

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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**

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* **Civil Action No.**
* **404629-V (Bair)**
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**Memorandum of Respondent
Donna R. Savage**

As a lay Respondent, unrepresented by counsel, I believe discussion of the specifics of this case and the legal arguments in support of those positions are best left to the other Respondents and the Memoranda filed by attorneys for the Kensington Heights Civic Association, the Stop Costco Gas Coalition, and Montgomery County. I hereby adopt the positions stated in those Memoranda and incorporate them as part of this Memorandum. However, I would like to opine briefly regarding three aspects of this case.

I attended the vast majority of the 37 hearing dates in this case and observed – and participated as a witness for 2 days – the conduct of that proceeding by the Hearing Examiner, Mr. Martin Grossman. As such, I believe I am able and qualified to express an informed layperson’s view of the proceeding and the arguments made therein.

ARGUMENT

1. Expertise and Approach of the Hearing Examiner. Martin

Grossman was the Hearing Examiner in this case. Mr. Grossman has been a Hearing Examiner for 12 years and Director of the Office of Zoning and Administrative Hearings for the last 5 years, so he has vast experience with the Special Exception process in Montgomery County. He was exceedingly fair to all parties, which Your Honor will see upon review of the record, and demonstrated an extraordinary grasp of the details of this proceeding from Day 1. On the opening day of the proceeding, he presented the parties with “twenty questions – with subparts” that he had gleaned from the extensive pre-hearing submissions that he had read and fully absorbed. (Tr. 4/26/13, pp. 28-39). Those 20 questions covered the gamut of the topics before him and anticipated much of what he was to hear before the hearing closed in September 2014.

From that first hearing date until the last, Mr. Grossman listened carefully to every word that was said and had nearly perfect recall of every aspect of the testimony and the exhibits. It was rarely necessary for a lawyer to object that a witness was not correctly stating prior testimony because Mr. Grossman had already caught the issue and noted a correction. He was deeply involved in the case at all times; one can open the transcripts at random and quickly find examples in which he actively questioned witnesses and counsel to clarify points and to ensure that the record fully reflected the scope of the issues. As Mr. Grossman stated in his Report (pp. 12-13), he began the case with the

assumption that this application would likely represent an appropriate use of space in an auto-centric mall, and it appeared that he expected that, like most other Special Exception cases, any issues that arose could be resolved through the normal process of attaching adequate conditions to its use. Proceeding from that assumption, the Opposition often faced probing questions from Mr. Grossman as he ensured that he had teased out our positions and that he understood the ramifications of the arguments and evidence that was being presented.

In the end, Mr. Grossman's fair and careful hearing process, and his deliberate considerations of the extraordinarily detailed record resulting from that process, produced a win for the Opposition. That win came after Costco was given every opportunity to make its case – and to repeatedly remake that case every time the Opposition punched holes in the testimony of Costco's experts. That win was based on Mr. Grossman's review of every nuance of that evidence, his assessment of the credibility of the witnesses, and his analysis of the law, and was by no means one-sided. Mr. Grossman denied many of the arguments raised by the Opposition, for the most part where the Opposition was unable to afford an expert to counter the testimony of the many experts retained by Costco; the Opposition was forced to rely on cross-examination and the efforts of its learned lay witnesses to expose the flaws in Costco's testimony. However, Mr. Grossman recognized and acknowledged that those lay witnesses managed to expose startling weaknesses in the Applicant's testimony and that the testimony

of the Opposition's lay witnesses, when combined with that of the experts the Opposition could afford, presented a succinct, coherent, and ultimately persuasive critique of Costco's case. His ultimate conclusion – that Costco had failed to carry its burden of proof on several of the issues required to be satisfied for approval of a Special Exception – is correct and eminently reasonable.

The Board of Appeals recognized the professional effort put forth by Mr. Grossman by unanimously accepting his Report and recommendation in full, and unanimously voting to DENY Costco's application for a Special Exception for a mega gas station at Westfield Wheaton.

2. The County's process has spoken. The Opposition has participated in all the steps in the County's Special Exception process, and at each juncture we have prevailed. The Technical Staff of the Planning Board recommended DENIAL, the Montgomery County Planning Board recommended DENIAL, the County's Hearing Examiner recommended DENIAL, and the Board of Appeals took all those recommendations into account and ruled that the application should be DENIED. Although the stated reasons for denial differed somewhat, the Hearing Examiner's Report noted that they all agreed on the fundamental point that this proposed gas station was not a compatible use at the proposed location. He also noted that the Planning Board's decision on the health issues was compromised in large part by its lack of awareness of the "egregious" calculation error made by Costco's expert in dealing with the NO₂ issues.

