IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

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<tr><td>PETITION OF COSTCO WHOLESALE
CORPORATION

FOR JUDICIAL REVIEW OF THE
DECISION OF THE MONTGOMERY COUNTY
BOARD OF APPEALS

IN THE MATTER OF COSTCO WHOLESALE
CORPORATION
Board of Appeals Case No. S-2863</td><td>)
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CIVIL ACTION NO.
404629-V (Bair)</td></tr>
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MEMORANDUM OF RESPONDENT
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INTRODUCTION

The Respondent files this Memorandum in the above-captioned matter as a rebuttal of the Memorandum of Petitioner (MOP) (1), specifically to address several issues that may not be covered by other Respondents. This statement should not be taken to imply that the Respondent disagrees with any of the arguments or assertions made by those other Respondents, which, taken collectively (and including this Memorandum), comprise the Opposition to the Petition filed by Costco. The Respondent is a scientist (not a lawyer) who participated extensively in the Special Exception Process (SEP) for S-2863; this involved reading many filings (and also preparing a number of filings), attending almost all hearings, cross-examining several of Applicants' expert witnesses, and testifying in detail regarding Applicant's Land Use and Traffic Impact filings. He argued that Applicant had failed to meet the burden of proof in any of the relevant aspects of Land Use code (2). He herein asserts that Petitioner's arguments before the Circuit Court are flawed and that the decision of the Board of Appeals (BOA) should be sustained. This response memorandum is based on a close reading of the MOP, in the course of which numerous misleading statements were identified. The Respondent could have structured this rebuttal to 'mirror' the MOP, much as he did in his rebuttal of Applicant's Land Use Report for S-2863 (3). Instead he has chosen to spare the Court and to focus on a very limited subset of those flaws, in the interests of brevity.

THE CASE

As in any Application for a Special Exception, the SEP is defined by County Land Use Code. The Code regarding SEP for proposed gas stations involves a number of specific requirements and the Applicant must meet the burden of proof that it has satisfied each requirement. There are two general factors about these requirements that should be noted here:

a. In many cases the individual requirements are so intricately interrelated that it is nearly impossible to cleanly separate one from another. Any attempt to do so constitutes – in the opinion of this Respondent – 'stove-piping'. Thus it was necessary for the Opposition to contest "virtually every requirement of the special exception". (MOP, p.2, line 12)

b. In essence none of the requirements designate a 'bright line' by which one can evaluate whether the requirement has been met. In many cases words are used that are subject to varying interpretations (e.g. adverse impact, nuisance, compatibility), which results in a situation in which those charged with rendering a recommendation, or a decision, on the request (for a special exception) must come to a reasonable opinion, based on the facts presented (by written filing and/or by testimony and response to cross examination) as well as on some assessment at to how to 'weight' the various facts.

Applicant was well aware of the nature of the SEP as carried out in Montgomery County and raised no generic objections to the process, either during the numerous hearings before the Hearing Examiner (HE) or elsewhere. In fact, in testimony before committees of the Maryland Legislature in Annapolis, representatives of the Applicant argued that legislation proposed by the Mega Gas Station Setback Coalition (MGSSC) was unnecessary and ill-advised because matters such as S-2863 were 'local' matters and best handled by local jurisdictions (such as the SEP in Montgomery County) (3).

The Special Exception Process in Montgomery County is complex and at times difficult to understand (5). Based on a set of rules (code/law), an applicant requests approval of a proposed land use. Opponents (if any) state their objections. The application is then evaluated in three steps (each leading to a recommendation) after which the BOA considers the recommendations and renders a decision. First, technical staff (professionals who serve the Planning Board) evaluates all available information and makes a recommendation: to approve or deny. In this case (S-2863), the Technical Staff recommended denial. Next the Planning Board holds one or more hearings and, based on those – as well as the technical staff recommendation – makes its recommendation. In this case (S-2863), the Planning Board recommended denial. In a third step, hearings are held by the Hearing Examiner (HE), who is aware of the first two recommendations, has (or receives during the hearings) relevant documents, and is charged with 'finding the facts'. In this case (S-2863), the HE held some 37 hearings and issued an extensive report/analysis, with the recommendation of denial.

