

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
FOR MONTGOMERY COUNTY**

**PETITION OF COSTCO WHOLESALE CORPORATION  
CASE NO. S-2863  
OZAH NO. 13-12**

**APPLICANT’S CLOSING BRIEF**

Applicant Costco Wholesale Corporation (“Costco”) submits this brief in support of its petition for a special exception (the “Special Exception”) to open and operate an automobile filling station at the Wheaton Westfield mall (the “Mall”). The Mall is owned and operated by Wheaton Plaza Regional Shopping Center, L.L.P., an affiliate of Westfield Corporation (“Westfield”). The proposed site of the gas station is a 36,800 square foot lease parcel in the southwest quadrant of the 75.21 acre Westfield Wheaton Mall Property (the “Site”) (the Mall property is referred to as the “Mall parcel.”)

**I. INTRODUCTION**

County Code, Section 59 (the “Zoning Ordinance”) allows the gas station to be built at the proposed site so long as Costco establishes by a preponderance of the evidence that it has satisfied the relevant Zoning Ordinance requirements.<sup>1</sup>

**A. The Costco gas station is appropriate for this location.**

The Zoning Ordinance requires the Hearing Examiner to analyze an application for a special exception by looking at its inherent and non-inherent adverse effects. It is well known that land uses that require special exceptions -- by their very nature -- create some adverse

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<sup>1</sup> Costco’s compliance with the following Zoning Ordinance Sections is undisputed: 59-G-1.2.1(a)(1) and (7) and 59-G-2.06(b)(1),(2),(3),(4),(6),(7) and(8). Sections 59-G-2.06(b)(5)(9) and (10) are not applicable.

effects. This gas station will, too. The evidence shows, however, that this gas station will not cause any non-inherent adverse effects that make the gas station incompatible with the proposed site.

In fact, the physical and operational characteristics of this gas station will minimize or reduce many adverse effects that are typically associated with gas stations. Moreover, there is nothing unique about this gas station that will generate any new types of adverse effects. The only difference is one of degree; and the evidence established that the volume of gasoline anticipated to be sold at this station will not generate traffic and emissions of such a magnitude that it renders the station incompatible with this neighborhood.

The general neighborhood<sup>2</sup> and surrounding areas are already heavily commercialized. The gas station will be in harmony with this neighborhood and there are several factors mitigating the gas station's potential effects on the surrounding properties. For example, the Mall parcel has no direct vehicular connection to the residential neighborhoods adjacent to the Mall. Any traffic, noise, or queuing related to the gas station will take place on the Mall parcel and will not interfere with homes in the area. Other than its customers, the only people whom gas station traffic may affect are the commercial tenants at the Mall, and their workers and visitors, all of whom visit the Mall voluntarily and who reasonably expect to encounter Mall-like conditions. People not on the Mall parcel will not even know the gas station is there. In addition, expert testimony established that the marginal increase in traffic due to the gas station's operations will not significantly impact Mall traffic. Notably, *none* of the Mall tenants (or their workers) oppose

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<sup>2</sup> The general neighborhood as defined by Staff and accepted by Costco, includes the entire Mall parcel and the first ring of residential properties adjacent to the south and west of the Mall parcel, bordered generally by McComas Avenue on the south and Coronada Place on the west (Ex. 70 at 6).

this Special Exception. Likewise, it is significant that neither the Montgomery County Public Schools nor the nearby Stephen Knolls School has expressed opposition to this Special Exception.

The gas station will also be separated from the residential community by several natural and man-made features. A ring road circumnavigates the Mall and the gas station Site. On the south and west sides of the ring road, a sloped and forested buffer separates the Mall parcel from the residential neighborhood. The gas station will be between ten and thirty feet higher than the closest residential properties located at least 118 feet away (measured from the Special Exception line to residential property line) and more than 284 feet away (measured from gas station canopy to residence). (Ex. 230). The forested buffer between the Mall parcel and the nearby residences ranges in depth from 25 feet to 140 feet (average 70 to 80 feet). (Ex. 70, Attachment 8). Costco will also install a green screen<sup>3</sup> that will totally conceal the gas station from any homes in the residential neighborhood, even if a resident is standing on the second floor of one of the nearest homes.

The potential for queuing vehicles on the Site will not be problematic because the gas station layout includes space for at least 40 queuing cars. Unlike many stations, Costco will always have one trained attendant on-Site to help drivers. Costco has agreed to provide a second attendant during peak hours on the weekends and will provide additional attendants as necessary. The evidence showed that 96% of the time the cars coming to the gas station will easily fit in the queuing area. On those rare occasions when space is not available in the queuing area, Costco

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<sup>3</sup> As part of the Special Exception, Costco will construct an eight-foot high solid screen wall (“green screen” or “screen wall”), to be located just outside the ring road beginning approximately 80 feet east of the three-way stop at the ring road and the drive aisle to the east of the Site and extend westerly to approximately due west of the southern edge of the canopy (Ex. 231).

attendants will direct drivers past the gas station to keep traffic flowing along the Mall's ring road. Costco's traffic expert testified that the gas station will be the most regimented and structured part of the Mall parking lot.

Costco only sells gas at its fueling stations. It will conduct no automotive repair activities or provide other sales or services at this station. Nor will the station change the Mall's hours of operation; when the gas station is open, other Mall stores will be open, too. Significantly, the gas station does not stay open later than the rest of the Mall, and the evidence is undisputed that it will cause no illumination, glare or light onto nearby properties.

Fuel deliveries to the gas station will be made, on average, two to four times per day, although one or two of them will take place in the early morning hours when there is little traffic at the Mall. Costco will take steps to schedule other deliveries when Mall traffic is at lower levels. In any event, these few additional deliveries are a small incremental increase to the overall number of deliveries to other Mall stores.

Costco will also utilize state-of-the-art technology to significantly reduce risk of spills or accidents and to lower emissions from the station. Costco's environmental expert performed extensive, if not unprecedented, levels of air modeling for this station. The expert's thorough and detailed analysis shows that the gas station (and the cars coming to it) will not generate enough pollution to even come close to violating any relevant Environmental Protection Agency ("EPA") standards. Those standards are the only applicable standards governing the pollutants in this case. The EPA is legally required to set standards so that they not only protect public health, but to provide a margin of safety to protect sensitive populations from adverse health effects, and to protect all population groups from as-of-yet unknown dangers. The Opposition offered no applicable alternative public health standard, performed no modeling, and introduced

no credible evidence that the proposed station will violate any EPA standard for any of the pollutants at issue, or cause any non-inherent environmental or health effects.

Costco's market analysis expert concluded that there is an annual market gap of over 13 million gallons of gas in this market area, establishing a clear need for the proposed station. In addition, more than 4,000 customers on average shop every day at the Costco warehouse. These shoppers are part of the general neighborhood, and Costco's expert calculates that they alone will purchase in excess of 5 million gallons of gas each year. Costco's expert further determined that other visitors to the Mall parcel will buy an additional 5 million of gas annually.

Despite the vocal opposition, the record also contains many statements and testimony from citizens who want the Special Exception to be granted. More than 5,000 people also filled out postcards and mailed them to Costco to show their support for the station. To the extent that these citizens shop at the Costco Wheaton warehouse, they are a part of the general neighborhood. Their support shows there is a strong demand for the gas station, and that demand also helps establish the *need* for this gas station.

The evidence established that the gas station will not negatively affect local property values. The Mall is part of a heavy commercialized area. The gas station will be consistent with, and will not change, the character of the neighborhood. Moreover, the gas station will be physically and visually segregated from the nearby residential properties and will be undetectable by residents. Costco's property value expert performed a market analysis and concluded the gas station will not reduce property values. In addition, the proposed gas station has been in the public eye for years and there is no evidence this highly charged dialogue has had any adverse effect on property values. The Opposition's fear that "perceptions" about the gas station will drive down real estate prices is speculative and unsubstantiated.

The gas station complies with all of the Zoning Ordinance's physical and operational requirements. It will not interfere with the future development of the general neighborhood or other areas because it is physically separated from the residential properties as well as any CR zoned properties. Nor will the gas station affect major redevelopment of the Mall. The gas station is an accessory use to the Costco warehouse. If major redevelopment occurs at the mall and Costco closes, the gas station will close too.

The gas station is compatible with this Site because the Mall and surrounding area are dominated by automobiles, and this station will be located in a portion of the Mall that is zoned C-2. The C-2 zone specifically supports "auto-centric" uses. The gas station represents only an incremental increase in activity to this thriving commercial retail area and will not, in any way, change the auto-centric character of the Mall parcel, or the general neighborhood. In addition, as part of building the gas station, Costco will take several steps to preserve and enhance existing environmental features, pedestrian safety and walkability. Those benefits to the neighborhood are irrefutable.

Since Costco unveiled its plans for the gas station in 2010, the County Council ("Council") has had two opportunities to weigh in on high volume stations. On both occasions the Council's actions have allowed Costco to continue to pursue its needed approvals for this station.

First, The Council adopted amended ZTA 12-07 requiring high volume gas stations to be set back only 300 feet from certain uses, instead of 1,000 feet, as originally proposed. (Ex. 99). In adopting ZTA 12-07, the Council affirmed the appropriateness of high volume stations in the C-2 zone, subject to the special exception requirements, including the 300 foot setback.

Second, in adopting the 2012 Sector Plan -- which is silent on the types of desired uses to be located on the majority of the Mall parcel -- the Council opened the door to allow *all* permitted C-2 uses on the Mall parcel, including high volume gas stations. The Council could have added language to the Wheaton Sector Plan precluding certain new uses on the Mall parcel such as new special exceptions, automobile service type uses, or gas stations. (Tr. 2/25/14 at 160). Although the Council has taken such steps for other sector plans, it did not do so here.

**B. After a lengthy process and tremendous scrutiny, the evidence shows that Costco has met its burden.**

Over the course of 36 hearing days, Costco presented voluminous amounts of evidence, including testimony from 13 witnesses, to meet its burden of establishing by a preponderance of evidence that the proposed station meets *all* Zoning Ordinance requirements. The Hearing Examiner certified many of Costco's witnesses as experts in their field. Those witnesses provided extensive testimony and reports supporting Costco's request for the Special Exception.

The Opposition rigorously scrutinized Costco's application and evidence, spending an extraordinary amount of time cross-examining Costco witnesses. The Opposition also offered testimony from about 30 of its own witnesses, including multiple days of testimony from several witnesses. Despite this unprecedented opposition, the evidence establishes that Costco has fully met its burden on all issues by a preponderance of the evidence.

Throughout these hearings, Costco has patiently and in good faith tried to respond to all of the Opposition's criticism, concerns, and questions. Costco regularly provided the Opposition with information and documents even when it was not required to do so, and even where it was obvious that many of the Opposition's concerns were unwarranted. When appropriate, Costco modified its application or proposed conditions to address the Opposition's concerns, and as a result Costco's application today is even stronger than when this process began. The evidence

supporting the Special Exception, along with Costco's proposed conditions, establishes that the proposed station will be in harmony with the neighborhood and will create no significant non-inherent adverse effects.

**C. The Opposition presented no credible evidence sufficient that the gas station does not comply with the Zoning Ordinance.**

The Opposition, consisting of some people who live near the Mall parcel, simply do not want the gas station "in their backyard." One of the community members testifying in support of the Opposition conceded that in her role as a committee member on Kensington View's Land Use and Zoning Committee, she has helped oppose *every* proposed special exception in this area for over 20 years. In terms of this Special Exception, the Opposition has expressed concern about a long list of things they fear may occur if the gas station is built, ranging from leaky tanks and fires, to increased traffic and noise. But no matter how badly they dislike the idea of the gas station, or how much they genuinely fear adverse effects, the Opposition has not provided credible evidence establishing that their fears are likely to materialize. Testimony amounting to unsupported dislike and fear of a project amounts to no evidence at all. *Rockville Fuel & Feed Co. v. Board of Appeals of City of Gaithersburg*, 257 Md. 183, 192-193, 262 A.2d 499, 504-05 (1970).

The evidence presented to the Hearing Examiner establishes conclusively that the gas station is compatible with both the Mall and the residential neighborhood, and fulfills every condition required by the Zoning Ordinance. The gas station will be clean, safe and convenient and will provide several improvements to the community, as well as additional benefits Costco's Costco's many members and other visitors who already come to the Mall each day. Accordingly, Costco asks that the Hearing Examiner recommend approving its Petition for a Special Exception.



**II. THE GAS STATION’S INHERENT AND NON-INHERENT ADVERSE EFFECTS DO NOT PROVIDE A SUFFICIENT BASIS TO DENY THE SPECIAL EXCEPTION**

**A. The Zoning Ordinance requires an evaluation of inherent and non-inherent adverse effects.**

The Montgomery County Zoning Ordinance (“Zoning Ordinance”), Section 59-G-1.2.1, sets forth the appropriate legal standard to evaluate requests for special exceptions: “The Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone.” Zoning Ordinance Section 59-G-1.2.1. In addition, “[n]on-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.” Zoning Ordinance Section 59-G-1.2.1 The Maryland Court of Appeals recently stated that “it is well settled that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied, is whether there are facts and circumstances that show that the particular use proposed *at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use.*” *Montgomery County v. Butler*, 417 Md. 271, 303, 9 A.3d 824, 843 (2010) citing *Schultz v. Pritts*, 291 Md. at 15, 432 A.2d at 1327. (emphasis added). Applying that standard to the evidence in this case supports a recommendation in favor of the special exception.

**B. The inherent and non-inherent aspects of the proposed Costco gas station will cause no adverse effects on the nearby properties or the general neighborhood.**

1. Inherent adverse effects.

The Code defines inherent adverse effects as “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Zoning Ordinance Section 59-G-1.2.1, Staff identified the following inherent characteristics associated with automobile filling stations:

1. fuel pumps;
2. a structure providing storage space and shelter for employees;
3. traffic generated by customers, employees, and fuel delivery trucks;
4. potential for queuing vehicles on site;
5. noise associated with the use;
6. signage advertising gas products and prices;
7. outdoor lighting;
8. longer hours of operation than the average retail establishment;
9. environmental impacts that may include fumes from idling vehicles and potential spillage of automobile fluids; and
10. underground fuel storage tanks.<sup>4</sup>

(Ex. 70). According to the Zoning Ordinance, “[i]nherent adverse effects alone are not a sufficient basis for denial of a special exception.” Section 59-G-1.2.1. As Mr. Gang testified, Costco’s list of inherent effects was very similar to Staff’s list. (Tr. 6/4/13 at 207).

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<sup>4</sup> The inherent effects identified in other gas station cases vary, and from time to time have also included the following: (1) fumes associated with vehicles patronizing the gas station; (2) impervious surfaces necessary for safe and efficient on-site vehicular movement; and (3) issues associated with access to the filling station site. (Tr. 6/4/13 at 207).

2. Costco's physical and operational characteristics will actually mitigate or eliminate many adverse effects that are inherently associated with gas stations.

Costco's proposed gas station will have several physical and operational characteristics that will actually *reduce* the inherent adverse effects caused by other gasoline stations:

1. It will be located in a commercial area so most -- if not *all* -- of the local traffic will be contained on private roads in a major regional shopping mall.
2. Costco's hours of operation are 6:00 a.m. to 9:30 p.m. Monday through Friday and 6:00 a.m. to 7:00 p.m. on the weekends, so there will be no night time noise or physical activity at the Site.
3. The light levels are zero footcandles at the property line so there will be no illumination, glare or light emanating from the station onto nearby properties.
4. The gas station will be on Mall property, elevated between ten and thirty feet above any residential properties which themselves are a minimum of 118 feet away (measured Special Exception line to residential property line) and more than 284 feet away (measured gas station canopy to residence). (Ex. 230). In addition, there is a forested buffer area ranging in depth from 25 feet to 140 feet (average 70 to 80 feet) (Ex. 70, Attachment 8) between the gas station and the nearby residences. Furthermore, Costco will construct a screen wall that will conceal the gas station from the residential portion of the neighborhood and will not be visible from any residences.
5. The location of the gas station and the physical features of the Site and Mall parcel ensure that the gas station will not create any adverse environmental effect.
6. Gas deliveries will be infrequent (only two to four times per day) and will not materially affect traffic. Costco has a lot of flexibility as to when the delivery trucks arrive given the large capacity of its tanks. Costco tries to schedule deliveries during less busy periods, including in the early morning. (Tr. 5/23/14 at 93-94).
7. The potential for queuing vehicles on Site will not be problematic because the gas station layout includes space for at least 40 queuing cars. Costco will always have one trained attendant on-Site to help drivers. Costco has agreed to have a second attendant work during peak hours on the weekends and will provide additional attendants as necessary. If there is no space in the queuing area, the Costco employees will direct drivers past the gas station to keep traffic flowing along the Mall's ring road.

The evidence established that the gas station will be virtually undetectable from the residential properties. Any traffic, noise, or queuing related to the gas station will take place on the Mall parcel and will not interfere with homes in the area. Other than its customers, the only people the gas station traffic may affect are the commercial tenants at the Mall, and their workers and visitors, all of whom visit the Mall voluntarily and therefore reasonably expect to encounter Mall-like conditions. The marginal increase in traffic due to the gas station will not significantly alter Mall traffic and none of the Mall tenants opposes the Special Exception application.

3. The gas station will not generate non-inherent adverse effects.

“Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” Zoning Ordinance Section 59-G-1.2.1. Staff identified several features of the Costco station that are not necessarily associated with all gas stations and may therefore be considered non-inherent<sup>5</sup>:

1. Credit Card payments only;
2. Members only;
3. Regular and premium gas sold – no diesel;
4. Located off of a private road;
5. Proximity to nearby residences;
6. Volume of gasoline sold; and
7. Traffic and queuing associated with higher volumes of sales.

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<sup>5</sup> The opposition seems to agree with these characteristics.

