 arrangement for a full-time care person for my 21 mom, and it's really hard to reschedule and I've 22 already paid someone for the full day today. 23 MR. HARRIS: Okay. I'll try to 24 accommodate you. I don't know whether -- David 25 Samba, I think, our traffic expert, is on the</p>
<p>271</p> <p>1 stations adjacent to those as potentially 2 competitive to a future gas station for Weis. 3 A Yeah, for some of the gas dollars, yes. 4 For some of the gas, yes. 5 MS. PRESLEY: Thank you. 6 MR. HARRIS: I just want to correct one 7 thing. Ms. Presley said that he said that gas was 8 five percent of the store's sales. I think what 9 he said was that gas is five percent of the 10 overall company's sales, and that at the store 11 it's 10 percent. 12 MS. PRESLEY: Is that correct? 13 THE WITNESS: That is accurate. 14 MS. PRESLEY: Okay, 10 percent. Thank 15 you. 16 THE WITNESS: It's 10 percent where we -- 17 about average 10 percent where we have a fuel 18 facility. 19 MR. HARRIS: I have nothing further. 20 Now, I will say this went more quickly 21 than I thought. We have other witnesses, but they 22 are not here today because I did not think we 23 would get that far. We do have the need to talk 24 about future hearing dates, though, and any other 25 housekeeping matters. You know, despite not being</p>	<p>273</p> <p>1 line. 2 David, are you still there? 3 MR. SAMBA: Yes, I'm here. I have to 4 switch my laptop to come on video, but I am here. 5 MS. POWELL: Okay. Excuse me. I think 6 that video testimony of a primary witness is going 7 to be difficult. I mean, I understand 8 Ms. Presley's predicament, but it would be better 9 for him to physically be here so we can look at 10 the exhibits at the same time that he is and just 11 track it. 12 MS. PRESLEY: No, that's fine. 13 MS. POWELL: Yeah. 14 MR. HARRIS: That's fine. I mean, the 15 Hearing Examiner does video testimony all the 16 time, but if you're objecting to it, I'm not going 17 to stand in the way so long as we can find a 18 hearing date to resume that is as promptly as 19 possible. 20 MS. POWELL: Sure. And I did provide 21 dates. 22 MR. HARRIS: Yes, yes. Thank you. 23 HEARING EXAMINER SOKONI: So have you -- 24 have you compared dates and -- 25 MR. HARRIS: No, we have not, but we can</p>

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274	<p>1 do that. What Ms. Powell said -- well, let me 2 back up. I don't -- I think you had previously 3 ruled out other dates in February here, which 4 would be my first preference. A combination of -- 5 I think Mondays and Wednesdays I think you had 6 said are out. Has any of that changed? 7 HEARING EXAMINER SOKONI: No. Mondays and 8 Wednesdays I'm not available. 9 MR. HARRIS: Okay. And then -- 10 HEARING EXAMINER SOKONI: And the 25th I 11 have an existing hearing. 12 MR. HARRIS: Okay. 13 HEARING EXAMINER SOKONI: So at this point 14 I think we're -- 15 MR. HARRIS: So what about the 27th or 16 28th? 17 MS. POWELL: I have a mediation. Are we 18 talking about February? I'm sorry. 19 MR. HARRIS: February, yes. Yeah. 20 HEARING EXAMINER SOKONI: Okay. We can 21 accommodate that. So that then moves us to March. 22 MR. HARRIS: 4, 6 or 7? 23 HEARING EXAMINER SOKONI: Can I ask the -- 24 could you pull up our OZAH schedule? Thank you. 25 We're now looking at March, and we're staying away</p>	276	<p>1 MR. HARRIS: I'd go with the 6th. And if 2 I could indulge, you know, I don't know how long 3 the opposition testimony is going to be. I don't 4 think they have many witnesses. I would certainly 5 hope that we could finish in one day. But, given 6 conflicting schedules, if we can put a hold on 7 7 just in case. 8 HEARING EXAMINER SOKONI: Ms. Powell, what 9 was the -- which date had a hard stop for you? 10 MS. POWELL: Oh, that's a 27th. 11 HEARING EXAMINER SOKONI: Okay. 12 MS. POWELL: Yeah. 13 HEARING EXAMINER SOKONI: So why don't we 14 plan for the 6th, and I think if we're reconvening 15 on the 6th I would plan for us to -- I think if we 16 set aside the full day, that should be plenty. 17 How many witnesses does the opposition -- how many 18 witnesses do you have? 19 MS. POWELL: Do I have? I have two, 20 because we were unable to obtain an expert 21 witness. 22 HEARING EXAMINER SOKONI: Correct. 23 MR. HARRIS: Two, plus Ms. Presley will 24 testify, I guess. So there are, I guess, three 25 opposition witnesses.</p>
275	<p>1 from Mondays and Wednesdays. 2 MR. HARRIS: So 4, 6 or 7. 3 HEARING EXAMINER SOKONI: Yeah. March 4 will have to be further out because -- 5 MR. HARRIS: 4, 6 and 7 don't work you 6 say, ma'am? 7 HEARING EXAMINER SOKONI: Yeah. Let me 8 just -- so we're looking at the rest of the OZAH 9 calendar here. 10 MR. HARRIS: I don't see anything in 11 March. 12 THE TECHNICIAN: That's May. I've got to 13 get my -- 14 MR. HARRIS: Yeah. 15 HEARING EXAMINER SOKONI: Okay. So -- 16 MS. POWELL: Well, I had said that I was 17 available the 6th, 7th, 13th, 14th, 21st, 27th, 18 28th and I could do the 27th, but I would have to 19 have a hard stop at two p.m. because I have to be 20 at another hearing in Thurmont at six p.m. 21 MR. HARRIS: Okay. So what about 6 and 7? 22 HEARING EXAMINER SOKONI: Does the 6th 23 work? I think March 6 and 7 both potentially 24 work? Is there a preference for 6 or 7? Can we 25 go with the 6th?</p>	277	<p>1 MS. PRESLEY: I'm still trying to get 2 somebody else relative to the compliance program 3 from the county. I'm waiting on legal opinion 4 from that person's counsel as to whether they can 5 appear. 6 MR. HARRIS: I thought you told the 7 Hearing Examiner you didn't need them. 8 MS. PRESLEY: That was for the Planning 9 Board one. The Planning Board Staff I said I 10 didn't need. There's somebody else in the county 11 who was a party to the compliance program, and 12 they're currently checking with their legal 13 counsel -- 14 HEARING EXAMINER SOKONI: So I had 15 specifically asked whether I could have the 16 questions that you needed them to address so that 17 I could determine whether we needed their 18 presence, and I didn't receive anything. 19 MS. PRESLEY: That's because I don't need 20 them. I'm talking about someone else. 21 HEARING EXAMINER SOKONI: You don't need 22 the two people you had identified previously? 23 MS. PRESLEY: Correct. 24 HEARING EXAMINER SOKONI: But you need a 25 third person?</p>