Finally, the BOA examines the recommendations (and the various supporting documents) and renders a decision. In its opinion of 11 March, 2015, the Board Of Appeals showed admirable brevity in stating why it decided to deny S-2863. It required only four pages to state, in essence, that the findings of the Hearing Examiner, based on an exhaustive series of hearings, exhibits, and testimony, were conclusive. They were. This respondent at times questioned the way the Hearing Examiner conducted the hearing phase of the SEP, but he never doubted the fairness or deliberate mode of searching for all relevant facts. That the process ended up taking a staggering 37 hearings can be attributed to the Applicant's insistence on filing more and more materials, which forced the Opposition to respond, and required the hearing examiner to prolong the process so that there could be no doubt as to his fairness nor as to his attention to every detail presented.

That said, Respondent does not mean to imply that he agrees with every finding of the HE, nor with every detail the HE cited to support each finding. In fact this Respondent remains convinced of the accuracy of the assertions he made with respect to the Land Use Report (2,3). And he is firmly convinced (6) that the HE erred in finding Applicant had met the burden of proof with respect to traffic as a nuisance. But since the overall recommendation (of the HE) was denial, it would be counterproductive to argue

over details. Petitioner of course is in a different position and is forced to argue the details.

THE ARGUMENT

Petitioner argues primarily the conclusion of the HE with respect to Health Risk and contrives to make the ruling on Compatibility secondary (or corollary) to the conclusion on Health. Before rebutting Petitioner's specific arguments, we chose to call attention to Petitioner's flawed use of the word "neighborhood", which error is a continuation of Applicant's inconsistency (regarding "neighborhood") during the SEP. This error affects both arguments, i.e. the primary one as to Health Risk, as well as the secondary one as to Compatibility.

Petitioner includes in the MOP (at page 4) an aerial view of the neighborhood. This is the definition of neighborhood adopted by the Technical Staff and the Planning Board, and agreed to by the Opposition. Petitioner fails to note that Applicant initially insisted that the "neighborhood" in this case was co-extensive with the Mall property and did **not** include the portion of the Kensington Heights community immediately to the south and west of the Mall property. Applicant persisted in its flawed definition of the neighborhood throughout the first two phases of the SEP and well into the HE phase. At some point (Respondent is not certain if/when this was explicitly stated), Applicant accepted the definition of neighborhood indicated by the photo proffered in the MOP. Now the Petitioner is, in effect, re-defining neighborhood yet again, because its arguments about Health Risk and Compatibility focus essentially on the residential homes in the southwest part of the total neighborhood and exclude an equally (or even more) relevant portion of the total neighborhood, namely the portion of the Mall within which the proposed gas station is to be placed. This error in essence invalidates much (if not all) of Petitioner's argument – as explained below.

Respondent chooses to address the Compatibility issue first, because it is not – as Petitioner attempts to convey – of secondary importance. Rather, as was explained in considerable detail (6) by the Respondent in his testimony about Traffic Impact, the incremental increase of traffic that will result if the proposed gas station is constructed and put into operation, will have a very large incremental impact by virtue of greatly increasing traffic congestion. And the largest incremental increase will be in the immediate vicinity of the gas station. That is because of the nearly unique nature of the proposed station – as is described in the filing that explains the 'linkage' between traffic impact and health risk (7). Respondent will not attempt to restate the contents of these two especially relevant filings (6,7) here. Rather he chooses to use a very simple diagram (8) – presented during his testimony but not fully understood by the HE – to clarify. The diagram, deliberately hand drawn so as to make clear it was not based on any actual measurements at the site (9), is a simple representation of the exponential increase (curvature upward) of the congestion in the vicinity of the gas station that can be expected if the gas station were to be approved. The Respondent wishes to emphasize

two points about this graphic statement of a very simple principle that are relevant to the assertion that the MOP is flawed:

a. It is the essential nature of any such situation that, as the stress on a given place is increased, the strain that results increases in a non-linear fashion. This is not to say that there is necessarily some ‘breaking point’, but rather that the addition of a very small amount of additional traffic is likely to cause a disproportionately large increase in congestion. The parking lot in which the project is sited is already heavily used and, in many instances, is over its capacity to smoothly handle the impediment to flow of traffic (both vehicular and pedestrian) that results when a few additional cars are added to the ‘mix’. It is important to understand that this simple concept means that the impact of the additional traffic on congestion can only be appreciated if it is viewed in proper context. [An analogous situation arises if one considers the assertion that “traffic from the gas station will merely cause: … An additional delay of about five seconds for each car travelling through intersection 16…” (MOP, p. 31, lines 16-18). Assuming this is accurate, consider the cumulative impact. If the queue at the intersection is about ten cars, the delay experienced by the tenth car is not 5 seconds, but more nearly one minute. Respondent is not asserting that a one minute delay is intolerable (although to some it might be). Rather he is asserting that the MOP presents this particular fact in a misleading manner.]

b. The second – and far more important – point to be made here is that the increase in traffic congestion is centered on the gas station site. It is not centered on the portion of the Kensington Heights neighborhood upon which Petitioner chooses to focus.