It is my lay understanding of the law that this Court is not to substitute its judgment for the multi-step process within the County if that result is one that could have been reached by a reasonable person. In light of the 37 days of hearings presided over by the Hearing Examiner and summarized in his Report, the detailed investigation by the Planning Board's staff, the considered resolution of the Planning Board after a multi-hour public hearing, and the careful review by the Board of Appeals, it is clear that Costco has been treated fairly and given every bit of due process to which it is entitled from the County. It is equally clear that the result of that consideration denying the Special Exception application was supported by substantial evidence that convinced all of the bodies of reasonable women and men who considered the issues for the County. As such, I believe that their unanimous conclusion is entitled to deference from this Court.

3. The Opposition is entitled to confirmation of its victory. It is clear that Costco will not voluntarily cease pursuit of its goal in this matter. Had it been prepared to do so, Costco could have dropped the issue upon being fully informed about the unique nature of the community into which it demanded to insert this mega gas station, including the nearby presence of some of the County's most profoundly challenged children at the Stephen Knolls School. Or, after seeing the strong opposition to its proposed exemption from the entire Special Exception process, it might have stepped back. Costco might also have chosen to abandon its pursuit of this application when the County passed ZTA 12-07 that set up a minimum buffer zone for large gas stations, thus precluding

Costco from building in the location that it had previously declared was the only viable location for that operation. Instead, Costco decided to revise its proposal by wedging its gas station awkwardly into the midst of the Mall parking area, in a location that would further exacerbate the traffic, parking, and pedestrian safety concerns that would have been created by the original location.

Most clearly, Costco could have chosen to cease pursuit of this application after its air quality expert, Mr. Sullivan, was forced to concede that his claim that he had resolved the issue of the gas station's safety, once and for all, was shattered by his own mathematical error. When it was discovered by the Opposition that he had divided when he should have multiplied, thus significantly skewing the air quality projections in favor of granting Costco's application, Costco could have stepped back and said "Enough." Instead, Costco had its expert double- and triple-down on his original position, writing and rewriting his reports with new parameters and new analyses, all in the attempt to show that, with sufficient effort, he could reduce the calculated emissions enough to eliminate any possibility of adverse health effects. The Hearing Examiner and the Board were entitled to find that the ever-moving target thus created, when coupled with the contrary testimony of the Opposition's experts, left them with no confidence in the conclusions asserted in Mr. Sullivan's reports. That was, again, an eminently reasonable conclusion and one that this Court can and should uphold, so as to put this case and Costco's application on the road to a final conclusion.

I harbor no illusions that Costco will give up before it has forced this process to the last possible stage of review, but it is the turn of this Court to decide the issues – and uphold the decision of the Montgomery County Board of Appeals.

CONCLUSION

Accordingly, I request that, upon consideration of the arguments herein and those put forward by the other Respondents, this Court uphold the determination of the Board of Appeals and DENY the Petitioner's request for review.

Respectfully submitted,

Donna R. Savage
10804 McComas Ct.
Kensington, Maryland 20895
301-942-2447 – voice
301-942-3329 – fax
donnarsavage@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September 2015 a copy of the foregoing "Memorandum of Respondent Donna R. Savage" was mailed, first class, postage prepaid, to:

Attorneys for Petitioner:

John E. Griffith, Jr.
DLA Piper LLP
6225 Smith Ave.
Baltimore, MD 21209

Patricia A. Harris, Esq.
Michael J. Goecke, Esq.
Lerch, Early & Brewer
3 Bethesda Metro Center, Suite 460
Bethesda, MD 20814

Attorneys for Montgomery County:

Barbara L. Jay, Esq.
Edward Lattner, Esq.
Office of the County Attorney
101 Monroe St., 3rd Floor
Rockville, MD 20850

Attorney for Kensington Heights Civic Association and Stop Costco Gas Coalition:

William J. Chen, Jr., Esq.
200A Monroe St., Suite 300
Rockville, MD 20850

Other Respondents:

Karen Cordry, Esq. (for KHCA)
10705 Torrance Dr.
Silver Spring, MD 20902

Abigail Adelman (for the Coalition)
3206 W. University Blvd.
Kensington, MD 20895

Mark Adelman (individual Respondent)
3206 W. University Blvd.
Kensington, MD 20895

Donna R. Savage