(Ex. 70). As Mr. Gang testified, Costco agrees with Staff's list of non-inherent effects, except for the proximity to nearby residences. (Tr. 6/4/13 at 210, 211). None of these non-inherent characteristics, however, will create any adverse effects on the nearby properties or the general neighborhood. No evidence was presented regarding any non-inherent characteristics sufficient to deny the Special Exception. To the contrary, many of these characteristics *reduce* the potential adverse effects.

Credit Card payments: Costco requires its members to purchase gas using a credit or debit card at the pump; it does not allow cash transactions. There are several practical benefits to this policy. First, Costco is committed to public safety and to make sure their members are safe. (Tr. 5/23/13 at 5). The use of credit or debit cards minimizes the threat of any robberies and promotes a safe environment. Second, customers never leave the pump to pay for their gas, so patrons exit the station more quickly. This allows the customers to move through the line more quickly and to reduce waiting and queues. Third, Costco requires *at least one* fully-trained attendant<sup>6</sup> to be on Site at all times and will provide additional attendants during peak hours. Because Costco attendants are not burdened by processing payments, they are available to assist customers, direct traffic, and address any issue or emergency that might arise to help ensure the safety of the Site and the members. This will mitigate queuing and traffic and provide an added level of safety to customers and the surrounding environment.

Members only – the Opposition argues that the Special Exception should be denied because the station will only benefit Costco members. Their argument is flawed because it applies the wrong legal standard.

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<sup>6</sup> In addition to State required training, Costco has its own training program which each attendant must pass prior to working at the gas station. (Tr. 5/23/13 at 79).

The Maryland Court of Appeals recently made clear that there is no legal requirement that an applicant establish benefits to the entire community:

Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden.

*People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 88-89, 956 A2d 166, 187 (2008). Moreover, the station clearly will provide needed gas to the 4,000 Costco members already coming to the Costco warehouse each day who are part of the general neighborhood.

Type of gas sold – no diesel – Costco only sells gasoline and does not sell diesel fuel, so no large trucks will enter the station to purchase gas. This creates a positive – not an adverse – effect.

Located off of a private road –The gas station will be located on private Mall property, which is served by a private perimeter ring road and numerous internal drive aisles. To the extent the gas station increases traffic, the main impact will be on the Mall parcel, and the owner of the Mall is a supporter of the station. As established at the hearing, the traffic will have little or no effect on drivers passing by the Mall on public roads. There is no evidence that the traffic will create any problems in the residential areas because the private ring road isolates the Mall and there is no direct connection between the ring road and the residential neighborhood.

Close to nearby residences – Staff concluded that the proximity of the Costco gas station to nearby residences was non-inherent, but during the hearing Costco established that this conclusion was incorrect. There are many examples of homes being close to gas stations, including the many gas stations located near the Mall. (Ex. 86(g)). However, unlike many of

these other stations, the Costco gas station is physically segregated and buffered from the residential area and not visible from the residences.

Large volume of gasoline sold – By itself, the volume of gasoline sold does not automatically create any adverse effect. The real issue is whether the activities associated with the higher volume of sales cause any adverse effects, such as increased traffic, queuing, and emissions. As discussed in greater detail elsewhere, the new auto trips and queues will not materially affect traffic in the general neighborhood (including the Mall parcel and the residences adjacent to the Mall parcel) or at the nearby properties. In addition, the potential emissions will be far below the ambient air standards the United States Environmental Protection Agency (“EPA”) sets to protect public health.

Traffic and Queuing - The environmental effects of traffic and queuing will be mitigated by Costco’s state-of-the-art technology, such as the Arid Permeator. Further, the physical characteristics of the Site – the forested buffer, elevation change, screen wall, lack of vehicular connection to the residential area, visual concealment from the residences, large queuing area and six means of exiting the Site after purchasing gas -- distinguish the Site from other gas stations and ensure that there will be no material adverse effects from traffic or queuing.

When the effects of this gas station’s operations are viewed individually and in their totality, any adverse non-inherent effects have either been significantly mitigated or eliminated by Costco’s thoughtful design and proposed operation and its use of advanced technologies. As such, the inherent and non-inherent adverse effects caused by the Costco gas station are not sufficient to justify denying the Special Exception application.

**III. THE GAS STATION IS CONSISTENT WITH THE SECTOR PLAN, IS IN HARMONY WITH THE GENERAL NEIGHBORHOOD AND WILL NOT BE DETRIMENTAL TO THE USE, PEACEFUL ENJOYMENT, OR VALUE OF SURROUNDING PROPERTIES, AND WILL NOT RETARD FUTURE DEVELOPMENT.**

The gas station satisfies the relevant Zoning Ordinance requirements. Large volume gas stations are expressly permitted in the C-2 zone, a zone designed to support auto-centric uses.

The gas station is consistent with the Sector Plan: it is consistent with the Sector Plan's specific recommendations for the Mall parcel; it promotes several of the Sector Plan's more general goals, and it is neutral (*i.e.* has no effect) on its remaining general goals.

A main reason this gas station is so compatible is that the Mall is dominated by automobiles. The gas station represents only an incremental increase in activity to this thriving commercial retail area and will not, in any way, change the auto-centric character of the Mall parcel. The Site is an appropriate location for the gas station. In addition, Costco will take several steps to preserve and enhance existing environmental features, pedestrian safety and walkability, providing real benefits to the neighborhood. Moreover, the gas station complies with all physical and operational requirements of the Zoning Ordinance. The gas station is physically separated from the residential properties as well as any CR zoned properties. The gas station will not interfere with the future development of these areas.

**A. Zoning Ordinance Requirements**

Section 59-G-1.21(a) requires Costco to show that the gas station:

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny a special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location.
- (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.

- (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.

Section 59-G-2.06(a) requires Costco to show that:

- (3) the use at the proposed location will not adversely affect nor retard the logical development of the general neighborhood or of the industrial or commercial zone in which the station is proposed, considering service required, population, character, density, and number of similar uses.

## **B. The Staff and Planning Board Decisions**

The Maryland-National Capital Park and Planning Commission Staff (“Staff”) determined that the gas station is consistent with the recommendations of the Sector Plan. It found that the gas station will be in harmony with the general neighborhood and is “not out of character with the surrounding mix of retail, transportation and office uses, which currently exist on the Mall property,” (Ex. 70 at 15) specifically noting it “does not believe that goals of walkability, connectivity and other smart growth principles necessarily lead to a prohibition against uses such as the proposed gas station.” (Ex. 70 at 7). Staff also found that the proposed use would not be detrimental to the use and peaceful enjoyment of the adjacent residential neighbors, again noting that the character of the proposed use is similar to the surrounding uses on the Mall parcel. (Ex. 70 at 16). Finally, Staff determined that the gas station is “consistent with the other uses in the Mall and the uses permitted in the C-2 Zone” and concluded that the gas station “will not adversely affect nor retard the logical development of the general neighborhood.” (Ex. 70 at 23).

The Planning Board agreed with many of the Staff’s findings but ultimately decided that the special exception would not comply with the Sector Plan. The Planning Board, however, did

not focus on the land use related issues and Sector Plan compliance until the end of the hearing. After a brief discussion of this issue, three of the five Board members voted that the gas station was not consistent with the Sector Plan and would adversely affect the development of the general neighborhood by retarding future development. (Ex. 89). The Board explained that even though the Mall is an “auto-centric” use, they believed the Mall should not perpetuate its “current suburban-style land use pattern dominated by automobiles.” (Ex. 89).

In reaching that conclusion, the Planning Board glossed over the significance of the C-2 Zone and contended that “the main part of the Mall was not rezoned to CR because that area would have non-conforming use problems for the existing Mall, which cannot meet all the development standards of the CR Zone.” (Ex. 89). The Planning Board is wrong. Zoning Ordinance §59-C-15.9(a) specifically states that lawfully existing structures do not become non-conforming uses merely because their zone is changed to CR:

One or more lawfully existing buildings, structures, or uses that predate the application of the...CR Zone... are conforming structures and may be continued, renovated, repaired or reconstructed...

Thus, a major premise of the Planning Board’s rationale is flawed. The Planning Board may not simply dismiss the significance of the C-2 Zone.

In stating that “the overall vision of the Wheaton Sector Plan is to move Wheaton towards transit-oriented development and that any redevelopment of the Mall should not perpetuate its current suburban style land use pattern dominated by automobiles” (Ex. 89), the Planning Board also disregarded the fact that Wheaton Mall has auto-centric 40-year leases.

In other words, the Planning Board agrees that the gas station is consistent with the Mall’s current auto-centric uses, and the evidence is that those uses are likely to continue for many decades in light of the Mall’s lengthy leases with current tenants. The Planning Board’s

conclusion that “any redevelopment of the Mall” should not allow auto-centric uses is inconsistent with the Sector Plan. The Sector Plan recommended this area for a zone that does not prohibit auto-centric uses, but, instead, specifically permits them. Westfield may develop the Mall for other auto-centric uses as a matter-of-right. Furthermore, the gas station is an accessory use to the Costco warehouse. When the Costco warehouse vacates the Mall parcel, so does the gas station. Until there are major changes to the Mall environment, something that is not foreseeable for many decades, if ever, the Mall parcel will remain auto-dominated, irrespective of the presence of the gas station.

The Planning Board also failed to explain why the Mall cannot co-exist with transit oriented development (“TOD”). Indeed, there is significant mixed use development already surrounding the Mall and an abundance of available public transportation options. Costco will enhance the pedestrian experience at the Mall and there is no evidence it will discourage or interfere with public transportation options. The Planning Board misconstrued the Sector Plan and ignored the plain language of the Zoning Ordinance to promote its own vision for the future of the Mall, a vision that is not shared by the Mall owner, tenants, or the people who use the Mall.

**C. Consistency with the Sector Plan.**

1. Legal Standard

*a. Sector Plans are advisory guides and do not require strict compliance.*

As a general rule, Sector Plans are advisory in nature, and are not mandatory as to special exceptions. *See In Trail v. Terrapin Run, LLC, 174 Md. App. 43, 920 A.2d 597 (2007)*. The Court of Special Appeals explained that “nothing within the Zoning Code or the Comprehensive Plan itself acts to elevate the [sector] plan beyond a mere guide.” *Id. at 56, 920 A.2d at 605*. (*See also, Montgomery County v. Woodward & Lothrop, 280 Md. 686, 704 (1977)* finding that

master plans "represent only a basic scheme generally outlining planning and zoning objectives... and serve as a guide rather than a strait jacket"). Thus, the Sector Plan serves as a guide and does not require strict compliance.

*b. The Zoning Ordinance merely requires the gas station to be consistent with the Sector Plan.*

Section 59-G-1.2.1 of the Zoning Ordinance requires a finding that the proposed special exception be *consistent with* the recommendations of the Sector Plan. The Sector Plan states that its "recommendations provide comprehensive guidelines for the use of public and private land.... Plans do not specify all development possibilities." The Maryland Court of Appeals recently explained that "in harmony with, consistent with, or in conformity with ... differ only semantically... each term connotes only a *general compatibility with the purpose and intent of the plan as opposed to a strict adherence of the plan.*" *Trail v. Terrapin Run, LLC*, 403 Md. 523, 534 (Md. 2008) (quoting *Trail v. Terrapin Run, LLC*, 174 Md. App. 43, 50-57 (2007)). (emphasis added). Thus, the proposed Special Exception, need only *generally* comply, or be in harmony, with the purpose and intent of the Sector Plan.

*c. Recommendations for specific zones are given more weight than the Sector Plan's general recommendations.*

The Sector Plan's recommendations for specific districts are given more weight than the Sector Plan's overarching goals, which apply to all of the districts. *See* Zoning Hearing Examiner Report, LMA G-907, p. 27, 28 (finding that "general recommendation[s]... are subsidiary to the specific recommendation[s]") (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992)). The goals and recommendations of the Sector Plan must be read in conjunction with the underlying zone and the requirements of the Zoning Ordinance.

2. The Gas Station Complies with the Specific Recommendation of the Sector Plan.

Costco's proposed gas station will be consistent with the recommendations of the Sector Plan that are specific to the Site for many reasons, as set forth below.

- a. *Locating a gas station in the C-2 Zone is permitted and appropriate.*

The Site and a majority of the Mall parcel are zoned C-2, as recommended in the Sector Plan. The C-2 zone is a general commercial zone *intended to support automotive related commercial uses*. Gas stations are permitted in the C-2 zone and, many of the County's gas stations are located in the C-2 zone.<sup>7</sup> Although the Sector Plan specifically designates desired uses for certain other sites and districts within the Sector Plan area, it does *not specify any desired uses for the Mall parcel*. As such, the Sector Plan effectively permits any allowed use in the C-2 zone to be located on the Mall parcel, subject only to meeting the relevant requirements.

In 2012, as part of the Wheaton Sector Plan amendment process, the County Executive suggested rezoning the Mall parcel in its entirety to a mixed use zone. (Ex. 464(a)). The Council considered this recommendation but *rejected* it, deciding instead to keep the majority of the Mall parcel (including the planned gas station site) in the C-2 zone, and to maintain the location as an auto-dependent area. At the same time, the Council rezoned the other five C-2 zoned sites in the Wheaton Sector Plan area to the CR zone, thereby promoting mixed-use

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<sup>7</sup> The County's planned County-wide comprehensive rezoning (DMA G-956) recommends that the C-2 zoned portion of the Mall parcel be replaced with the GR Zone, which will also allow gas stations and generally provides "development opportunities adjacent to the County's most auto-dominated corridors."

development on these sites, but retaining the C-2 auto-oriented land use pattern for the majority of the Mall parcel.

The Council's decision to keep the Mall area zoned C-2 is significant here because the CR zone serves a very different purpose. The CR zone is intended to "promote economically, environmentally, and socially sustainable development patterns where people can live, work, recreate, and have access to services and amenities while *minimizing the need for automobile use* (Zoning Ordinance Section 59-C-15.2). The CR zone is intended to promote the type of mixed use development which epitomizes transit oriented development. By comparison, the specific role of the C-2 zone is "*to support automotive related commercial uses,*"<sup>8</sup> which, by reasonable inference, includes Costco's proposed gas station at the Mall. Indeed, the C-2 zone permits as a matter-of-right a number of auto-centric uses (such as the Costco warehouse) including: automobile sales; automobile parts and tire supply stores; self-storage facilities; furniture stores; and building material and supplies stores (Zoning Ordinance 59-G-C-4.2). Even Donna Savage, the Opposition witness who testified about Sector Plan issues, *agreed* that gas stations are appropriate in an auto dominated area and that the Mall is an auto-dominated use (Tr. 2/25/14 at 142, 143).

Of course, Westfield also may develop as *a matter-of-right* an additional 212,032 square feet (the equivalent of 793 peak hour trips) of retail development on the Mall parcel. Westfield Corporation Vice President Jim Agliata, testified that if the gas station is not approved, Westfield intends to develop the Mall further, which includes potential development where the gas station would be located. (Tr. 6/4/14 at 149). Additional development in accordance with the APF

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<sup>8</sup> Ironically, the Opposition has suggested that the gas station would be more appropriate in the CR zone, which is designed to minimize, if not discourage automobile use, suggesting "wouldn't it be great to have a Costco gas station right out on Veirs Mill Road." (Tr. 12/6/13 at 178). This is the height of the "not in my backyard" perspective as projected by the Opposition.

approval will attract more cars and traffic than the proposed station. Whether cars drive to the Mall to purchase gas or for some other purpose, the Mall will still be an auto-dominated use. Denying this Special Exception will not achieve any goal of making this Mall less auto-centric.

*b. Costco will enhance and maintain the existing green buffer.*

The Sector Plan recommends that new development maintain the green buffer zone between the Mall and the residential properties. (Ex. 150 at 53). Costco's plans, which were approved and endorsed by Staff, not only preserve the green buffer, they enhance it -- Costco will plant more than 100 new trees, exceeding its obligations with respect to the green buffer and the recommendations of the Sector Plan. (Ex. 241(a) and (b)).

The Sector Plan also recommends that no structures be allowed within the buffer zone. (Ex. 150 at 55). The Site is more than 50 feet from the forested area. Mr. Duke specifically testified that "none of the forested buffer or the trees will be affected by the pedestrian path" and in response to the question of "will the construction of the green wall in any way adversely affect the forest buffer?" Ms. Duke offered an emphatic "no ma'am." (Tr. 8/2/13 at 100, 101). Notably, both the green screen and the pedestrian path provide benefits to the general neighborhood.

The Planning Board recommended denying the Special Exception because it might interfere with unknown and unplanned future efforts to expand the green buffer. (Ex. 89). The Sector Plan, however does not mandate expanding the green buffer: it merely recommends "considering" expanding the green buffer when there is "major redevelopment." Yet, there are no plans for major redevelopment of the Mall parcel near the green buffer. Costco has a 40 year lease at the Mall, which suggests there will be no major redevelopment in the area of the Costco

warehouse and gas station for decades. (Tr. 4/26/13 at 80). The Planning Board's determination that the gas station is not consistent with the Sector Plan's goals is belied by the evidence.

*c. The height of development on the Site is considerably lower than the 45 foot height recommendation*

The Sector Plan recommends that building heights should be limited to a maximum of 45 feet within 200 feet from the southern property line along the ring road. (Ex. 150 at 55). The kiosk and canopy structures associated with the gas station will only be 17 feet, 6 inches in height and therefore comply. (Ex. 7). (Tr. 6/4/14 at 112).

3. The Special Exception also complies with many of the general recommendations of the Sector Plan

As discussed above, the Zoning Ordinance does not require Costco to be consistent with every recommendation of the Sector Plan. The Opposition acknowledges that the Special Exception need not be consistent with all of the Sector Plan's recommendations, stating on several occasions that the Special Exception use "certainly [does not] have to meet every single goal" of the Sector Plan. (Tr. 2/24/14 at 257; Tr. 2/24/14 at 295). Even so, Costco's plans are consistent with many of the more general recommendations of the Sector Plan.