Respondent has chosen to insert these comments into his rebuttal of Petitioner’s assertions as to the Compatibility issue because the impact of additional traffic in the vicinity of the proposed gas station site is very much relevant to the question of compatibility. The parking lot where S-2863 proposed a mega gas station be placed is very much a part of the “general neighborhood” (MOP, p.4, lines 8-9). The portion of the neighborhood immediately adjacent to the gas station site is characterized by both pedestrian and vehicular traffic. People in that neighborhood may not be ‘residents’ of it in the commonly accepted sense, but they spend time in that neighborhood. Whether they are pedestrians walking through the parking lot on their way to the Metro, or pedestrians walking to/from their cars (to shop at one of the nearby Mall stores, or dine at one of the food service points), or pedestrians walking to their jobs (in one of the Mall businesses), they experience a certain ambience and one part of that ambience is the extent to which traffic congestion impedes their passage – or ‘stresses’ them as they traverse the parking lot in the vicinity of the proposed gas station site.

Compatibility is a complex and easily misconstrued (or misrepresented) matter.

Petitioner's assertion that "The Board's Finding of Incompatibility is Based on Its Erroneous Findings of Potential Adverse Health Effects and Fails for the Same Reasons" (MOP, p. i, lines 24-26 and p. 27, lines 16-17) is preposterous on its face, especially because it presumes to read the mind of the HE by presuming that his statement of reasons for finding incompatibility are the only factors he considered. The SEP requires the HE to treat each requirement as a distinct/separate entity. But the requirement for compatibility is inherently one that straddles many of the other requirements (vide supra regarding the problem of 'stove-piping'). Consider that the increased congestion in the parking lot means that some people who wish to take the Metro will find it less compatible with the path they prefer to take. In that sense, the parking lot location of the gas station is incompatible with the objective of increasing the use of public transportation: it does not prevent it, but makes it more difficult to achieve. Or consider the notion of nuisance. Respondent did not cite traffic congestion nuisance as the primary reason for objecting to the gas station. In fact, traffic as a nuisance was explained in a very nuanced way (6) and the argument introduced by the Respondent never suggested there would be an increase in traffic within or through the Kensington Heights neighborhood. The Petitioner has either misconstrued (or deliberately chosen to make misleading statements on) this point (MOP, pages 28 and 29)]. We restate the question of nuisance so as to clarify:

a. Increased congestion in the immediate vicinity of the gas station will be a nuisance (or an inconvenience – which is one alternative cited by legal dictionaries) to those who, by virtue of being in that portion of the neighborhood, find it more problematic to traverse that portion of the neighborhood. Whatever the legal definition of level of nuisance may be required to reject some land use, there can be no question that any level of increase in nuisance is to some extent incompatible with the existing neighborhood (as it exists absent the proposed new land use).
b. When the Respondent raised the issue of traffic nuisance to the Kensington Heights portion of the neighborhood, he attempted to make clear that this was a smaller (tertiary) concern and he focused on ingress to/egress from the neighborhood at the intersection of Drumm and University. The fact that the Respondent already often avoids going through intersection 16 entirely (in part because of the traffic back-up to University, to which the problem at Drumm contributes) and instead drives completely around the Mall to enter from the Veirs Mill side is another example of nuisance: one finds the problem inconvenient and finds a way to solve it, but that does not mean it is not a nuisance. And it almost certainly will be made worse if the gas station is permitted in the portion of the neighborhood proposed in S-2863.
c. Above and beyond any health risk posed by exhaust emissions (see below),

the nature of the stress of attempting to navigate (either on foot or in a vehicle) the congested parking lot area around the site of the proposed gas station would be harmful to the health of people in that portion of the neighborhood.