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278	1 MS. PRESLEY: I've since met with a third 2 person, and I'm waiting on legal opinion because 3 he's part of the county government as to whether 4 or not he is able to testify. 5 HEARING EXAMINER SOKONI: And who is that 6 person? 7 MS. PRESLEY: Is it okay for me to -- 8 MS. POWELL: I can't speak to that. 9 MS. PRESLEY: The County Executive, Mark 10 Eldridge. He was on the County Council at the 11 time. I'm waiting to hear back as to whether or 12 not I can have testimony from Mr. Eldridge. 13 HEARING EXAMINER SOKONI: And what 14 testimony are you seeking? 15 MS. PRESLEY: As to the implementation of 16 the compliance program, the validity of the 17 compliance program and the still legally-binding 18 nature, according to the county, as to the 19 compliance program and what was owed under it. 20 MR. HARRIS: If we're going to get into 21 all that, it's a Planning Board resolution. The 22 county executive did not adopt it. It's not his 23 resolution. 24 MS. PRESLEY: No, but he was on the Board. 25 MR. HARRIS: I would suggest then that you	280	1 with administering the plan of compliance should 2 be here. And if we're going to do all of that, 3 then I think we need to reserve the 7th, too. 4 HEARING EXAMINER SOKONI: Can we reserve 5 the 6th and the 7th? 6 MS. PRESLEY: It's difficult for me to do 7 back to back because of the issue with caregiving. 8 Hold on. 9 MS. POWELL: I'm available on the 7th. 10 HEARING EXAMINER SOKONI: Both the 6th and 11 the 7th? 12 MS. POWELL: Yes, ma'am. 13 MS. PRESLEY: Okay. We can reserve it 14 even if -- 15 HEARING EXAMINER SOKONI: Okay. So we'll 16 be reconvening on March 6 at 9:30 for a continued 17 hearing, and the Applicant will continue your case 18 in chief with two additional witnesses. 19 MR. HARRIS: Yes. 20 HEARING EXAMINER SOKONI: After which 21 we'll turn over to the opposition. 22 MR. HARRIS: Thank you. And I apologize 23 again for not having the other witnesses here 24 today. I really, you know, wish I had but -- and 25 I understand that they don't want to do it by
279	1 ask the Planning Staff to attend, which was what 2 Ms. Presley initially announced. 3 MS. PRESLEY: And that was going to be to 4 ask them about their process for review, 5 Mr. Harris. What I'm speaking to directly now is 6 the County Council's adoption of the compliance 7 program as sufficient to remediate all violations 8 that were being addressed at the time. And if it 9 can't be -- if it can't be Mr. Eldridge, I'm 10 trying to get an affidavit from anyone else who 11 can support that so that that can be officially 12 entered into the record. 13 HEARING EXAMINER SOKONI: Why don't we -- 14 let's set aside March 6 as the day to reconvene, 15 and let us plan for a full day of hearing. If we 16 don't need the full day, well and good. But my 17 hope is that maybe when we convene on the 6th we 18 can conclude. 19 MR. HARRIS: Okay. But, again -- 20 HEARING EXAMINER SOKONI: I just -- 21 MR. HARRIS: Excuse me. I'm going to 22 object if she wants to invite Mr. Eldridge here, 23 because I think it's irrelevant. And if he is 24 going to be here, I believe that the Park and 25 Planning Staff members who are the ones charged	281	1 Zoom. We can accommodate, and 6 and 7 work. 2 HEARING EXAMINER SOKONI: Okay. 3 MR. HARRIS: Thank you for your 4 understanding. 5 HEARING EXAMINER SOKONI: You're very 6 welcome. Ms. Presley, I'll return this to you. 7 If you're able to get us a YouTube -- 8 MS. PRESLEY: I'll do it by YouTube, and 9 and I will -- I will respond to everybody whether 10 or not the presence of Mr. Eldridge is going to be 11 confirmed. If it is, then I'll mention him right 12 away. 13 HEARING EXAMINER SOKONI: The hearing is 14 closed. 15 (The hearing adjourned at 3:09 p.m.) 16 17 18 19 20 21 22 23 24 25

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Nicole Mastrosimone,
Stenographic Reporter, Legal Transcriptionist
March 3, 2025

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