*a. The Special Exception Improves Pedestrian Connections*

One of the four general principles of the Sector Plan is "improving connectivity within and beyond the Plan area with expanded pedestrian connections." (Ex. 150 at 12). In addition, the goal of enhancing pedestrian connections is mentioned throughout the Sector Plan, Costco will promote pedestrian connections by installing a five foot wide, elevated off-site pedestrian path, beginning east of the warehouse loading dock and extending west and north to Faulkner Place. (Ex. 229).



The pedestrian path furthers the Sector Plan's objective to promote walkability and pedestrian connections through construction of a safe, separated path along the Mall's ring road, where there presently is no such path. The path will provide a connection to the existing and proposed pedestrian connections set forth in the Sector Plan (Ex. 150 at 61) and provide an improved path of travel for residents walking to the Metro station. Indeed, the proposed green screen wall was carefully located so as to not interfere with the future connection of the proposed paths to the ring road pedestrian path. (Tr. 2/25/14 at 184). The Opposition, including Ms. Savage, acknowledged on several occasions that the pedestrian path will improve walkability. (See e.g. Tr. 2/24/14 at 138). If Costco's request for the Special Exception is denied, the path may never be built, because Westfield has no independent plans (or obligation) to construct the path. (Ex. 122).

Also, consistent with the Sector Plan, Costco is proposing other pedestrian connections within the Mall parcel. A six-foot wide east-west pedestrian path is proposed in the southwest parking lot, to be located to the south of the east-west access drive. This will provide a safe, delineated walk path from the far western portion of the parking lot to the Mall itself and will provide additional structure and cohesiveness to the parking lot. (Ex. 494(a); Condition No. 26).

*b. The gas station promotes the Sector Plan's environmental goals.*

The Sector Plan contains numerous recommendations to promote the County's environmental objectives, including the use of native plants, increasing the tree canopy and using environmental site design to reduce impervious surfaces. (Ex. 150 at 73). One of the overarching principles of the Sector Plan is that "natural and built environments can be improved through development.... that provides better stormwater management, greater tree canopy and walkable streets." (Ex. 150 at 12).

The gas station furthers these environmental objectives through a series of improvements that will not be provided if the Site remains a surface parking lot. The Special Exception decreases the impervious surface (Tr. 4/26/13 at 227), increases the tree canopy with more than 100 additional trees (Ex. 265(d)), and provides storm water management to an aging regional mall that currently has no stormwater management in the area of the Site. (Tr. 4/26/13 at 268, 269, 274, 276).

4. The gas station will not undermine the remaining General Recommendations of the Sector Plan.

In addition to complying with the Sector Plan's many specific and general recommendations, the gas station will not interfere with the remaining recommendations in the Sector Plan.

*a. Transit Oriented Development*

The Opposition insists that the gas station will somehow undermine the Sector Plan's aspirations to promote TOD. This concern is unwarranted. Westfield's plans for development on the CR zoned portion of the Mall parcel show more than 3.8 million square feet of TOD development along the eastern portion of the Mall site co-existing with the gas station which is located more than 900 feet away. (Ex. 464(b)). There is no other CR zoned property located closer to the gas station than the CR zoned area on the Mall parcel. In addition, the Site is physically isolated from all of the other areas of the Sector Plan that are recommended for TOD and therefore will not impede this type of desired development:

- 1) The Site is located more than 1,400 feet from the CBD and is separated by the 120 foot wide Veirs Mill Road, which is used by more than 20,000 cars daily (Tr. 5/1/13 at 89);
- 2) The Site is physically obscured to the east by the Mall structures, including the Costco warehouse and other buildings associated with the Mall structure; and

- 3) The CR development permitted on the Mall parcel along Veirs Mill will allow buildings up to 200 feet in height, providing an additional physical barrier.

Moreover, Mr. Guckert testified that the additional new trips to be generated by the gas station will not affect the traffic volumes within the CBD where the vast majority of the TOD is planned. (Tr. 3/11/14 at 139 Wes)<sup>9</sup>. Although the Opposition argues that construction of the gas station *may* impede the Sector Plan's goal of promoting TOD, they offered absolutely no evidence supporting this contention.

*b. Promotion of Transit Services*

The Sector Plan identifies existing and proposed transit services. (Ex. 150 at 70). These include the Metro station located more than 1,600 feet from the Site, several bus stops and a future Bus Rapid Transit System located along the University Boulevard and Veirs Mill Road frontages of the Mall Parcel. The gas station does not abut any of these transit services and will not adversely affect them.<sup>10</sup>

In addition, as addressed above, in retaining the C-2 zoning on the Mall parcel, the Council made an affirmative decision to maintain the Mall as an auto-centric use. So long as the Mall exists, people will drive there. This is particularly true for people coming to the Costco warehouse, many of whom will make large purchases. The gas station will not materially alter the number of people driving to the Mall because Costco members are already driving and will continue to drive to the Mall. The gas station simply will not influence how many people take public transportation within the Wheaton Sector Plan area. (Tr. 6/4/14 at 150).

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<sup>9</sup> The Hearing Examiner acknowledged this during the testimony of Ms. Savage (Tr. 2/24/14 at 293).

<sup>10</sup> The Hearing Examiner noted that irrespective of whether the area has TOD, BRT or transit corridors, there is still going to be a need for gas stations, which are not mutually exclusive of these other modes of transportation. (Tr. 2/24/14 at 292).

**D. The Gas station will be in harmony with the general character of the neighborhood and will not be detrimental to the use, peaceful enjoyment, or development of the surrounding properties.**

The proximity of this gas station to a residential area is not unique in any way. Mr. Gang presented many examples of residences located as close, if not closer, to one or more gas stations. (Ex. 86(g); Tr. 6/4/14 at 253). In addition, the residential neighborhood already borders a major commercial center -- the Mall. The Mall parcel consists of 1.5 million square feet of development surrounded by a massive parking lot. Adding the gas station to an already thriving commercial center will not change the character of the Mall parcel.

The gas station use fits within the “umbrella” of the existing Mall operations. Certain uses on the Mall parcel open as early as 5:00 a.m. and close as late as 12:00 p.m. (Tr. 5/6/13 at 39). The gas station hours will not extend beyond those of the existing commercial operations on the Mall in the morning or at night. The lighting provided by the station is minimal and except for safety lights, lights will be turned off by 9:30 p.m. during the week, and by 7:00 p.m. on the weekends. In contrast, the brighter Mall lights stay on until at least 10:30 p.m. (Tr. 4/26/13 at 246, 247).

The incremental increase in commercial activity generated by the proposed gas station will have no measureable effect on the residential neighborhood, and moreover, Costco’s eight foot high green screen will visually conceal certain areas of the Mall not just the gas station, from the residential neighborhood -- even from second floor windows -- and thus enhance the already existing natural buffer between the two areas. Further, the green screen will also help mitigate current noise impacts arising from the Mall’s operations.

In addition, for all the reasons already discussed herein, as well as those addressed in elsewhere in this brief, the gas station will not be detrimental to the use, peaceful enjoyment or the development of the surrounding properties.

**E. The Special Exception Does Not Adversely Affect or Retard the Logical Development of the General Neighborhood or the commercial zone in which the gas station is located.**

Zoning Ordinance Section 59-G-2.06(a)(3) is intended to evaluate whether the gas station will adversely affect or retard the development in the general neighborhood (*i.e.* the Mall parcel and residential swath around Mall) or in the C-2 zone in which the gas station is located, which happens to be the Mall parcel. There is a plethora of reasons why the gas station will not adversely affect or retard neighborhood development.

First, as explained above, the gas station is physically isolated and virtually undetectable from the residential neighborhood contiguous to the Mall parcel.

Second, Westfield's concept plans for the development of more than 3.8 million square feet of mixed used development on the eastern portion of the Mall parcel (Ex. 464(b)) include the gas station. Unlike many other cases, the entire zone in which the gas station is located is owned by one property owner – Westfield – which supports the gas station. (Ex. 3(b); Tr. 5/6/13 at 85, 86). The fact that Westfield is planning this development in concert with the gas station indicates conclusively that the gas station will not “retard or adversely affect” Westfield’s development of the Mall parcel. Furthermore, it is Westfield’s decision, when, if, and how to develop its property.

Third, Costco provided evidence that the gas station’s operations will not adversely affect the future development of the Mall parcel from an environmental perspective. Mr. Hurlocker, Director of Operations for Costco’s Gasoline Division, testified to Costco’s safety record. Mr.

Hurlocker further testified that as a result of Costco's safety measures, monitoring systems and attendant training, Costco gas stations are "as safe, or safer, than [any other gas station] in the United States," even those that sell a lower volume of fuel. (Tr. 5/23/14 at 126). There is no evidence that the Site could not be redeveloped for another use if the gas station closes in the future. Even Mr. Silverman admitted that there are no environmental issues that would preclude the Costco gas station from being removed and other uses developed on the Site (Tr. 2/24/14 at 329, 330).

Fourth, there is no evidence that the gas station – or the highly publicized opposition to it – have curbed development near the general neighborhood. To the contrary, during the course of this hearing, Ms. Savage testified that there has been significant development in the CR zoned areas of the CBD, near the Metro station, even though the potential development of the gas station is widely known. (Tr. 2/24/14 at 221, Tr. 2/25/14 at 130). Ms. Savage agreed that the gas station would not "undo" any of these developments or impede further development. (Tr.2/25/14 at 132).

Fifth, the portion of the Mall parcel that is zoned CR is closer to the Site than any other CR zoned property in the Sector Plan area. All other CR zoned sites are separated by a major highway –Veirs Mill Road or University Boulevard. If, as contemplated by Westfield's plans (Ex. 464(b)), development in accordance with the CR zone can go forward on the Mall parcel, there is no reason the gas station will impede development even farther away.

Finally, the residential neighborhood within the general neighborhood consists primarily of single family homes and townhomes. The residential area is zoned R-60, PD-9 and RT-8 (Ex. 18(a)). As indicated by the aerial photograph, the area is essentially built out. (Ex.102). There is no further "logical development" that could be retarded by the presence of the gas station within

the Mall. The last remaining developable site in the residential neighborhood (the "Mt. McComas" site), received both Preliminary Plan and Site Plan approval to construct 14 residential townhouses during the course of the Special Exception process. The threat of the gas station did not prevent the owner from obtaining these needed approvals and, as Joe Cronyn testified, this suggests "business as usual." (Tr. 8/2/13 at 247). There is no evidence to suggest that the gas station will impede or retard this townhouse development or any other future development that may occur in the residential area.

**IV. THE TRAFFIC AND COMMERCIAL ACTIVITIES AT THE GAS STATION WILL BE IN HARMONY WITH THE NEIGHBORHOOD AND WILL NOT CREATE A NUISANCE OR HAZARD FOR VEHICLES OR PEDESTRIANS.**

The gas station will be in harmony with the general neighborhood because it will generate a relatively low level of new commercial activity in an already thriving area. The gas station traffic will not affect traffic or pedestrian safety in the adjacent residential neighborhoods. To the extent the gas station marginally increases the number of automobiles on the public roads, the minor increase will be imperceptible to people passing through this heavily-commercialized area.

In addition, the gas station activity on the Mall parcel will create no problems for drivers or pedestrians. The gas station is designed with eight lanes and can accommodate queues of at least 40 automobiles. Mr. Guckert testified that 96% of the time there will be less than 40 vehicles in the queue. The rest of the time Costco will provide one or more additional attendants to mitigate congestion by directing drivers to the shortest lines or sending them along the ring road to come back later. Nor will the gas station significantly affect parking at the Mall, as testimony confirmed that hundreds of parking spaces close to the Costco warehouse are not currently being used even when the Mall is most busy.

As discussed above, Costco is making the Mall parcel more pedestrian friendly by installing a pedestrian path around part of the ring road complementing the pedestrian walkway Costco has already built which connects the parking garage to the Mall. There is no empirical (or other) evidence suggesting that the Mall is unsafe for pedestrians. Finally, Costco's expert evidence established that the gas station will not affect driver or pedestrian safety on the Mall parcel, that the gas station is compatible with the Mall parcel, and that it will not create a hazard or nuisance.



**A. Zoning Ordinance Requirements**

Section 59-G-1.21(a) requires Costco to show that the gas station:

- (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.

\* \* \*

- (9) Will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public records, storm drainage, and other public facilities.
- (C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

Section 59-G-2.06 requires Costco to show that:

- (b)(2) the use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads or intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic pattern from such buildings, or by reason of its location near a vehicular or pedestrian entrance or crossing to a public or private school, park, playground, or hospital, or other public use or place of public assembly;

**B. Staff and Planning Board recommendations.**

Staff confirmed the existence of Adequate Public Facilities (“APF”) to support future development on the Mall parcel, noting that “all intersections will continue to operate within acceptable Critical Lane Volume (“CLV”) standards. Therefore the proposed use meets the LATR requirements of the APF review.” (Ex. 70 at 17). Staff further determined that the gas station would not create a traffic hazard or nuisance. Staff noted that potential pedestrian conflicts could be mitigated by providing pedestrian crossings on the ring road. (Ex. 70 at 17, 18, 23). Subsequently, Staff reviewed and endorsed Costco’s amended plan for the new pedestrian path. (Exs. 230, 233). Finally, Staff determined that the proposed use will be in harmony with

the general character of the neighborhood, noting that transportation uses currently exist on the Mall parcel. (Ex. 70 at 15).

The Planning Board's letter of recommendation to the Hearing Examiner (Ex. 89) did not address any aspect of traffic.

**C. Costco's Expert Traffic Consultant Conducted Extensive Evaluations of the Traffic Related Issues**

Costco's traffic expert, Wes Guckert, testified that: (1) that traffic associated with the gas station will be in harmony with the general character of the neighborhood; (2) that the Site will be served by adequate public services and facilities; (3) that the use will not create a traffic nuisance or hazard; and (4) that the use will not reduce the safety of vehicular or pedestrian traffic. His testimony was unrebutted by any empirical data or expert analysis.

1. Mr. Guckert's Experience

Mr. Guckert is a well-respected expert Traffic Consultant with over forty years of experience in the field of traffic engineering. (Ex. 95(a)). He has played a major role in more than 6,000 projects, spanning both urban and suburban locations, primarily in the mid-Atlantic region. Mr. Guckert testified that his work over the years has included evaluations of parking lots to ensure they operate safely and efficiently. (Tr. 3/11/14 at 125). Mr. Guckert has been involved in the development of the Westfield Mall for close to thirty years. (Tr. 5/01/13 at 22). He has also testified many times as an expert witness in land use hearings in Montgomery County.

2. Mr. Guckert's Analysis

Mr. Guckert prepared a Traffic Analysis for LATR (Local Area Transit Review) and PAMR (Policy Area Mobility Review), in accordance with the methodology accepted by the County and employed by Staff. ("Traffic Report"). (Ex. 11). The Traffic Report included an

Intersection Capacity Analysis to determine the CLV of all of the relevant intersections. CLV measures capacity by examining the number of approach lanes and volumes versus opposing left turn volumes. That process occurs for all four approaches of a four legged intersection. The highest two critical lane volumes are added together and the resulting total is associated with the level of service standard. This analysis yielded County-acceptable levels of service throughout the study area and satisfied Staff as well as the Planning Board. (Exs. 70 and 89).

Mr. Guckert also conducted an analysis of the intersections known as Intersection 16 (Valley View Drive and the ring road) (Ex. 607) and Intersection 4 (University Boulevard and Valley View Drive). (Ex. 504). For that additional analysis, he utilized the Highway Capacity Manual (“HCM”) methodology, which measures capacity by associating seconds delay per vehicle to levels of service. Mr. Guckert and his staff visited the Site on several occasions and prepared videos and observations of these two intersections.

The Opposition offered no expert testimony to rebut Mr. Guckert’s testimony, but instead relied heavily on anecdotal evidence and other documents that are not material and have no bearing on what is occurring or will occur on the Mall parcel. The Opposition also submitted several news articles and other documents to support their assertion that, as a general rule, all parking lots are unsafe. As shown below, this evidence is neither relevant nor persuasive.

**D. The gas station will be in harmony with the neighborhood.**

1. The proposed gas station location has many benefits.

Locating the gas station on the Mall parcel is harmonious and compatible and provides many benefits and greatly mitigates potential traffic issues as follows:

1. The gas station is totally segregated from the residential community. There is no direct road access between the Mall parcel and the residential neighborhood and thus no traffic flowing into the residential areas.

2. Traffic on the ring road is about 1/10 the traffic on nearby main arterials such as Veirs Mill Road or University Boulevard (Tr. 5/1/13 at 89).
3. Average ring road traffic is slower – 15 mph vs. 35 mph – than on main arterials and thus is safer (Tr. 3/11/14 at 123).
4. The location allows for regimented and controlled on-site traffic. Vehicles enter through one entrance from the south and proceed in a northerly direction to exit, where they can exit six different ways, reducing the potential for congestion.
5. The gas station sells only gas and all transactions occur at the pump. There are no pedestrians walking across the Site to pay for gas or to make purchases at a convenience store, repair garage, or other use.
6. The gas station will provide a large queuing area to accommodate cars during peak periods and Costco will provide additional attendants to assist drivers during peak hours.
7. The gas station will be the most orderly, supervised, and regulated portion of the entire Mall parking lot.

Costco has 368 gas stations throughout the United States and *all of them* are located in parking lots, in close proximity to Costco warehouses. (Ex. 4/26/13 at 84). There is no evidence that traffic from Costco's gas stations has caused problems anywhere else in the country. If this model were unsafe, Costco would not keep using it.