This Respondent recognizes that lawyers rely heavily on case law/precedent. He used Google Scholar in an attempt to find some case law regarding traffic congestion in parking lots, but was unable to find any such case law. He was not surprised, given the complexity of traffic in a parking lot (which is in essence a maze of intersecting small 'roads') and the reality that Traffic Analysts are just beginning to sort out how to handle congestion in such situations – using computer simulations.

The above is not to suggest that the HE gave heavy weight to traffic congestion when he decided the Applicant had failed to meet the burden of proof as to Compatibility. But, in the opinion of this Respondent, that would have been appropriate. However, the HE is a jurist (while the Respondent is a scientist) and told the Respondent (during one of the hearings) that the logic of the law is somewhat different from the logic of science. Given the complexity of matters such as the legal definition of 'compatibility', it is to be expected that differences of opinion will arise. The HE went to great lengths to sort out the various shades of gray on each issue he considered. In the final analysis, he had to render a binary decision – approve/deny. And, while this Respondent may not agree with every detail, he recognizes that – as to Compatibility – the HE made the correct recommendation.

Finally, Respondent turns to Petitioner's argument as to Health Risk. The concern about Health Risk was always (and remains) the most important issue for the Opposition, but not the only one. For the Applicant it was always the 'elephant in the room'; it was not addressed directly (10) but only via arguments about other requirements. It is a curious turn-around that Petitioner has chosen to focus on Health Risk and argue that the issue of Compatibility is of secondary importance because, according to Petitioner, the HE and BOA only found against S-2863 because one could only argue Compatibility due to its linkage to Health Risk. In some sense Respondent's filing (7) on the connection between Traffic Impact and Health Risk would appear to be of a similar nature, but it is not. That filing does not imply that Traffic Impact (and other factors involved in Compatibility) and Health Risk are the same. It says they are linked – as they are.

What is perhaps most striking about Petitioner's argument regarding Health Risk is the extent to which it mirrors how Applicant approached this issue during the hearings for S-2863: Applicant constructed an argument that was 'smoke and mirrors'. There are three relatively simple reasons for stating that the Petitioner has presented a seriously flawed argument regarding the BOA ruling as to Health Risk:

a. Applicant presented no facts regarding air quality at the site of the proposed gas station. Petitioner has essentially attempted to obscure this fact by

addressing only the portion of the neighborhood outside (i.e. at the southwest of) the Mall proper. Given that some air quality numbers come close to the limits recommended by the EPA at sites distant from the center of the impacted part of the neighborhood, it is inconceivable that the numbers (had they been presented) for pollutants at the center of the impact region would not exceed the recommended limits. Petitioner might have provided data to counter this assertion, but did not. Referring back to our comments about Compatibility, this Respondent reminds the Court that people traverse the region immediately around where the proposed gas station would be sited and thus would be exposed to any noxious components added to the air by the cars queued and idling at the gas station (as well as those, slowed by the traffic congestion, moving in and around the parking lot and ring road near that gas station). Hence Applicant's failure to provide actual numbers about the levels of such noxious components in the immediate vicinity of the gas station is an egregious failing, and Petitioner's inability to correct this failure is a major flaw in its argument.

b. Petitioner argues that the HE and the BOA erred by substituting their judgment for the authority of the EPA in determining acceptable levels of air quality. This is simply not so. The standards determined by the EPA are regional ones and how they are used in a particular situation must be determined on a case-by-case basis [e.g. deciding which monitoring station(s) is/are the appropriate reference points]. Local, State, and Federal laws certainly constrain how much latitude exists in any specific case as to how the EPA standards are to be applied, but once again, this is an example of the absence of 'bright lines'. The issue is further complicated, in this particular case (S-2863) by several 'uncertainty' factors. First, the site is an unusual one – having characteristics of both 'urban' and 'rural' – and parameters must be chosen by the analyst based on a judgment as to whether the site is more urban or more rural. [The fact that applicant provided no data on the immediate vicinity of the proposed gas station further complicates this issue.] Secondly, the standards are given without any range and the Applicant provided no estimate as to the uncertainty of any of the reported measurements. Absent 'error bars' it is extremely difficult – if not impossible – to say whether or not a given number is so close to a 'standard' that it is actually above or below that standard. In situations like this a scientific expert must make a judgment call and the credibility of the expert becomes of vital importance, which raises a third factor, namely the credibility of Applicant's Air Quality Expert. Respondent

described in some detail (2, slides 54-57) how Mr. Sullivan's presentation of data was not scientifically sound. Nor did Mr. Sullivan comport himself as a true scientist when informed of an error in his presentation: when Opposition pointed out the simple arithmetic error Mr. Sullivan had made (dividing when he should have multiplied), Mr. Sullivan did not simply acknowledge the error but rather pretended it was a complicated matter that required careful analysis.

