

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. S-2863

PETITION OF COSTCO WHOLESALE CORPORATION

OPINION OF THE BOARD

(Opinion Adopted March 11, 2015)
(Effective Date of Opinion: April 3, 2015)

Case No. S-2863 is an application by COSTCO Wholesale Corporation for a special exception under Section 59-G-2.06 of the Zoning Ordinance to allow construction and operation of an Automobile Filling Station with 16 gasoline pumps.

The subject property is Lot N631, Wheaton Plaza Parcel 10, also known as the Westfield Wheaton Mall, located at 11160 Veirs Mill Road, Silver Spring, Maryland, 20903. The property was in the C-2 Zone at the time of the application and hearing, and was later rezoned to the GR-1.5 Zone. The zoning change does not affect evaluation of the application since, under Section 59-7.7.B.1 of the Zoning Ordinance, the application must be evaluated under the provisions in effect on October 29, 2014.

The Hearing Examiner for Montgomery County conducted 37 days of hearings on the application between April 26, 2013, and September 19, 2014, when the record closed. The Hearing Examiner issued a Report and Recommendation for denial of the special exception on December 12, 2014.

Decision of the Board: Special Exception Denied.

The Board of Appeals initially considered the Report and Recommendation at its Worksession on January 21, 2015, but had to postpone its consideration, pending applications by two Board members to the Montgomery County Ethics Commission for rulings on possible conflicts of interest. The Ethics Commission granted waivers to each of the Board members concerned, and the Board considered the Report at its Worksession on March 11, 2015. The Board also had

before it a requests for oral argument from Danila Sheveiko, and in the event that the Board granted oral argument to any other party, from COSTCO.

The Board finds that the Hearing Examiner's Report and Recommendation thoroughly and comprehensively addressed all of the issues in the case, and that no further argument is needed for the Board to make its decision. On a motion by Carolyn J. Shawaker, Vice-Chair, seconded by Stanley B. Boyd, with John H. Pentecost, Edwin S. Rosado and David K. Perdue, Chair, in agreement, the Board denied the motions for oral argument.

Because this application was filed on November 13, 2012, under Section 59-7.7.1.B of the Zoning Ordinance (Mont. Co. Code, 2014, as amended), the application must be evaluated under the standards in the 2004 Zoning Ordinance. Section 59-G-1.21 contains the General Conditions that are applicable to all special exceptions. Section 59-G-2.06 contains the specific standards applicable to automobile filling station special exceptions.

After careful consideration and review of the record in the case, the Board concurs with the Hearing Examiner's finding that the COSTCO has not met its burden of proving, by a preponderance of the evidence, that the automobile filling station use would meet all of the specific and general requirements for the special exception. In particular, the Board agrees with the Hearing Examiner's findings that the application does not meet the requirements of the following standards:

§5-G-1.21(a) *A special exception may be granted when the Board or the Hearing Examiner finds from a preponderance of the evidence of record that the proposed use:*

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Sec. 59-G-2.06. Automobile filling stations.

(a) *In addition to findings required in division 59-G-1, an automobile filling station may be permitted if the Board of Appeals finds that:*

(1) *the use will not constitute a nuisance because of noise, fumes, odors or physical activity in the location proposed;*

The Board agrees with the Hearing Examiner's finding that fumes produced by the gas station would be a nuisance, in violation of Section 59-G-2.06(a)(1), and thus that the application does not meet either requirement.

§5-G-1.21(a)(4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

The Board adopts the Hearing Examiner's finding that the proposed auto filling station will not be in harmony with the adjacent residential neighborhood to the south, southwest and southeast of the subject site due to the adverse effects of traffic congestion, parking congestion, additional physical activity, as well as the potential health impacts described in Part III.B. of the Hearing Examiner's report.

§5-G-1.21(a)(5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board adopts the Hearing Examiner that the proposed use will be detrimental to the peaceful enjoyment of the general neighborhood, as discussed in Part. III.B. and Sections III.C. 1, 2. and 6 of the Hearing Examiner's report.

§5-G-1.21(a)(6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board adopts the Hearing Examiner's finding that there will be considerable physical activity, and objectionable fumes, as discussed in Parts III.C and III.B. of the Hearing Examiner's report.

§5-G-1.21(a)(8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board adopts the Hearing Examiner's finding that Petitioner has failed to prove, by a preponderance of the evidence, that the proposed use will not adversely affect the health, safety and general welfare of residents, visitors or workers in the

area at the subject site, as discussed in Section III.B.7. of the Hearing Examiner's report.

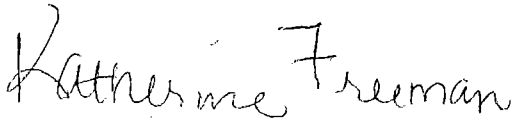
Therefore, based upon the foregoing, on a motion by Carolyn J. Shawaker, Vice-Chair, seconded by Edwin S. Rosado, with Stanley B. Boyd, John H. Pentecost and David K. Perdue, Chair, in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that Case No. S-2863, Petition of COSTCO Wholesale Corporation, is **denied**.



David K. Perdue
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 3rd day of April, 2015.



Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.