2. The gas station will have minor effects on traffic.

As with any new use, the gas station will generate some additional traffic. The gas station's incremental increase on traffic, however, will be compatible and in harmony with the type and level of traffic that already exist in and around the Mall. Mr. Guckert found that during the Mall's busiest period on Saturday afternoons, the traffic from the gas station will merely cause:

1. An additional delay of about five seconds for each car travelling through Intersection 16 (Ex. 607);
2. Two additional cars per light cycle at the Valley View Drive and University Boulevard intersection (Tr. 3/11/14 at 77); and

3. One car will exit the gas station area every 16 to 20 seconds with each car having *six* potential exit routes to minimize congestion. (Exs. 481 and 510; Tr. 4/1/14 at 200).

These conditions or delays are minor and insignificant, especially when placed in proper context.

The Wheaton Westfield Mall is one of the busiest regional malls in the Washington D.C. metropolitan area, and is located in a central business district. In addition, the gas station will be located on private Mall property, away from the public streets, and totally segregated from adjacent residential communities. It will not affect pedestrians or vehicles in the residential neighborhoods. Mr. Guckert testified the effect on public roads in the CBD “is going to be not even noticeable, imperceptible.” (Tr. 3/11/13 at 139).

**E. There are Adequate Public Facilities for the gas station.**

Section 59-G-2.06(a)(9) requires a finding of Adequate Public Facilities (“APF”), and that the Special Exception use will not reduce the safety of vehicular or pedestrian traffic on a public street. In 2001, Montgomery County granted the Mall parcel APF approval to construct an additional 579,625 square feet of development. (Exs. 86(b), 11 at 5). The County confirmed the existing APF on the Mall parcel in November 2012. (Ex. 86(c)). Although it was not required, Mr. Wes Guckert’s Traffic Report reaffirmed there are adequate public facilities in terms of road capacity to serve the proposed gas station. He concluded that *all* of the tested intersections will operate well below the 1,800 CLV standards for the Wheaton CBD Policy Area and the 1,600 CLV for the Kensington/Wheaton Policy Area. (Ex. 11 at 3).

The APF approval is based in part on capacity that Westfield created through the construction of more than \$2.5 million worth of transportation improvements. (Tr. 5/1/13 at 23). The County intended these improvements, including the westbound University Boulevard double turn lane, to accommodate the additional traffic generated by approved future development on the Mall Parcel. Since the original APF approval, Westfield has added density on the Mall parcel

through new construction, and the remaining APF is 212,032 square feet, allowing Westfield to build new uses that will generate an additional 793 trips. (Ex. 11 at 5). The proposed gas station will utilize only 138 of these trips, leaving another 655 unused trips (or 175,845 square feet) for future development. With or without the gas station, the Mall will continue to grow.<sup>11</sup>

**F. The gas station will not create a Traffic Hazard or Traffic Nuisance.**

The Zoning Ordinance does not define what constitutes a traffic nuisance. Rather, guidance is provided from Maryland courts, through case law involving both private nuisances (*i.e.*, nontrespassory invasions of a neighbor's interest in the private use and enjoyment of land) and public nuisances (*i.e.*, interference with a public right or interest, rather than to one individual, which has a common effect and produces a common damage). See *e.g.* *Rosenblatt v. Exxon Co., U.S.A.*, 642 A.2d 180, 1990 (1994); *Burley v. Annapolis*, 34 A.2d 603, 605 (1943). For both private and public nuisances, Maryland courts have applied a legal standard based in reasonableness to evaluate whether an interference with rights or interests rises to the level of a nuisance. The courts have confirmed that the interference must be “unreasonable,” not merely annoying or inconvenient. See *e.g.*, *Wietzke v. Chesapeake Conference Ass'n*, 26 A.3d 931 (Md. 2011); *Miller v. Maloney Concrete Co.*, 491 A.2d 1218 (Md. App. 1985); *Tadger v. Montgomery County*, 479 A.2d 1321 (Md. 1984); *Gallagher v. H.V. Pierhomes, LLC*, 957 A.2d 628 (Md. App. 2008).

1. The gas station traffic will not affect the residential neighborhoods.

There is no evidence that the gas station will cause drivers to detour through the surrounding residential neighborhood, and the physical layout of the area surrounding the Mall

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<sup>11</sup> Mr. Guckert testified that 183,000 square feet of unused density or 750 peak hour trips remain available on the Mall parcel. (Tr. 3/11/14 at 34, 35).

makes that extremely unlikely, as again it is not possible to access the residential neighborhood from the Mall parcel by car.

2. The Mall parcel will easily accommodate the incremental traffic increase.

a. *The station is well-designed to accommodate gas queues.*

The station's anticipated sales suggest that most, if not all, queues will be exclusively on-Site in the designated queuing area. Theoretically, the station can accommodate a total of 240 cars (a volume greater than the 225 cars expected only during the busiest periods) without any queue. (Tr. 4/1/14 at 74). As a practical matter it is unlikely that 240 cars will pass through the Station in one hour, as cars do not normally arrive in a synchronized manner. Still, Mr. Guckert testified that "You can easily fit 40 cars into the queuing area without any issues and . . . 96 percent of the time, the gas station queue is going to be 40 cars *or less*." (Tr. 3/11/14 at 110). The Site can easily accommodate this level of traffic with limited and contained queuing.

To help minimize queuing, Costco will provide a second attendant on Saturdays and Sundays and will dispatch one or more additional attendants at any time, as necessary. The sole responsibility of the additional attendant will be to manage the queue "to avoid any queuing on the ring road." (Ex. 494(a), Condition Nos. 15 and 16).

Mr. Guckert also testified that at the gas station's peak, one car will complete fueling and exit the gas station every 16 to 20 seconds and that each car will have six possible routes to exit the gas station. (Tr. 3/11/14 at 78, 88; Ex. 482). These exit options will also help reduce potential congestion.

b. *The ring road signage assists traffic flow.*

A three-way stop is located along the ring road, immediately to the east of the Site. This stop ensures that there will be constant breaks in the westbound ring road traffic, allowing

customers of the station traveling eastbound on the ring road to turn left into the Site without interference and with little likelihood of causing a traffic back up on the ring road. (Tr. 3/11/14 at 122, 123). In addition, the Site is a retail “pad” site located on the privately owned Mall parcel, accessed from a private ring road with low volumes (approximately 3,000 cars a day, Tr. 5/1/13 at 89, 162) and low speeds (approximately 15 to 20 miles per hour). (Tr. 3/11/14 at 123). The gas station is a good fit for this location within the Mall.

*c. The gas station will not significantly affect Mall parcel parking.*

Although the Mall is a successful commercial center that routinely experiences a high volume of traffic, it has not reached its saturation point. The Mall parcel provides 6,079 parking spaces, in three levels of parking equipped with at least four elevators.<sup>12</sup> Mr. Guckert conducted on-site investigations of parking conditions during the busy holiday season, between Thanksgiving and Christmas. (Tr. 3/11/14 at 129, 130). He testified that even during the peak hours of operation, “there’s still about 400 spaces available in the third level of the parking garage.” (Tr. 3/11/14 at 129 and 130). This is consistent with Ms. Cordry’s testimony, based on her numerous site visits. (Tr. 11/21/13 at 113).

*d. The gas station will not increase pedestrian-vehicle conflicts on the Mall parcel.*

Building the gas station will result in relocating about 90 surface parking spaces from the Site to the southwest portion of the Mall parcel parking lot. These parking spaces will be a similar distance to the Mall entrance, as many other parking spaces in the Mall’s parking lot. In addition, Costco proposes to extend the six-foot wide pedestrian path located parallel and to the south of the east-west drive aisle, west to the ring road. (Ex. 494(a), Condition No. 26). This

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<sup>12</sup> The number of parking spaces complies with the Montgomery County’s Parking Waiver. (Ex. 90(c)).



will provide a secure pedestrian path from this portion of the parking lot to the Mall entrance. And as Costco has already built a pedestrian bridge providing direct access from the parking garage to the Costco warehouse, it is possible to shop at the Mall without setting foot in the parking lot. (Tr. 4/26/14 at 72).

*e. Fuel deliveries will be appropriately scheduled and safe.*

Typically, there will be between two and four gas deliveries a day. (Tr. 5/23/13 at 94). Mr. Hurlocker testified that under normal circumstances at least two of these deliveries will occur early in the morning. (Tr. /23/13 at 93). Costco will minimize potential inconvenience by scheduling deliveries in the morning or when there is less traffic, and has agreed to use commercially reasonable efforts to schedule at least one of the daily gas deliveries prior to 9:30 a.m. (Ex. 494(a), Condition No. 12).

The Station's fuel loading area will be located along the western edge of the Site, to the west of the fuel pumps. As required by the Zoning Ordinance, the fuel delivery drive aisle will be 20 feet wide. Costco has agreed to designate six parking spaces immediately to the west of the gas delivery area as "employee only parking" in order to minimize turnover and activity in that area. (Ex. 494(a) Condition No. 11). Mr. Guckert agreed that given these conditions, gas deliveries will not create a nuisance. (Tr. 3/11/14 at 136).

The truck turning exhibit (Ex. 232) demonstrates that there is sufficient area to accommodate the turning radius of the gas delivery trucks. The Opposition submitted pictures showing tire marks of delivery trucks on islands in the Mall parcel. These trucks, however, have nothing to do with the gas station. In addition, the Opposition presented no evidence of any actual accident involving delivery trucks at the Mall parcel. In fact, Ms. Cordry visited the Mall numerous times, recorded her observations, and never witnessed a single accident.

*f. The gas station will not interfere with deliveries to the warehouse.*

The truck turning diagram (Ex. 232) also demonstrates that there is an adequate area for the delivery trucks to access the loading area, and those deliveries will not interfere with the warehouse loading area located to the east of the gas station site. Mr. Hurlocker testified that the “vast majority of those trucks come and go to the loading docks prior to 6:00 a.m.,” (Tr. 5/23/13 at 176).

*g. Gas station traffic will create no nuisance or hazards at “Intersection 16.”*

Mr. Guckert conducted an intersection analysis showing that Intersection 16 operates at a level of service A under a CLV analysis. Mr. Guckert also conducted a HCM analysis for Intersection 16, which showed that during the peak Saturday period on the Mall, drivers will experience a 4-5 second delay at this intersection. (Tr. 4/29/14 at 273).<sup>13</sup> Mr. Guckert testified this delay would be “barely perceptible” (Tr. 4/29/14 at 273) to drivers on Saturday afternoon, and would create no nuisance or hazard. Moreover, the short delay will only occur during peak conditions on Saturdays.

The Opposition insists that parking lots are inherently unsafe, but at the same time, agree that there is no data showing that this parking lot is unsafe. When testifying, Dr. Adelman discussed his surprise about why there were not more accidents at the Mall parcel. He answered his own question, explaining, “the answer is quite simple: people are very careful; they’re

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<sup>13</sup> Intersection 16 operates at an acceptable level of service under either a CLV or HCM analysis. Nonetheless, Costco proposed additional improvements to the intersection to help create free flow right turns onto the ring road, because it may significantly reduce delays. (Ex. 504(a)). The Hearing Examiner ruled that Costco’s proposals arrived too late in the process. If upon further evaluation of this issue the Hearing Examiner determines that the proposed improvements would be in the public interest, Costco would agree to make them.

moving very slowly.” (Tr. 11/14/13 at 202). There is no reason to think the gas station will cause people to drive faster.

*h. The Opposition’s evidence shows the Mall parcel is safe.*

Ms. Cordry submitted a video tape that she made during an unspecified “very, very busy” Sunday afternoon. (Tr. 5/20/14 at 291). The video shows peak hour conditions. And yet, Ms. Cordry was able to drive through the parking lot safely at speeds ranging from 7 to 12 miles per hour, while holding and operating a video camera. The video demonstrates that Mall traffic -- *at its worst* -- is not a nuisance. In addition, the video refutes the Opposition’s contention that cars are unable to travel faster than 5 miles per hour in the parking lot. There is simply no evidence that traffic and congestion at the Mall are atypical of those in a heavily commercialized area.

**G. The gas station will not reduce the safety of vehicular or pedestrian traffic on the public street.**

The majority of the new station’s customers will either be on the Mall parcel already, visiting the Costco warehouse or the other available uses on the Mall parcel, or passing by the Mall parcel on one of the major arterials -- University Boulevard, Georgia Avenue or Veirs Mill Road – in proximity to the Mall parcel. (Exs. 11, 198). As a result, the evidence established that the gas station will generate a relatively limited number of new trips -- 138 AM peak hour trips and 138 PM peak hour trips. (Ex. 11 at 22). This will not impact safety of the vehicles or pedestrian traffic on the public roadways contiguous to the Mall.

The Traffic Report found that all of the public roads surrounding the Mall parcel are improved with sidewalks, and that pedestrian signal indications, pushbuttons and handicap ramps are provided at all pedestrian crossings at signalized intersections. (Ex. 11 at 27). In Mr. Guckert’s expert opinion, the additional new trips generated by the gas station will not cause additional vehicular or pedestrian conflicts, or increase potential accidents at the intersections

allowing access to the Mall parcel along University Boulevard and Veirs Mill Road. (Tr. 5/23/13 at 269, 270).

Mr. Guckert testified that accidents are chance occurrences, typically a result of driver or pedestrian error, and that more traffic does not equate to more accidents, let alone those involving pedestrians. (Tr. 5/23/13 at 270). He also testified, repeatedly, that in his opinion, based on his decades of experience, a nuisance must be a *sustained* occurrence. He noted that traffic analysis and the results are based on hourly observations, not minute by minute evaluations, given the inherent fluctuations that can occur in the shorter interval. (Tr. 4/1/14 at 113). There is no credible evidence in the record that the slight incremental increase in traffic and delays are a sustained occurrence that would unreasonably interfere with anyone's use and enjoyment of their property.

**V. THE PROPOSED GAS STATION WILL BE SERVED BY ADEQUATE PUBLIC FACILITIES.**

**A. Zoning Ordinance Requirements**

Section 59-G-1.2.1(a) requires Costco to show that the gas station:

- (9) will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities.

**B. Stormwater**

There are currently no stormwater management controls in place in proximity to the Site. Prior to the construction of the gas station, Montgomery County will require an approved stormwater management plan. Costco's witness, Mr. Dan Duke, an expert in the field of civil engineering, testified that the stormwater plan was designed in accordance with Montgomery County's environmental site design criteria. (Tr. 4/26/13 at 219). Montgomery County approved the concept stormwater management plan for the gas station (Approval No. 241647). (Ex. 103). Mr. Duke testified that Costco employs additional protection systems, above and beyond those required by Montgomery County to ensure the safety of any stormwater runoff. These additional safeguards include a separate oil/water separator to be located under the canopy and a series of filter and pipe systems. (Tr. 4/26/13 at 220). Mr. Duke testified that the construction of the gas station will result in "a decrease in the impervious area on the Site" (Tr. 4/26/13 at 227) which further mitigates the amount of water run-off.

**C. Sewer Capacity**

Mr. Duke testified that the Special Exception would be served by adequate sewer facilities. Mr. Duke stated that during the permitting of the gas station, a new site utility plan

will be submitted to the water and sewer providers for review and approval. (Tr. 4/26/13 at 228).

This testimony was undisputed.

**D. Police and Fire Protection**

Mr. Duke testified that the Site is located within two miles of the police station located at 2300 Randolph Road and is also within one-half a mile of the fire and rescue station located at Blue Ridge Avenue and Grandview Avenue. (Tr. 4/26/13 at 228). Staff consulted with Montgomery County Fire and Rescue, which deemed the proposed special exception plan sufficient. (Ex. 70 at 28).

**VI. THERE IS A NEED FOR THE FILLING STATION TO SERVE THE POPULATION IN THE GENERAL NEIGHBORHOOD.**

Costco has demonstrated that the gas station will be expedient, reasonably convenient and useful to the public. Based on the standard set forth by the Maryland Court of Appeals, a need exists for the gas station. This need exists whether evaluated based on the general neighborhood or the larger market area. More than 4,000 people shop daily at the Costco warehouse. Those shoppers are part of the general neighborhood used to determine need. Approximately one-third of these warehouse shoppers will seek to combine a trip to the Costco warehouse with purchasing gas. This will account for approximately 50 percent of the gas station's total sales, or 5 million gallons a year. These figures alone establish a need for the gas station. The demonstrated need increases to 13.1 million gallons annually when the analysis is expanded to include the market area.

**A. Zoning Ordinance Requirement**

The relevant Zoning Ordinance Section governing the Special Exception requires Costco to demonstrate as follows:

Section 59-G-1.24 requires Costco to show:

that a need exists for the proposed automobile filling station to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood.<sup>14</sup>

**B. There is a need for a gas station if the station will be expedient, reasonably convenient and useful to serve the population in the general neighborhood.**

The Zoning Ordinance does not define "need," but several cases provide guidance. In *Lucky Stores, Inc. v. Bd. of Appeals of Montgomery County*, 312 A.2d 758 (Md. 1973), the Court

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<sup>14</sup> The neighborhood need test is to be distinguished from the community need requirement of Section 59-G-1.25 which requires in part that the "uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood." This language is absent from Section 59-G-1.24 and thus there is no basis to deny the Special Exception merely because of a potential saturation of similar uses.

of Appeals determined that the word “need” in Section 59-G-1.24 did not mean “absolute necessity” but “expedient, reasonably convenient and useful to the public.” *Lucky Stores*, 312 A.2d at 765-66. The Court of Special Appeals, applying that standard in *Friends of the Ridge v. Baltimore Gas and Elec. Co.*, 120 Md. App. 444 (1998), emphasized that an applicant is *not required* to show absolute necessity:

The judicial gloss given to the definition of the ‘need’ requirement in Maryland special exception lore has been that it means ‘expedient, reasonably convenient and useful to the public.’ *Neuman v. City of Baltimore*, 251 Md. 92, 99, 246 A.2d 583 (1968) (citations omitted); accord *Lucky Stores v. Board of Appeals*, 270 Md. 513, 527-28, 312 A.2d 758 (1973) (citing *Neuman* ). “Need” does not mean absolute necessity. *Id.* The term is elastic and relative, infusing the designated local government decision-maker with a degree of discretion, not unfettered or to be arbitrarily exercised, in interpreting and applying the facts of each case to this requirement. *Id.*

120. App. at 488.

1. The 2002 amendment did not create a heightened standard for need.

In 2002 the County Council amended Zoning Ordinance Section 59-G-1.24 by substituting the requirement that a special exception be “for the public convenience and service” to instead require that only “a need exists” for the special exception.