c. Applicant never presented a credible report from a Health Expert. The report filed by Dr. Chase had virtually no credibility, as was demonstrated by written rebuttal and a cross-examination that was so effective the Applicant chose not to call Dr. Chase in the rebuttal phase of the hearings. In fact, as Respondent explained in his written testimony (2, slides 61-64), the most credible explanation for how the various documents submitted regarding Health Risk were named and filed is that Applicant itself realized the inherent weakness of the 'report' of its 'Health Expert'.

Put very simply, the HE evaluated a complex set of 'facts' and interpretations of those facts and made his best judgment as to how closely the facts/interpretations matched up with the standards set by EPA. Once again, in a very complex situation, with many shades of gray, the HE had to make a binary decision. He did and it was the correct one. The BOA concurred in this judgment.

CONCLUSION

As has been stated above, the Applicant is required – by the SEP – to meet the burden of proof as to having satisfied each of a series of requirements. Failure to meet the burden of proof with respect to just one requirement is sufficient basis for denying the Special Exception Application. In the case of S-2863, it was the judged by those responsible for recommending/deciding that Applicant had failed to meet the burden of proof with respect to two of the requirements. Based on the arguments presented by this Respondent, as well as those of other respondents, we urge that the Court deny Petitioner's request for review of the Board of Appeals decision.

Respectfully submitted,

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ENDNOTES

1. It should be noted that while the Respondent became somewhat familiar with certain aspects of the legal process (via his participation in S-2863), he chooses to provide references and clarifying statements as do many scientists; i.e. by a series of "Endnotes" which are indicated in the body of this document by an Arabic number. Acronyms: Each is defined when first used and is repeated here for the Court's convenience. MOP = Memorandum of Petitioner; SEP = Special Exception Process; BOA = Board of Appeals; HE = Hearing Examiner; MGSSC = Mega Gas Station Setback Coalition
2. Available at http://www.stopcostcogas.org/s2863filings/OZAH321a.pdf
3. Available at http://www.stopcostcogas.org/s2863filings/NewOZAH/Exhibit%20C.pdf
4. See for example http://www.megagassetback.org/refs/againstsummary2014.pdf
5. Respondent presumes the Court is quite familiar with details of the SEP. This description is included to emphasize how many people are involved and how much effort goes into the process. It is also included "for the record" so that, if the Court rules against Petitioner and Petitioner takes the matter to a higher court, that court will have easily at hand evidence of this Respondent's knowledge of the process. Alternative descriptions of the SEP are available at http://www.stopcostcogas.org/refs/opc_brochure.pdf and http://www.stopcostcogas.org/refs/specialexceptions.pdf
6. Available here: http://www.stopcostcogas.org/s2863filings/OZAH358b.pdf
7. Available here: http://www.stopcostcogas.org/s2863filings/NewOZAH/Exhibit%20S.pdf
8. Available here: http://www.stopcostcogas.org/s2863filings/OZAH358c.pdf
9. At two points in the MOP, Petitioner attempts to use the fact that the Opposition did no studies of its own to convey the notion that the Opposition argument is thereby weakened (MOP, p.10, line 1 and p. 32, lines 4-5). In the SEP, Opposition is not required to provide any studies of its own; its 'job' is to explain to the HE the flaws in the studies presented by the Applicant. In fact, the Respondent did present a limited amount of traffic impact data, derived by a very simple study (Opposition had neither the resources nor the time to conduct a more 'expert' study and that was not its intent), showing that the prediction of Applicant's Traffic Expert as to congestion at one crucial intersection near the gas station site was in error, by about 15%.
10. While the official records show that Applicant hired a 'health expert' and he filed a 'report', the brevity and quality of that report – as well as the way Applicant presented it – constitute prima facie evidence that Applicant did not take the notion that health risk should be taken seriously as a requirement, the lack of which must be proven by a preponderance of the evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October 2015, a copy of the foregoing "Memorandum of Respondent, by Dr. Mark R. Adelman" was mailed first class, postage paid to:

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