The 2002 Amendment was part of a comprehensive amendment to the sections of the Zoning Ordinance governing special exceptions (Zoning Text Amendment No. 01-10 adopted April 16, 2000). The legislative history does not reflect the basis for the language change in the 2002 amendment. However, in *Hearing Examiner’s Report and Recommendation, Germantown Walter Johnson Prop., LLC*, Case No. S-2631, at 87 (August 8, 2005) the Hearing Examiner found that the plain language of the revision “loosened the [need] requirement by making it less specific.”



2. The Opposition is applying the wrong legal standard.

The Opposition applies the wrong legal standard when it argues that Costco “cannot establish a need” for the proposed filling station because “current law requires a finding of absolute necessity.” (See Exhibit 88(s)). This assertion is not supported by the language or legislative history of Section 59-G-1.24, the interpretations of that section by the Office of the Zoning Hearing Examiner or the Board of Appeals, or the dispositive case authority cited above.

As noted above, the plain language of Section 59-G-1.24 requires only that “a neighborhood need” be shown. In fact, few, if any, of the uses listed in 59-G-1.24 -- all of which must demonstrate a neighborhood need as a condition to obtaining a special exception – could meet an “absolute necessity” standard. For example, is there ever an “absolute need” for a community swimming pool?

In addition, the Opposition wrongly argues that the burdens imposed on the general neighborhood do not justify the benefits received by Costco members who want to buy gas here. The Opposition’s argument applies the wrong legal standard; Costco does not have to show a benefit to the neighborhood. See *People’s Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 88-89, 956 A.2d 166 (2008), in which the Court stated that an applicant for a special exception and a variance “does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden.” Moreover, the Opposition ignores the fact that most of the likely gas purchasers are already part of the general neighborhood, and they will benefit from the presence of the Station.

**C. Staff found there is a need for the gas station.**

Staff concluded that there was a need for the gas station based on the Costco membership within the defined neighborhood, as well as the existence of a “retail gap” reflecting an unmet demand for gas purchases within the study area. (Ex. 70, Attachment 10). Staff also determined that Mr. Flynn’s Supplemental Analysis (Ex. 417(a)) further supported a finding of need. In its letter to the Hearing Examiner, the Planning Board did not disagree with Staff’s findings or offer any comment about need. (Ex. 89).

**D. Costco established there is a need for the gas station.**

1. Costco’s Expert

Costco presented testimony and reports from an expert in market analysis, Thomas Flynn, President of Thomas Point Associates (“TPA”). Mr. Flynn has over 30 years of experience in market analysis and has been certified by an expert before the Board of Appeals on several occasions, including in cases involving gas stations. (Tr. 7/30/13 at 172, 173).

In analyzing need, TPA evaluated potential fuel sales based on the following factors:

- Needs of current and future residents, employees, and shoppers in the area, based on a 7-minute trade area and the more limited general neighborhood.
- Supply of gas stations in the area and extent to which these establishments meet existing and projected need.

In the course of its work on this matter, TPA identified a market area and projected sales at the Site. To determine the relevant market area Mr. Flynn relied in part on his experience on other retail studies, including work on gas stations, as well as interviews with consumers and station

operators. He also evaluated data on population and retail sales from Nielsen Claritas, Inc., one of the leading data companies in the United States.<sup>15</sup>

TPA's methodology included the following:

- Conducted field studies throughout the market area, including several visits to each gas station described in the Needs Analysis (Ex. 14) and interviews with consumers at various stations and at the Costco station in Beltsville.
- Met on several occasions with Staff in order to review Staff projections of population and jobs and address issues that Staff identified for further evaluation.
- Reviewed Maryland State Highway Administration ("SHA") traffic counts, and discussed the planned improvements at Georgia Ave. and Randolph Road with SHA staff.
- Evaluated data and information from the U.S. Census Bureau regarding the gas station industry and from the National Petroleum News regarding changes in station operations.
- Evaluated national data on energy industry conditions, trends and projections from the US Department of Energy ("DOE") and interviewed DOE staff members.

TPA's research and analysis is consistent with methodologies previously accepted by the Board of Appeals and Maryland Courts.<sup>16</sup>

2. Costco's 7-minute drive market area analysis shows a need reflected in the annual sales gap of 13.1 million gallons of gas.

Based on its comprehensive analysis and investigation, TPA concluded that there is a market gap of 13.1 million gallons. (Ex. 14 at 5-1). Mr. Flynn testified that the primary indication of need is the difference between the estimated sales in the market area and demand,

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<sup>15</sup> Many of the top retail chains and developers use Nielsen Claritas, Inc. in analyzing market areas and store locations.

<sup>16</sup> The extensive analysis performed by TPA is in a stark contrast to the lack of evidence supplied by the applicant in *Lucky Stores*, where the special exception application was denied in part because Applicant provided no evidence establishing need, such as studies and reports "showing the number of residents in marketing area, the average number of automobiles per household, the average number of gallons consumed per vehicle in Maryland and the indicated desire of a substantial number of residents that [the] filling station was desired."

measured by potential sales. (Tr. 7/30/13 at 181-183). He further explained that the difference between sales and demand, defined as “opportunity,” could be a gap (a positive number) or a surplus (negative). (Tr. 7/30/13 at 181-183). With respect to gasoline sales in the relevant area, the quantitative model yields a positive number that represents a market gap of \$71 million. (Ex. 14 at 4-2). Mr. Flynn’s report found that gasoline sales typically account for two-thirds (65.4%) of total sales at gas stations. (Ex. 14 at 4-1). Accordingly, Mr. Flynn concluded that based on an estimated gap of 65.49% and using an average Maryland price per gallon of \$3.55 (November 2011-2012), there is an annual shortage of 13.1 million gallons in the market area. (Ex. 14 at 4-2).

Mr. Flynn testified that this need reflects not only unmet demand, but consumer choice--the proposed station will be “convenient and cheap and safe” (Tr. 7/30/13 at 200) for the many Costco members who come to shop regularly at the warehouse.<sup>17</sup> This further demonstrates that the proposed station will be “reasonably convenient and useful to the public.”

3. A need exists for the gas station to serve the population in the general neighborhood.

No matter how the Hearing Examiner defines the relevant neighborhood (either by reference to the “general neighborhood” or the “market area”), there is a need for the gas station because under either analysis, over 4,000 Costco members, one-third of whom are expected to purchase gas, are part of the neighborhood population. (Ex. 198 at 5). This dynamic creates an automatic internal capture rate for the gas station which does not exist for other gas stations. (Ex. 198 at 5). This means about 1,300 Costco shoppers will buy gas at the gas station every day, resulting in annual anticipated gas sales of at least 5 million gallons just from those shoppers alone. The projected annual sales from the general neighborhood increases to 11.1 million when

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<sup>17</sup> The evidence includes more than 5,000 postcards of support from Costco members (Ex. 183).

other visitors to the Mall, employees on the Mall parcel, commuters to the 976 space WMATA parking garage and pass-by drivers are included. (Ex. 198 at 5).

The Code provides that the use must “serve the population in the general neighborhood.” The Code does not limit “population” to only the residential population. Costco warehouse shoppers became part of the “population in the general neighborhood” for purposes of evaluating need when they visit the Costco warehouse.<sup>18</sup>

This conclusion is consistent with other findings of the Hearing Examiner (See *In the Matter of Henderson Corner and 355, LLC*, S-2743: “The next step in determining need is to look at the residential population in the area, and also commuter traffic through the area, including people who do not live in the market area but who might be coming through for the retail uses at the big shopping centers nearby.”) (S-2743 at 30). Accordingly, Mall workers and visitors, including Costco shoppers and the residents of the limited portion of the residential neighborhood to the south and west of the Mall parcel, must be considered members of the “population in the general neighborhood” when need is evaluated.

This volume of projected sales establishes that there is a demonstrable and real need for a Costco gas station in the general neighborhood.

**E. The Opposition’s criticisms of Mr. Flynn’s analysis are contradictory and ultimately unpersuasive.**

1. Ms. Cordry’s estimate of gas sales demonstrates there is a need.

On the one hand, the Opposition argues that the gas station will sell too much gas. On the other hand, it argues that the gas station should be denied because there is no need for the gas station. Ms. Cordry herself testified that “the range [of gas sold] in this county is for most

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<sup>18</sup> The Hearing Examiner stated that the “Costco warehouse is part of the neighborhood by any definition.” (Tr. 10/17/13 at 106).

stations is about one to perhaps 2.5 million gallons.” (Tr. 9/23/13 at 36). Ms. Cordry further testified that there is a neighborhood demand for 2 million gallons of gas. (Tr. 9/23/13 at 255). Even though she grossly underestimates demand, Ms. Cordry’s concession that Costco may sell 2 million gallons of gas is sufficient by itself to establish there is a need.

2. Ms. Cordry’s theories about why other gas stations have closed is pure speculation and the absence of those stations could signal a greater need for more capacity to the neighborhood.

The Opposition also points out that three stations in the area have closed in the past few years (Tr. 9/23/13 at 73), ignoring the fact that the neighborhood has changed dramatically in those years. Since the Costco warehouse opened in April 2013, there are more than 4,000 additional people in the general neighborhood every day, greatly expanding the population of potential gas purchasers. Moreover, the fact that three gas stations closed recently also means that the neighborhood has three fewer options to purchase gas.

The Opposition’s attempt to draw a parallel between two gas stations in proximity to the Costco Beltsville gas station that went out of business after a Wawa gas station entered the market is unavailing. (“Now probably in that particular case it was the entrance of the Wawa as opposed to the Costco that drove those stores out of business...” (Tr. 9/23/13 at 101)). The issue is demand: the Opposition offered no evidence that the closed gas stations failed because of a lack of demand, and in fact no one from the Opposition even spoke to any owner or employee of any gas station that closed. There are many reasons why a gas station might close: its prices were too high, its hours inconvenient, its rent was too high; the station was unkempt or unsafe; the costs of new state of the art equipment or compliance with environmental regulations were too high; the lease expired; the owner decided to retire or relocate. Pure speculation is not a proper basis for analyzing need.

3. The Hearing Examiner should reject the Opposition's request to protect existing business from new competition.

National trends favor larger higher volume gas stations that are able to provide greater value to their customers. Many smaller stations are closing for that and other reasons. (Ex. 290 at 4). In fact, the Opposition touches upon this when it argues that the Special Exception should be denied because Costco will drive other stations out of business. (Tr. 9/23/13 at 44, 45, 109). That is unproven, but in any event, the law precludes the Board of Appeals from making its decision for anti-competitive reasons. (*Lucky Stores* at 528).<sup>19</sup>

The Opposition also argues that if other stations close, the community *may* lose certain amenities (convenience stores, auto repair shops, air for tires, etc.). These concerns too, are purely speculative. There is no evidence that any gas station or other retail store will shut down because of the presence of the Costco gas station,<sup>20</sup> and of course to the extent that certain stations provide products or services not offered by Costco or other stations it can be agreed that those stations are more likely to succeed. It also is possible that other stations in the area may enhance their services or products in order to better compete and distinguish themselves from Costco.

**F. There is a lack of identical or similar uses to the neighborhood**

The proposed Costco station will be the only membership *discount* gas station available to the general neighborhood, and the nearest Costco gas station is in Beltsville,

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<sup>19</sup> The Hearing Examiner pointed out, "If one were to adopt a more restrictive interpretation of need as kind of as a necessity, which I think you are in fact suggesting, do you run afoul of the concern raised in the Lucky Stores case about the interfering with competition?" (Tr. 10/17/13 at 210, 211).

<sup>20</sup> There was testimony from some competitors that they would not be able to compete with Costco's prices and that they were concerned they would have to shut down. While these concerns and opinions are understandable, they were not supported by any analysis or evidence and more importantly cannot overcome the presumption that this decision cannot, as a matter of law, be based on anti-competitive reasons.

over ten miles away in Prince George's County, and well outside the relevant market area. (Tr. 4/26/13 at 77). Thus, this case is distinguishable from *Lucky Stores*, in which the Court of Appeals affirmed the denial of a special exception in part because there were already two discount filling stations serving the same general neighborhood.

**G. Speculation about future driving trends or fuel consumption does not change that there is a need for gas today.**

Finally, the Opposition relied heavily on articles and some studies predicting that people will drive less in the future. Even if that were true, there is no evidence about what effect, if any, this would have on the demand (and concomitant need) for Costco's gas station. Nor does it change the fact that there is a need *today* for the gas station. The Zoning Ordinance provides "that a need *exists* for the proposed automobile filling station... considering the *present availability* of identifiable or similar uses to that neighborhood" (59-G-1.24). (See *Travco Insurance Company v. Williams, supra*, 61 A.3d 50, 430 Md. 396 at 409, where the court stated "in interpreting this statute we must not forget lessons learned in grammar school" in reference to the proper application of verb tense.) Finally, if the Opposition is correct that overall gas sales will decline and that this will also affect Costco's station, such a development will reduce traffic and emissions at the Site, diminishing the Opposition's environmental traffic concerns.



## **VII. THE GAS STATION WILL NOT BE DETRIMENTAL TO THE ECONOMIC VALUE OR DEVELOPMENT OF SURROUNDING PROPERTIES**

The gas station will be located in a major regional shopping Mall and will not change the character of the Mall parcel. The Mall is -- and will remain -- a commercial area, regardless of whether this station is built. The station will be physically and visually segregated from the nearby residential properties, undetectable from neighborhood homes. Costco's property value expert performed a market analysis and concluded the gas station will not reduce property values. In addition, the proposed gas station has been discussed publicly for years and there is no evidence that those discussions have had any effect on property values. In short, the gas station will not adversely affect or otherwise be detrimental to the economic value of the surrounding properties, including the residential properties.

### **A. Zoning Ordinance Requirement**

Section 59-G-1.2.1(a) requires Costco to show that the gas station:

- (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.

### **B. The gas station will not be detrimental to the economic value of the surrounding properties**

There is no evidence to suggest that the gas station will have any detrimental effect on the surrounding properties, and in that regard, it is telling that neither Staff nor the Planning Board commented on the gas station's impact, if any, on surrounding property values.

#### **1. Costco's Real Estate Market Analysis Expert**

Costco provided ample evidence showing that the gas station will not diminish local property values. The Hearing Examiner qualified Costco's consultant Joseph Cronyn, a

Principal of Lipman Frizzell & Mitchell (“LF&M”), as an expert in Real Estate Market Analysis. Mr. Cronyn has over 35 years of experience in the real estate business (Ex. 17(e)) and until December 2012, also was licensed to sell real estate. Mr. Cronyn is experienced in evaluating market trends and determining whether certain uses will impact the values of neighboring residential properties. He has been qualified as such on numerous occasions before boards and commissions across Maryland, including the Montgomery County Board of Appeals. (Tr. 8/2/14 at 27).

2. Costco’s Market Analysis demonstrates no adverse impact.

Mr. Cronyn evaluated what, if any impact the gas station would have on residential property values in the general neighborhood and prepared an Impact on Nearby Property Values report (the “Values Report”) of his findings. (Ex. 243). Mr. Cronyn analyzed the conditions within the subject’s immediate environment, the specific externalities which could affect neighborhood values (*e.g.*, noise, hazardous/odors, traffic, nuisances, unpleasant views) and residential value trends (*i.e.*, a trend analysis). Mr. Cronyn testified that in this case, like every other residential valuation case, he prefers to start with a paired analysis (evaluating prior and current sales of the same home) near the particular subject property. He noted that an important component of his work is finding a reasonably analogous situation close to the property.

However, the finite number of sales that had occurred in the area near the Site (due in part to the recession) made this difficult. (Tr. 8/2/13 at 51). Accordingly, Mr. Cronyn first evaluated general trends in the sales in the neighborhood of the Site, tracking sales over a period of time.

He based the trend analysis on the best available objective, quantitative data from actual residential sales in the Kensington Heights neighborhood. (Tr. 8/2/13 at 45, 46). To avoid subjectivity or conjecture, he compared this information to actual residential sales of properties

located near the concentration of six gas stations on Connecticut Avenue in nearby Kensington. Mr. Cronyn concluded that the residential properties in that neighborhood did not suffer a loss of value because of their proximity to filling stations. (Tr. 8/2/13 at 51-53). Based on that evidence, Mr. Cronyn concluded that the Costco gas station will not negatively impact the values of residential properties in the nearby Kensington Heights neighborhood. (Tr. 8/2/13 at 45, 46).

In reaching that conclusion, Mr. Cronyn opined that the presence and sales trends of the six gas stations in close proximity to one another was comparable in scale to that presented by the proposed Costco gas station, although they likely had more of a negative impact on their neighborhood than the proposed Costco station, as the Costco gas station would be better managed and operated. (Tr. 8/2/13 at 240).

Mr. Cronyn also opined that while proximity to a gas station under certain circumstances may adversely impact property values, the Costco gas station will not have an adverse impact on the property values in the general neighborhood. This is because the dominant feature of the neighborhood - the Mall - is what drives real estate prices in the area. He found the Mall parcel had not adversely affected residential property values, and that people purchasing homes in that area understand that they will be living next to a busy regional mall. (Tr. 8/2/13 at 55, 56). Mr. Cronyn further testified that the complete separation between the Mall parcel and the residential area reduces the station's potential effect on property values: "The neighboring properties are already significantly buffered from the existing Mall and that's only going to remain the same as far as the Costco gas station is concerned." (Tr. 8/2/13 at 56, 57). He expressly noted the forest buffer, elevation difference, and eight-foot green screen, and the fact that cars on the Mall parcel cannot access the adjacent residential area without first leaving the Mall parcel. (Tr. 8/2/13 at 56, 57). Mr. Cronyn confirmed that the gas station will not be visible from the nearby

residences, but even if it were, the station would not adversely affect the property values given the distances involved and its lack of any serious intrusive qualities. (Tr. 8/2/14 at 225).

To the extent a gas station – or other use – is so intrusive that it might affect property values depends on many factors, including noise, unsightly appearance, odors, fumes, light pollution, the existing character of the neighborhood, crime and loitering. Those factors simply do not apply here: the station is not visible from the residential properties adjacent to the Mall parcel; it will be physically segregated from nearby residential properties with which it has no direct vehicular connection; the residential properties themselves are separated from the Site by a ring road, a forested buffer and a significant change in elevation; the hours of operation of the proposed station are fewer than at most gas stations; the proposed station will offer no other services or uses, and the light levels at the property line are zero footcandles.

In addition, the Site is located on a regional mall with more than 1.5 million square feet of development. There is a high level of activity on the Mall parcel every day. Adding a gas station will not change the overall nature of the Mall parcel. The Costco gas station will be subsumed by existing conditions on the Mall parcel. Mr. Cronyn’s Value Report concludes, “If there is any impact (positive or negative) on adjoining residential uses, the Westfield Shoppingtown Mall is the cause.” (Ex. 243 at 6). The Value Report further notes that “adjoining residential property owners purchased their homes understanding the relationship of their properties to the Mall.” (Ex. 243 at 12).

The proposed station’s proximity to residential properties is not unique, and the Zoning Ordinance expressly contemplates gas stations abutting residential properties. In such cases, Zoning Ordinance Section 59-G-2.06(b)(2)) provides only that certain landscaping or screening

must be provided.<sup>21</sup> Applicant submitted more than 30 photos evidencing the proximity of gas stations to residences throughout Montgomery County. (Ex. 86(g)). To the extent this gas station differs from other gas stations because of anticipated sales, the station will comply with all setback and other requirements required by the Council, including the 300 foot setback required by ZTA 12-07.

3. Other high-volume stations do not hurt property values.

Ms. Kathy Shen, the representative of the Freestate gas station located at 11295 Veirs Mill Road provided support for Mr. Cronyn's conclusion that the gas station will not adversely affect the property values of the nearby residences. The Freestate gas station sells approximately 3.3 million gallons a year (Tr. 11/21/13 at 72) and is approximately 60 feet from the residential properties located across Kensington Boulevard (Ex. 396), with only a fence measuring approximately 6 feet 4 inches high located between the Freestate station and those properties. (Tr. 11/21/13 at 79). Ms. Shen testified that the nearby residential neighbors have never complained about traffic, noise or odor. (Tr. 11/21/14 at 78-80).

4. The lack of studies evaluating property values and gas stations suggests no causal relationship.

The lack of any published study specifically analyzing the effect that gas stations may have on property values further suggests that there is no causal or uniform relationship. Mr. Cronyn reviewed approximately ten reports on various externalities and the impacts on residential property values, and noted that none dealt specifically with gas stations. (Tr. 8/2/14 at 265). Similarly, the Opposition's lay witness Mr. Jim Core's exhaustive research on the Internet

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<sup>21</sup> As has been detailed elsewhere in this brief, Costco is exceeding this requirement by agreeing to planting more than 100 trees within the existing forested buffer and constructing an eight foot high green screen.

did not reveal any studies that were on point. There is simply no evidence showing that this gas station will decrease local property values.

**C. The Opposition's provided no evidence that the gas station would adversely affect surrounding property values.**

The Opposition proved no expert testimony or analysis of the local real estate market. It relied entirely on Jim Core's testimony. Mr. Core works as a senior analyst at the U.S. State Department (Tr. 10/21/13 at 125) and conceded that he has no experience, training or expertise in evaluating property values: "I am not a licensed appraiser. I am not a real estate agent." (Tr. 11/14/13 at 68). There was no attempt to qualify Mr. Core as an expert in the issues at hand.

In Maryland, a home owner is qualified to testify about the current value of his property, but not about how future development might affect his property value. Accordingly, Mr. Core is not competent to testify on the future value of his property or others' properties. *Ray v. Mayor and City Council of Baltimore*, 430 Md. 74 at 98-99; 59 A.3d 545, at 559-560 (2013) (holding that lay witness testimony about future property values was inadmissible and could not be relied upon by the court.) In *Ray*, the Maryland Court of Appeals held that a property owner can testify as a lay witness about his property's *current* value but that expert testimony is *required* for testimony about whether the value of his property will increase or decrease because of a future development in the area. A property owner in *Ray* was permitted by the trial court to testify about "what he *believed* would be the value of his home sometime into the future." (430 Md. at 99, 59 A. 3d at 559). The Court of Appeals characterized that testimony as "merely speculative." (430 Md. at 99, 59 A.3d at 559). In rejecting the property owner's contention that he should be permitted to testify about the future value of his property, the Court of Appeals stated that "adopting [the property owner's] position would require that we abandon the very justification for the treatment of property owners as presumptively competent to testify about the [present]"

value of their property [*i.e.* based on personal knowledge of the price paid, rents received, land uses possible]. We refuse to do that.” (430 Md. at 99, 59 A. 3d at 560).

Like the witness in *Ray*, Mr. Core testified about what he believed his property value might be in the future if the gas station is constructed:

Q. Mr. Core, you testified that if Costco’s gas station opens, it will devalue your home by at least \$25,000. Do you stand by that opinion today?

A. So that’s what I testified to?

Q. Yes. I’m trying to get, was that an arbitrary number, is that based on something, is that a worst case scenario? Where did you get that number from?

A. *That was my feeling.*

(Tr. 11/14/13 at 81).

Mr. Core provided no data, no sales records, and no evidence whatsoever to show what effect, if any, the proposed Costco gas station is already having on real estate values:

Q. Okay. Are you aware of any values on your block or your neighborhood decreasing since Costco announced its plans to open a gas station at the Mall site?

A. I can’t speak to that. (Emphasis added). (Tr. 11/14/13 at 89).

Mr. Core’s testimony was based solely on his fear that the gas station might influence people’s perceptions about his home value. For example, he claims that “Overshadowing all of this is the fact that people are going to be concerned -- potential home buyers, people who live in the area or are considering living in the area -- are going to be very concerned about potential adverse health effects, ...*whether or not they are scientifically proven*, and frankly, *that perception*, in terms of my house, is going to have serious impacts.” (Emphasis added). (Tr. 10/24/13 at 24-25). In Maryland, it is firmly established that “testimony amounting to unsupported dislike and fear of a project amount[s] to no evidence at all.” *Entzian v. Prince George’s County*, 32 Md. App. 256, (361 A.2d 6) (1976), citing *Rockville Fuel and Feed*

*Company, Inc. v. Board of Appeals of the City of Gaithersburg*, 257 Md. 183 (262 A.2d 499 (1970)). Mr. Core’s beliefs, fears and speculation have no place in this process.<sup>22</sup>

**D. The gas station will not retard development of surrounding properties.**

The Opposition failed to offer any important evidence to establish that the gas station will have any adverse effect on the development of surrounding properties. As Ms. Savage testified, development has been robust in Wheaton since Costco first announced plans to pursue the gas station. Further, as Mr. Cronyn testified, the owner of the vacant site immediately south of the Mall has elected to “go ahead with development” of residential townhouses at the same time Costco has pursued Special Exception proposal, strongly suggesting “business as usual.” (Tr. 8/2/13 at 247). The evidence clearly establishes that the proposed station is an appropriate addition to this commercial area.

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<sup>22</sup> In addition, the hearsay documents that Mr. Core relies upon have no relevance to this case. For example, Mr. Core relies on “Preliminary Stated-Preference Research on the Impact of LUST Sites on Property Values: Focus Group Results.” (Ex. 352(b)), a report that evaluated the impact of *leaking* tanks on property values. He also relies on “Building Prosperous Places in Michigan: Understanding Placemaking Values, Perceptions and Barriers” (Exs. 353, 353(a) and 615(b)), a report conducted for the purpose of assisting rustbelt region projects to attract growth, not to evaluate the effect of a gas station on property values.



**VIII. THE GAS STATION WILL NOT CREATE A NUISANCE OR CREATE EXCESSIVE LEVELS OF NOISE, VIBRATIONS, FUMES, ODORS, DUST, GLARE, OR PHYSICAL ACTIVITY.**

The physical and operational characteristics of the Site and the gas station will not significantly impact the surrounding area. As discussed throughout this brief, the gas station will be virtually undetectable from the residential neighborhood. It will be located on the Mall parcel with a surrounding ring road providing distance between the gas station and the residential neighborhood. Costco will also install a green screen atop the sloped, forested buffer, providing an added barrier of separation and further seclude the gas station. The gas station will operate concurrently with other stores in the Mall and will not extend the hours of activity at the Mall.

Costco will utilize state of the art technology to significantly reduce risk of spills or accidents and to lower emissions from the station. Sullivan Environmental extensively modeled the gas station and addressed all of the concerns and questions raised by the Opposition. Mr. Sullivan testified that the gas station will not cause any violation of the EPA National Ambient Air Quality Standards (“NAAQS”). The Opposition only seriously argues that the gas station may cause violations of the 1-hour NO<sub>2</sub> standard and the Annual PM 2.5 standard. The Opposition attacks Sullivan’s methodology even though they provided input on his modeling protocol -- which complied with EPA guidelines -- and (at least initially) agreed with much of the protocol. The Opposition elected to do no modeling, even though they are in possession of the AERMOD software and all necessary data inputs to perform modeling.

**A. Zoning Ordinance Requirements.**

Section 59-G-1.21(a) requires Costco to show that the gas station:

- (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.

Section 59-G-2.06 requires Costco to show that:

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

Staff determined that “the proposed gas station will not cause objectionable noise, vibrations, . . . odors, dust, . . .(or) illumination.” (Ex. 70 at 16). The Planning Board agreed with this conclusion. During the Special Exception Hearings, Costco fully met its burden on these issues.

**B. The gas station will create no non-inherent adverse effects or cause any nuisance because of noise, vibrations, fumes, odors, dust, illumination, glare or physical activity.**

1. Noise, Vibration, and Dust.

Costco will sell gas; it will conduct no automotive repair activities or provide other sales or services at this gas station. Activities at the station will be relatively quiet and will not cause any significant vibrations, dust, or emissions. In addition, and as discussed above, Costco went to great lengths to design the gas station to minimize its effects on the neighborhood, including installation of a green screen that will reduce the potential for adverse noise, vibration or dust, and the green screen will conceal the gas station from the residential neighborhood and blend in with the trees and vegetation along the forested buffer.

The County Code sets standards for ambient air noise received by residential properties. The “nighttime” standard applies from 9:00 p.m. to 7:00 a.m. on weekdays and 9:00 p.m. to 9:00 a.m. on weekends and holidays. (Ex. 195(a)). COMAR 26.02.03.02 (B)(1) includes a table setting the maximum allowable noise levels (dBA) for Receiving Land Use Categories. (Ex. 195(c)). For residential properties, the maximum dBA is 55 at night and 65 during the day. (Ex. 195(c)).

Mr. Sullivan, whom the Hearing Examiner qualified as an expert on noise (Tr. 6/17/13 at 166, 167), conducted a noise investigation. He recorded background noise levels on and around the Mall parcel on July 20, 2013, at various times throughout the day, including peak conditions. The measured noise levels at the Mall were far below the Code's maximum levels. The highest measured average noise level for daytime levels was less than 50 dBA, and for nighttime levels it was less than 45 dBA. (Exs. 15(a) at 164-67; 54(b) at 6-8; 56(a) at 6-8; 249); (249(e)). Mr. Sullivan also modeled anticipated noise levels for the proposed gas station's operations and concluded that the noise from the gas station will be insubstantial and will not violate the Code:

In summary, background noise levels show substantial margin with the County noise requirements when specifically matched to the "daytime" and "nighttime" periods. As modeled with the Traffic Noise Model, the incremental increase caused by the peak hour incremental gas station traffic (69 vehicles/hour) plus pass-by traffic of 78 vehicles/hour will be minor, less than 1 dBA to the background levels. *The summation of this minor incremental increase and the background levels, as measured in this monitoring program, are far below the County noise requirements.* As expected, a gas station operation, especially one without auto repair or other ancillary activities, does not produce substantial noise levels.

(emphasis added). (Ex. 195(c) at 9).

The Opposition provided *no* evidence over 36 days of hearings that the gas station will create a noise problem. The Opposition relied entirely on anecdotal testimony about current noise at the Mall; but did nothing to refute the objective evidence that the incremental increase in traffic at the Mall will not create non-inherent adverse noise, or a nuisance.

## 2. Illumination and glare.

Costco provided unrefuted evidence that the gas station will cause no illumination or glare into the residential community. In addition to the physical characteristics of this Site that mitigate any illumination or glare, Costco will install a green screen between the ring road and the forested buffer. (Ex. 10 at 24; 78(d) at 10). The green screen will conceal the gas station

from residents in the neighborhood, so that even people who live in homes closest to the station will not be able to see the Station from the second floor of their homes. (Tr. 9/9/13 at 72).

As an added assurance, the Costco gas station, unlike many other stations, will not stay open all night. The proposed hours of the Costco gas station are Monday – Friday from 6:00 a.m. until 9:30 p.m., Saturday and Sunday from 6:00 a.m. until 7:00 p.m., with lights to be extinguished upon closing of the gas station, except certain low level canopy lights that will remain on for security purposes. (Ex. 70 at 7). Ms. Vopicelli testified that *the lighting will create no glare* into the residential neighborhoods (Tr. 5/6/13 at 249), and that the foot candle measurement at the residential property line will be *zero*. (Tr. 5/6/13 at 249).

### 3. Odors.

The Hearing Examiner also qualified Mr. Sullivan as an expert in measuring and modeling odor. (Tr. 6/17/13 at 166). Mr. Sullivan conducted an odor analysis using two methods, as explained in detail at (Exs. 15(a); 44(a); 54(b); 56(a); 86 (f); 174). His report and testimony show that odor will not be a problem for the residential community, and the Opposition presented no evidence to contest this finding. Likewise, both Staff and the Planning Board found that the gas station will not create any odor problems. (Exs. 70 and 89).

The demonstrable lack of an odor problem is due, in part, to Costco's use of a device known as the Arid Permeator, which is attached to the underground storage tank exhaust vents. (Tr. 5/23/13 at 84). The Arid Permeator will prevent the release of vapors from evaporating gas in the underground storage tanks, as often occurs at gas stations. It condenses vapors, and returns the condensed liquid gasoline back to the tank, thereby capturing 99.27% of the vapors that otherwise might escape from the underground storage tanks. (Tr. 6/17/13 at 213). According to Mr. Sullivan, "the Arid Permeator approximately reduces the emissions of

odoriferous chemicals by about a factor of two.” (Tr. 6/17/13 at 193). This reduction in odors is *in addition* to the further (albeit relatively minor) odor protection offered by the wooded buffer. (Tr. 6/17/13 at 193).

Enhanced controls in place in the automobile industry to minimize tailpipe emissions, and the use of on-board canister technology to minimize gasoline vapor emissions also minimize the potential for significant odors. Sullivan measured low levels of odor at the Costco station in Sterling. Odors at Wheaton are likely to be even less because: (1) the Sterling station sells more gasoline than the Wheaton station is projected to sell; (2) the Sterling station does not have an Arid Permeator; and (3) by the time the station opens in Wheaton in 2015 (or later) more vehicles will be equipped with on-board canister technology.

**C. The gas station will create no non-inherent adverse effects or cause any nuisance because of fumes.**

1. The Planning Board found that fumes will not create a nuisance or adverse effects.

Staff recommended against the Special Exception because it believed that fumes from gas station activities *could* have an “adverse effect.” (Ex. 70). Unfortunately, this unique case forced Staff to interpret highly technical data that they are not used to reviewing, and for which they are not adequately trained or experienced. Ultimately, Staff adopted the Opposition’s argument that *all* pollution necessarily causes adverse health effects, and, concluded that since this gas station will generate *some* pollution, albeit a miniscule amount, the gas station will also cause adverse health effects. (Ex. 70). Staff based its recommendation solely on the large volume of anticipated gas sales. Staff did not, however, explain when gas station fumes become non-inherent, let alone when or how they would create an adverse health effect in this case. Its decision was not based on any objective standard and was therefore arbitrary.

The Planning Board considered the fumes issue, and rejected Staff's conclusion and analysis, finding instead that the gas station will not create any non-inherent adverse effects:

The majority of the Planning Board did not agree with the technical staff recommendation of denial, which was based on staff's conclusion that the Applicant did not provide enough evidence for staff to make the finding required by § 59-G-1.21(a)(8) that the proposed use will not have an adverse impact on the health of residents and workers in the area.

(Ex. 89 at 1) and agreed that

satisfying the National Ambient Air Quality Standards (NAAQS), used by the Maryland Department of Environment and the Environmental Protection Agency regulating air quality in Maryland and the U.S., is sufficient to satisfy the findings of the special exception for the proposed gas station.

(Ex. 89 at 2).

2. The Hearing Examiner should apply the EPA's National Ambient Air Quality Standards.

The Zoning Ordinance does not identify what specific air quality levels -- or "fumes" -- are unacceptable, and neither Montgomery County nor the Maryland Department of Environment has any applicable quantifiable ambient air quality standards. Maryland, like all states, is free to adopt standards that are more stringent than the EPA standards, but it has *not* done so. In the absence of any objective local standards, it is appropriate (as the Planning Board did) to measure the anticipated emissions from the Costco gas station against the only applicable and quantifiable standards, *i.e.* the Environmental Protection Agency's National Ambient Air Quality Standards ("NAAQS").

The Clean Air Act requires the EPA to set NAAQS that protect the public health with an adequate margin of safety. (Tr. 6/17/14 at 188).<sup>23</sup> In addition, these standards are designed to

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<sup>23</sup> The NAAQS are used to set acceptable air quality concentrations that protect public health and welfare with a reasonable margin of safety. Emission control standards for stationary and mobile sources are the means to ensure that the NAAQS are achieved and maintained. The NAAQS and emission controls are used to manage air quality from power plants, chemical manufacturing

protect even the most sensitive populations, such as those with asthma. (Tr. 6/17/13 at 188, 256). EPA reviews and updates the NAAQS every five years and the NAAQS process is strenuous and thorough, involving extensive input from the public, as well as the recommendations from stakeholders in environmental groups, industry, academia, and the Clean Air Scientific Advisory Committee (“CASAC”). The process allows EPA to establish standards based on recent and established scientific and medical literature.

The Clean Air Act also requires EPA to set the NAAQS so that they provide an “adequate margin of safety” to the general population. (See Ex. 424(c), the EPA’s Final Rule on Carbon Monoxide, Federal Register Vol. 76, No. 169, Wednesday, August 31, 2011, at 54925). “The requirement that primary standards provide an adequate margin of safety was intended to address uncertainties associated with inconclusive scientific and technical information available at the time of standard setting. It was also intended to provide a reasonable degree of protection against hazards that research has not yet identified. See *Lead Industries Association v. EPA*, 647 F.2d 1130, 1154 (DC Cir. 1980) *cert. denied*, 449 U.S. 1042 (1980).” (Ex. 424(c) at 54295).

3. The gas station air quality impacts will be below the EPA NAAQS.

The Hearing Examiner also qualified Mr. Sullivan as an expert in meteorology, air quality and analysis, determining potential exposure to toxic chemicals and the monitoring of air quality and meteorology monitor. (Tr. 6/17/13 at 166). He and his company, Sullivan Environmental (collectively “Sullivan”) performed extensive modeling and quality analysis at the proposed site. (Exs. 15(a); 86(f); 95(c); 125(a)(b); 174; 175; 189(b)(i)(ii); 196, 207(a); 249(c); 253(a)(b); 255; 274; 466; 473(a)(b)). Mr. Sullivan has nearly forty years’ experience as an air quality meteorologist and has worked for both plaintiffs and defendants in environmental

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operations, iron and steel manufacturing, and many other industries that emit far more air pollutants than a gas station of any size.

litigation throughout the country.<sup>24</sup> He concluded with a *reasonable* degree of scientific certainty that the gas station will not exceed any applicable NAAQS.

Although the Code does not define “fumes,” certain emissions commonly and inherently result from gas station operations: volatile organic compounds (VOCs), NO<sub>x</sub>, PM<sub>2.5</sub> and CO. (Ex. 15(a) at § 1.6). Sullivan performed extensive air modeling focused on those pollutants, and took into consideration numerous potential sources of gas station-related emissions, including the fueling pumps, underground storage tanks, queuing automobiles, gasoline delivery trucks, traffic along the Mall ring road, traffic in the Mall parking lot adjacent to Costco and in the adjacent parking garage, and ingress-egress at the gas station. Sullivan added the modeled levels from the proposed station’s operations to the Mall property’s measured existing background levels. Sullivan’s reports and presentations establish that the Costco gas station will neither cause nor contribute to any violation of any applicable NAAQS. (Exs. 15(a); 86(f); 95(c); 125(a)(b); 174; 175; 189(b)(i)(ii); 196; 207(a); 249(c); 253(a)(b); 255; 274; 466; 473(a)(b)).

One of the reasons the Zoning Ordinance requires filling stations to obtain a special exception is that all gas stations emit some fumes. A request for a special exception cannot be denied merely because a gas station emits fumes. The issue here is whether the Costco gas station fumes will be so significant as to constitute a non-inherent aspect of a gas station that also results in a nuisance or intolerable adverse effect on the general neighborhood. (Zoning Ordinance §§ 59-G-1.21(a)(6); 59-G-206).

Resorting to rhetoric and hyperbole rather than empirical evidence, the Opposition contends that the fumes from the Costco gas station will be “unprecedented.” This is not true. Sullivan’s analysis demonstrated that if Costco sells 12 million gallons of gas in one year, the

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<sup>24</sup> Mr. Sullivan’s resume was entered into the record as Exhibit 17(f).



conservatively modeled resultant emissions are comparable to a station selling 3 million gallons of gas in 2000. (Ex. 74 at 7); (Tr. 6/17/13 at 200). That is because current technology, including the Arid Permeator and improvements in auto technology discussed above, significantly reduce the potential for fumes. Mr. Sullivan also testified that although fumes increase in relation to volume of gas sold, the fumes do not increase on a one-to-one basis. In other words, if Costco sells 9 million gallons of gas in a year it *will not* produce six times the amount of fumes as a station selling 1.5 million gallons.

4. Gas station emissions will comply with the EPA 1-hour NO<sub>2</sub> NAAQS.

As Mr. Sullivan testified, he projects that actual 98<sup>th</sup> percentile concentrations in the vicinity of the gas station would like be less than 100 µg/m<sup>3</sup>, *i.e.* approximately half the NAAQS of 190 µg/m<sup>3</sup>. (Tr. 5/8/14 at 300).

The Opposition does not seriously contest most of Sullivan's modeling, which establishes that gas station pollutants will comply with the NAAQS. They do contend, however, that gas station emissions may violate the 1-hour NO<sub>2</sub> standard. At the same time, the Opposition witnesses agree that background ambient levels of NO<sub>2</sub> are decreasing. This trend is likely to continue.

Sullivan modeled gas station-related NO<sub>2</sub> levels that will be much lower than the NAAQS. Sullivan's most accurate, but still conservative model, shows that 98<sup>th</sup> percentile 1-hour NO<sub>2</sub> levels will be highest in the gas queue and then get lower as the air dissipates. (Ex. 466). In reality, he predicts even lower numbers because advances in technology continue to reduce emissions, and overall background levels are decreasing. (Tr. 5/1/14 at 64, 65). The Opposition witness agrees that ambient levels of NO<sub>2</sub> and PM<sub>2.5</sub> are trending down.

In fact, real-world data collected at 411 air quality monitors across the United States in 2013, shows that the most heavily affected location in the United States had a 98<sup>th</sup> percentile 1-hour concentration of 156 µg/m<sup>3</sup>. The Opposition's argument that the proposed station at the Wheaton Mall will be *the* most heavily impacted location in the *entire United States* for 1-hour NO<sub>2</sub>, and will exceed the NAAQS, is simply not credible. It would require this location to generate more than 20 percent more pollution than any other location in the United States. There is no evidence that this could or would happen, and monitoring locations at much more heavily travelled and congested areas show actual measurements far below the standard.<sup>25</sup>

The reality is that there are not any real-world violations in the 2013 national data set, the most current data set available. Even though Sullivan's modeled levels are comparable to some of the highest measured NO<sub>2</sub> levels anywhere in the country, the results still fall comfortably within the NAAQS. Moreover, Sullivan's modeled levels for the proposed station are based on several conservative assumptions and thus overstate the potential emissions.

The Opposition's expert, Dr. Henry Cole, an environmental activist working for KHCA<sup>26</sup> criticized Sullivan's methodology, but did not actually perform any modeling. He testified that he believed it is "likely" emissions will exceed the NO<sub>2</sub> 1-hour standard (Tr. 12/5/13 at 211), but did not testify that there would be a violation of any other NO<sub>2</sub> NAAQS. Sullivan debunked Dr. Cole's wild estimate in Appendix G of the February 2014 rebuttal report, demonstrating that Dr. Cole had erroneously assumed there was more ozone than actually available to convert NO to

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<sup>25</sup> One study highlighting this involves monitors at the port of Long Beach and Las Vegas (Ex. 342).

<sup>26</sup> Costco maintains that the Hearing Examiner should give less weight to Dr. Cole's testimony because of bias. He has a history of working for community organizations that are opposed to commercial development and his website proudly touts a list of his "successful" projects, which he defined as those in which he helped thwart a developmental project.

NO<sub>2</sub>. Dr. Cole failed to refute this fact. The record fully supports Sullivan's modeling establishing that NO<sub>2</sub> concentrations will not exceed the NAAQS and will pose no health threat to the neighborhood.

Dr. Cole testified that the gas station may create 1-hour NO<sub>2</sub> levels as high as 287 µg/m<sup>3</sup>, which would exceed the EPA NAAQ by 50 percent, and which is nearly twice as high as *the highest* reading at *any* location in the United States in 2013. (Ex. 593). This stands in stark contrast to actual readings in Los Angeles and Las Vegas, both of which have much higher levels of pollution-causing traffic than the area surrounding Wheaton Mall, yet each of which produced 1-hour NO<sub>2</sub> levels that complied with the NAAQS. For example, typical roadway traffic contains 1-2 percent heavy duty diesel vehicles, which generally emit relatively high levels of NO<sub>x</sub> emissions compared to automobiles. I-710 traffic in Los Angeles is comprised of approximately 15-18 percent heavy duty diesel trucks, many of which are headed to or from the Port of Long Beach. (Ex. 342). Yet the measured NO<sub>2</sub> levels on I-710 still fall far beneath the 1-hour NO<sub>2</sub> NAAQS. Dr. Cole's testimony that the gas station emissions will inexplicably exceed measured readings on I-710 and every other location in this country is not credible and conflicts with real world measurements.

5. Gas station emissions will comply with the EPA 24-hour PM<sub>2.5</sub> NAAQS.

According to the Washington Council of Governments, as of 2011 the current background levels for PM<sub>2.5</sub> are 10.8 micrograms per cubic meter. In 2013, the EPA revised its annual standard to 12 micrograms per cubic meter. Based on Sullivan's modeling, the gas station activities will generate a maximum incremental PM<sub>2.5</sub> levels of <= .01 ug/m<sup>3</sup> at the closest residential area, school, or the nearby pool. (Ex. 15(a), Table 1-14). Even adjusting to account for the differences in mobile source emission models (the EPA model MOVES was effective

March 2013), the maximum incremental impacts would be  $\leq 0.1 \text{ ug/m}^3$ . Thus, at the areas of greatest concern to Dr. Cole and the Opposition, *i.e.* the pool, school, and nearest home, incremental contributions will be no more than 0.8 percent of the applicable NAAQS, and *three times below the EPA de minimis level of  $0.3 \text{ ug/m}^3$* . Adding these *de minimus* contributions to existing background levels in the area will not come close to violating any NAAQS. In short, there is no basis in fact for a concern with particulate emissions from the proposed station's operations.

Dr. Cole first testified on December 5, 2013 that he thought “that there is a potential for exceeding the PM 2.5 [standard].” (Tr. 12/5/13 at 210, 211). However, the next day when pressed by the Hearing Examiner, he conceded that for locations off the Mall “[Costco] might have a point for the boundary sites, the home, the pool and the school” (Tr. 12/6/13 at 77, 78), and that there was “no significant problem” with respect to PM 2.5 at these locations. Dr. Cole then shifted his focus to the concentrations of PM<sub>2.5</sub> and NO<sub>2</sub> at or around the gas queue. Sullivan conducted modeling to demonstrate annual average PM<sub>2.5</sub> concentrations near the gas queue, including a 10x scale-up in emissions for MOVES, and again established that projected impacts were well below the NAAQS (see Figure 6 of the February 2014 Sullivan Rebuttal Report showing the maximum PM<sub>2.5</sub> concentration *within* the gas queue at  $10.77 \text{ ug/m}^3$ ).

6. The Opposition helped prepare the modeling protocol.

Before Sullivan performed any modeling, Costco met with and spoke with concerned community members to explain why the gas station would not cause any adverse health effects. Mr. Sullivan also met with Dr. Cole. In fact, Costco paid KHCA to compensate Dr. Cole for his participation in the air modeling protocol. Although Mr. Sullivan and Dr. Cole did not agree on all aspects of the modeling protocol, they agreed on many of them. (Tr. 6/17/13 at 203; 15(a)).

7. The Opposition's experts performed no modeling.

Although the Opposition criticized Sullivan's methodology and conclusions, they do not contest his calculations.<sup>27</sup> The Opposition chose to perform no modeling, even though Mr. Sullivan provided them with all of the data upon which he relied. On December 5, Dr. Cole testified that it was "cost-prohibitive" to model the emissions because of the time and effort required to develop the data inputs that are used in the AERMOD software. (Tr. 12/5/13 at 54-55).

This testimony was *not* credible because Costco provided the Opposition with a disk containing the inputs Sullivan used in running his air models, and the AERMOD program. At first Dr. Cole claimed he wasn't aware the AERMOD program was included in the materials Sullivan provided, but later admitted that he was aware that the program is readily available *for free* on the EPA website and other places. (Tr. 5/29/14 at 109-110). In truth, all information necessary to perform an independent modeling in a cost effective manner was readily available to Dr. Cole. This is why Dr. Cole eventually admitted that he does not know how to use the AERMOD modeling software. (Tr. 12/6/13 at 55).

Opposition witness Dr. Patrick Breysee likewise offered no credible testimony as to why *he* chose *not* to do the modeling, especially given his testimony that air modeling "in general, is not that hard." (Tr. 2/10/14 at 65, 66). According to Dr. Breysee, the difficulty in performing modeling lies in creating the inputs and making assumptions, but once those are done, all someone has to do is input them into the AERMOD program and push a button. (Tr. 2/10/14 at 66). Dr. Breysee, like Dr. Cole, simply chose not to do so, but instead offered more speculation and unfounded criticism of Mr. Sullivan's quantifiable, objective findings. Mr. Sullivan's

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<sup>27</sup> The one exception being the conversation of background levels of NO<sub>2</sub> from ppb to µg/m<sup>3</sup>.

extensive air modeling is the only air modeling that anyone conducted for the Site, and his testimony is the only credible evidence presented at the hearing on this issue.

**D. The Opposition's criticism is misplaced and does not establish that fumes will be a nuisance or cause any non-inherent adverse effects.**

Sullivan's extensive modeling and methodology withstand all of the Oppositions criticisms, and, importantly, demonstrated that the anticipated emissions will not violate the NAAQS or cause NO<sub>2</sub> levels that exceed all measured areas in the United States. The Opposition complaints amount to much ado about nothing. Their criticisms of Sullivan's methodology -- individually or collectively -- do not change the fact that the gas station emissions will not violate any applicable NAAQS. The Opposition's main arguments are addressed here.

1. Urban v Rural

The Opposition argued that Sullivan understated emissions because he mischaracterized the Mall parcel as "urban" while they think it should be defined as "rural." The characterization matters because "urban" air has different characteristics than "rural" air. In this context, "urban" air will yield lower modeled NO<sub>2</sub> levels than "rural" air. This argument is utterly without merit. It does not take an expert to know that the Wheaton Mall is not a rural site, in any sense of the term.

EPA air modeling guidance recommends analyzing a 3 km radius, and then characterizing that area as either rural or urban, depending on its characteristics. Sullivan followed this guidance when conducting its large-scale modeling. This guidance, however, must be looked at in context. It typically applies to industrial facilities and power plants, emissions from tall stacks and for air modeling large areas. When modeling a smaller area, such as

receptors within Site, as conducted by Sullivan in its February 2014 Rebuttal Report, the calculations would be inaccurate if they were modeled as “rural air.”

Not surprisingly, EPA guidance emphasizes that *accuracy* is the goal of modeling. As Mr. Sullivan testified “the model that most accurately estimates concentration in the area of interest is always sought. . .you don’t apply consistence at the expense of accuracy.” (Tr. 5/8/14 at 260). For this reason, EPA gives discretion to air modelers to tailor their analysis to fit a specific site. Mr. Sullivan’s detailed modeling of NO<sub>2</sub>, for example, was focused on impacts within and immediately adjacent to the paved gas station source on the 75 acre Wheaton Mall parcel, not an agricultural preserve. Dr. Cole was forced to concede the Mall parcel is urban, but then claimed that the air dispersion at the Mall will somehow be a “mixture of half urban and rural” because it will take time for the air coming from the south to transform into “urban air.” This argument was clearly contrived, and Mr. Sullivan showed why this is false.

Using a peer-reviewed reference, Mr. Sullivan demonstrated in his Rebuttal Report that air traveling from the south towards the Site will have *urban* characteristics at the 5 foot receptor height (breathing level and approximate height of the motor vehicle sources) well *before* reaching the start of the gas queue. Dr. Cole’s testimony failed to demonstrate that the reference was inapplicable, or that Mr. Sullivan’s calculations were in error. Furthermore, even if Dr. Cole were correct that air on the Site will be half “urban” and half “rural,” the Rebuttal Report (Appendix G), establishes that there is not enough ozone available in the relevant area to convert NO to NO<sub>2</sub> to support Dr. Cole’s calculation. Applying an accurate level of ozone to Dr. Cole’s other assumptions reduces Dr. Cole’s estimate from 287 µg/m<sup>3</sup> to 176 µg/m<sup>3</sup>, below the applicable standard (but still approximately 20 µg/m<sup>3</sup> higher than *any* of the 411 NO<sub>2</sub> monitors

across the U.S. in 2013). (Ex. 593). Neither of Dr. Cole's calculations (corrected or uncorrected) are within the plausible range of actual measured concentrations in the United States.

## 2. Background levels

During their protocol meeting, Dr. Cole and Mr. Sullivan agreed on the methodology for calculating background levels. Dr. Cole and Mr. Sullivan evaluated various monitoring locations and chose to use Arlington for NO<sub>2</sub> and Beltsville and Rockville for CO and PM<sub>2.5</sub>. Dr. Cole requested that the outlier PM<sub>2.5</sub> monitor at Beltsville be included in the averaging of PM<sub>2.5</sub> background, which was included in the initial modeling for the November 2012 modeling report.

Mr. Sullivan maintains that based on his decades of air modeling experience, these locations represent a representative background sample. Dr. Cole agreed with the selection of these locations for calculating background levels. From September 2012 through his testimony in December 2013, he expressed no concern with the selection of these locations. Dr. Cole submitted reports, consulted with the Opposition during Mr. Sullivan's cross-examination, and testified on December 5 and 6, 2013, all the while never objecting to the background monitoring until May 22, 2014, the 35<sup>th</sup> day of the hearing. Even at that last moment, he was unable to identify what location(s) he thought were more representative of Wheaton – he simply said that Mr. Sullivan selected incorrect background sites. This failure was remarkable, and renders his testimony unworthy of belief.

One week later, on the 36<sup>th</sup> day of hearings, after having had time to consult with the Opposition's counsel and to analyze which monitoring locations had the highest levels in the region, Dr. Cole changed his testimony yet again. (Tr. 5/29/13 at 36). This time Dr. Cole suggested that the more appropriate monitoring locations were located in Washington D.C. (34<sup>th</sup> Street, NE and 1<sup>st</sup> Street NW). This suggestion is flawed for the obvious reason that those two



locations are in far more urban areas than Wheaton, and thus would be expected to have higher levels of background pollutants.

### 3. Ozone Limited Method (“OLM”)

Automobile exhaust fumes contain a mixture of pollutants that include Nitrogen Oxides (NO<sub>x</sub>). The most harmful oxides of nitrogen is nitrogen dioxide (NO<sub>2</sub>). NO<sub>2</sub> represents only a portion of the NO<sub>x</sub>, but, with time, distance, and sufficient molecular mixing, some NO converts to NO<sub>2</sub>. The Ozone Limited Method (OLM) is one method that can be used to conservatively calculate how much NO converts to NO<sub>2</sub>.

EPA guidance discusses using OLM to determine NO<sub>2</sub> levels. The EPA’s Tyler Fox memo acknowledges that “given the stringency of the 1-hour NO<sub>2</sub> standard relative to the annual standard, many more permit applications may find it necessary to use the less conservative Tier 2 or Tier 3 approaches in order to demonstrate compliance with the new NAAQS rather than relying on the Tier 1 assumption of full conversion.” (Ex. 407 at 5). For these reasons, EPA allows applicants for permits to engage in alternative modeling methodology by using PVMRM or OLM options in AERMOD. (Ex. 407 at 5).

The OLM method is less conservative compared to other modeling methods, but is still highly conservative for modeling near-source receptors. (Ex. 466). Sullivan relied upon extensive peer-reviewed documentation that demonstrates that it takes far more time, distance and ozone to convert NO to NO<sub>2</sub> than Dr. Cole suggests. Instead of treating *all* NO<sub>x</sub> as NO<sub>2</sub>, the OLM method assumes a certain percentage of the NO<sub>x</sub> is NO<sub>2</sub> and then determines how much NO will convert into NO<sub>2</sub>, based in part, on how much ozone is available to combine with the NO in the plume. The OLM method assumes instantaneous conversion of NO to NO<sub>2</sub>, even if there is not sufficient travel time to allow sufficient mixing of the plume to the molecular level

with the ambient air containing the ozone to support convert NO to NO<sub>2</sub>. This means that the OLM method overstates actual NO<sub>2</sub> levels near the source of emissions. Nevertheless, based on his extensive modeling and interpretation of numerous supporting references, Mr. Sullivan concluded that all NO<sub>2</sub> levels would be *far* below EPA NAAQS (Ex. 466), and will likely drop over time as technology improves to further reduce emissions. (Tr. 5/1/14 at 64, 65).

The Opposition aggressively sought to exclude Mr. Sullivan's report and testimony, filing several motions, and seeking reconsideration each time they lost. Ultimately, the Hearing Examiner denied all of the Opposition's motions and admitted Mr. Sullivan's reports and testimony. Mr. Sullivan provided credible, consistent and unimpeached testimony for three days in May 2014 during the hearing, explaining what he did and why, and how his work complies with the EPA guidance. This mountain of evidence conclusively shows that the gas station will not exceed any NAAQS.

#### 4. Traffic counts

The Opposition also argues that Mr. Sullivan underestimated emission levels because he did not account for actual traffic levels on the Mall parcel. They are wrong. The Traffic Group calculated peak-hour traffic levels based on weekday data. Sullivan assumed that the peak weekday peak traffic occurred along the ring road and parking areas *for every hour the Mall was opened*. In other words, Sullivan assumed peak-hour traffic conditions *all the time* and thus his results greatly overstated actual traffic and emissions, but still did not exceed any NAAQS. If Sullivan more realistically accounted for hour-by-hour differences in Mall traffic weekdays and weekends (rather than conservatively use either peak value), the modeled impacts would be further reduced. Sullivan's numbers, therefore, were conservative and appropriate.

The Traffic Group subsequently estimated peak *weekend* traffic hour (783 vehicles/hour) which was 23 percent higher than the peak Mr. Sullivan used for all operational hours (639 vehicle/hour). Even if that analysis were accepted, the difference between using peak weekend traffic instead of peak weekday traffic results in a mere 1 µg/m<sup>3</sup> change in modeled one hour NO<sub>2</sub> emissions. (Tr. 5/1/14 at 77-80).

5. Conversion of background levels from parts per billion to micrograms per cubic meter.

On July 30, 2013, the Opposition showed that Sullivan's August 2013 Report erroneously converted NO<sub>2</sub> units from ppb to micrograms per cubic meter. When the conversion for background levels was corrected, it resulted in moderate concentration levels that exceeded the NAAQS for one-hour NO<sub>2</sub>. Since that moment, the Opposition has tenuously clung to the belief that there is a NAAQS violation.<sup>28</sup> The evidence, however, easily rebuts their contention.

As Mr. Sullivan testified, his November 2012 report applies numerous conservative assumptions that overstate actual projected concentrations. For example, he exaggerated the level and duration of emissions from idling trucks at the Costco loading dock, resulting in a more than 10-fold overstatement of those emissions. He also used outdated background levels, which are much higher than existing levels. His November 2012 Report also treated all NO emissions from vehicles as NO<sub>2</sub>, thus greatly exaggerating the NO<sub>2</sub> concentrations. In addition, Sullivan applied peak-hour weekday traffic levels as if they existed for all hours the station is open. When adjusting even just some of these conservative assumptions as EPA guidelines allow significantly reduces the modeled levels below NAAQS.

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<sup>28</sup> The Opposition immediately attempted to prolong these proceedings and also filed Motions to Dismiss. The Hearing Examiner denied both motions. The Board of Appeals also denied the Motion to Dismiss (as well as other Motions to Dismiss filed by Dr. Mark Adelman).

6. Government Oversight.

The Opposition complains that Costco -- and in particular Sullivan -- have failed to obtain governmental approval for their methodology, even though they well know that neither MDE nor EPA have jurisdiction over this matter. That is because the emissions from the gas station are not significant enough to require oversight at the state or federal level. Gas stations are regulated by technology-based requirements and are not based on dispersion modeling that require them to obtain air quality permits. In fact, the Opposition has tried repeatedly -- and unsuccessfully -- to have MDE and EPA participate in this process. The only result of these efforts were two letters signed by Angelo Bianca of MDE. Neither of those letters provide any basis to deny the Special Exception. (Exs. 90(b) and 372(a)).

7. High volume gasoline sales do not equate with significant levels of pollutants.

The volume of gas sold and the traffic levels associated with sales from a higher volume gas station do correlate to emissions, but the correlation is not a one-to-one ratio. Indeed, Mr. Sullivan testified about how Costco's use of state-of-the-art technology, such as the Arid Permeator, will significantly reduce the levels of emissions of this gas station's activities. In his slide show during direct testimony Slides 7 and 8 (on June 17, 2013), Mr. Sullivan compared emissions from the Costco gas station with historical emission levels from stations that sell much lower volumes of gasoline. (Tr. 6/17/13 at 197-201). He found that even if the Costco gas station sold 12 million gallons of gas, the resulting emissions would be comparable to 3 million gallons of sales in 2000 or 1.5 million gallons of sales in 1988. Contrary to Mr. Silverman's arguments, the projected emission levels from the Costco gas station are not unprecedented.

Moreover, Mr. Sullivan's modeling, which was very conservative, shows that the modeled concentrations will be far below the NAAQS.

For these reasons, Costco has shown that it will comply with all the requirements of Zoning Ordinance Sections 59-G-1.21(a)(6) and 59-G-206(a)(1).

**IX. THE GAS STATION WILL NOT ADVERSELY AFFECT THE HEALTH, SAFETY, SECURITY OR GENERAL WELFARE OF RESIDENTS, VISITORS OR WORKERS IN THE AREA.**

Emissions from the gas station activities will not violate any objective air quality standards or create levels of emissions known to cause any adverse health effects. In addition the station includes many safety features and will be operated in a manner that protects the neighborhood.

Costco has gained much experience operating more than 300 gas stations across the United States. Costco's environmental and safety record is impeccable. For this station, Costco will employ state-of-the-art technologies and require all attendants to be specially trained and certified (Tr. 5/23/13 at 79, 89). It conducts daily inspections of its equipment. (Tr. 5/23/13 at 74, 75). For these reasons, the gas station will not adversely affect the health, safety, or general welfare of the residents, visitors or workers in the area of at the subject site.

**A. Zoning Ordinance Requirement**

Section 59-G-1.21(a) requires Costco to show that the gas station:

- (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.

**B. Staff and Planning Board Recommendations.**

Staff concluded that gas station emissions may adversely affect the health of the neighborhood population. The Planning Board disagreed and found that by complying with the NAAQS, Costco established that the gas station *will not* cause adverse health effects.

- C. The gas station will not adversely affect the health, safety or general welfare of residents, visitors or workers in the area because a conservative modeling of anticipated pollutants shows that none of them will exceed the EPA NAAQS.**

The Hearing Examiner qualified Dr. Kenneth Chase as Costco's health expert. Dr. Chase is board-certified in internal medicine and occupational and environmental medicine. (Tr. 9/16/13 at 23-24; Ex. 17(h)). He matriculated from the University of California at Los Angeles, with a B.A. in mathematics in 1964 and a medical degree in 1968. (Ex. 17(h); Tr. 9/16/13 at 23). Dr. Chase completed his internship at the University of Michigan and performed the first year of his residency at the University of Michigan, before spending two years at NIH, and then completing his residency at Georgetown University. Dr. Chase is a former Assistant Professor of Medicine at George Washington University School of Medicine. (Ex. 17(h)). Over the last 30 years, he has been admitted as an expert in occupational and environmental medicine in cases throughout the country about 150 times. (Tr. 9/16/13 at 26).

In forming his opinions in this case, Dr. Chase drew from his decades of medical experience, and also reviewed 80-100 articles, the Opposition's reports, articles that the Opposition experts relied on, and Sullivan's environmental reports. (Tr. 9/16/13 at 46 - 48). Dr. Chase concluded that the gas station will not cause any adverse health effect because the gas station emissions will not exceed EPA NAAQS. (Tr. 9/16/13 at 48). He further testified that the gas station will not "adversely affect the health or general welfare of the residents, visitors or workers to the area." (Tr. 9/16/13 at 49). And Dr. Chase specifically confirmed that the gas station will have no health impact on the students attending any schools in the area or children or adults playing at a local swimming pool. (Tr. 9/16/13 at 50-51).

Dr. Chase was aware that Sullivan's November 2012 report contained a conversion error, but testified that correcting this calculation did not change his conclusion. (Tr. 9/16/13 at 72). He reviewed Sullivan's subsequent reports and remained convinced that no emission will violate any NAAQS (Tr. 9/16/13 at 55). Dr. Chase emphasized that the emissions from the gas station

will be so low that it would be impossible to conduct a study that measured its health effects. “It’s like white noise. You won’t be able to separate it out from the background from what’s already there.” (Tr. 9/16/13 at 58). Dr. Jison similarly testified that she didn’t know whether it was even possible to conduct “a reliable scientific study over that small an area, with that small a population,” to show the adverse effects if any from a gas station. (Tr. 1/10/14 at 220,

221.) The incremental increase in pollutants emitted as a result of the gas station will not cause any adverse health effects.

**D. The EPA NAAQS are designed to protect the public health.**

Dr. Chase testified that the NAAQS are “intended to protect the public health” and contain “a wide margin of safety for the general pollution” and are “intended to protect vulnerable populations that would include the elderly, persons with emphysema, COPD, chronic obstructive pulmonary disease, [and] asthma.” (Tr. 9/16/13 at 52). In discussing the legislative history of the Clean Air Act, the Federal Register points out that NAAQS are intended to protect the health of *any* sensitive group:

The legislative history of section 109 indicates that a primary standard is to be set at “the maximum permissible ambient air level \* \* \* which will protect the health of any [sensitive] group of the population,” and that for this purpose “reference should be made to a representative sample of persons comprising the sensitive group rather than to a single person in such a group.” S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970).

Federal Register Volume 75, Number 26 (Tuesday, February 9, 2010), at 6475. Dr. Chase further testified that NAAQS are intended to protect the students who attend Stephen Knolls (Tr. 9/16/13 at 53, 54). This is also supported by the Federal Register, which, after a lengthy analysis discussing the evidence and commentary for establishing 1-hour NO<sub>2</sub> standards, concluded that the standard of 100 ppb was sufficient to protect at-risk populations:



Therefore, the Administrator judges that a standard reflecting the maximum allowable NO<sub>2</sub> concentration anywhere in an area set at 100 ppb is sufficient to protect public health with an adequate margin of safety, including the health of at-risk populations, from adverse respiratory effects that have been linked to short-term exposures to NO<sub>2</sub> and for which the evidence supports a likely causal relationship with NO<sub>2</sub> exposures. The Administrator does not believe that a lower standard level is needed to provide this degree of protection. These conclusions by the Administrator appropriately consider the requirement for a standard that is neither more nor less stringent than necessary for this purpose and recognizes that the CAA does not require that primary standards be set at a zero-risk level or to protect the most sensitive individual, but rather at a level that reduces risk sufficiently so as to protect the public health with an adequate margin of safety.

*Id.* at 6502. The EPA, as required by law, has established standards that protect sensitive populations with an adequate margin of safety. Costco will comply with these standards and thus will not adversely affect the healthy, safety or welfare of the residents, workers or visitors near the gas station.

**E. There is no evidence showing when emissions will create adverse health effects.**

The Opposition's medical expert, Dr. Maria Jison, agrees that "[t]he EPA standards are designed to protect public health." (Tr. 1/10/14 at 245). She argues, however, that the NAAQS are not the "be-all/end-all of this." *Id.* At the same time, Dr. Jison was unable to offer any alternative standard for consideration or application.

On occasion, the Opposition has argued that the Hearing Examiner should apply the World Health Organization ("WHO") guidelines, which are more restrictive than the EPA NAAQS. The WHO guidelines, however, are just that -- guidelines -- mere recommendations that have no force of law in Maryland or anywhere. Abigail Adelman, testifying for the Stop Costco Gas Coalition, agrees that the "World Health Organization does not publish regulation or standards, but, rather, guidelines . . .". (Tr. 1/10/14 at 54). In addition, the EPA, in final agency

rulemaking on the NAAQS, specifically considered the thresholds in the WHO guidelines for PM<sub>2.5</sub> and PM<sub>10</sub> and decided to adopt different thresholds for the regulation of such pollutants in the United States. *See* 40 C.F.R. §§ 50, 51, 52, 53, 58 (2013); *see also* National Ambient Air Quality Standards for Particulate Matter; Final Rule, 71 Fed. Reg. 200, 61176 (Oct. 17, 2006) (“[t]he Administrator does not agree that the . . . WHO guideline provide[s] an appropriate basis for setting the level of the annual PM<sub>2.5</sub> in the U.S.”); *id.*, at 61198 (“[t]he American Lung Association . . . stated that EPA . . . had also ignored substantial evidence from European studies as well as the recommendations for an annual PM<sub>10</sub> standard made by a WHO working group . . . EPA disagrees that it ignored the evidence that is relevant to evaluating the health effects associated with long-term exposure to thoracic coarse particles . . .”).

In addition, Dr. Jison’s conclusion that the emissions will cause health effects is suspect because she didn’t know all the pertinent facts. For example, she did not know the background levels of any pollutants in the general neighborhood, describing them merely as “high.” (Tr. 2/10/14 at 67). This failure is significant, because it is the *total* level of pollutants that will cause adverse health effects, not the incremental increase from the proposed Station’s operations.

Dr. Jison’s argument that all pollution causes adverse health effects ignores the reality that “dose makes the poison.” (Tr. 9/16/13 at 58). Anything, even water, can be harmful in sufficient quantity. Conversely, toxic materials, in low doses, can cause no harm. Sunlight provides helpful vitamin D, but at certain levels it can cause cancer. Chlorine is added to public water supplies, but too chlorine can be harmful, even fatal. At certain levels, it is accepted that the gas station pollutants will not cause adverse health effects. Although Dr. Jison (and Dr. Breysee) reject this premise, neither of them could testify *when* any adverse health effects will occur. In essence, the Opposition contends that the Hearing Examiner should apply no standard

at all. Dr. Jison testified that “it’s always been my opinion that you can’t rely on a particular line drawn in the sand in this case.” (Tr. 2/25/14 at 68). But if there is no line, how do you know when you’ve crossed it?

The Opposition and Dr. Jison do not argue that emissions become harmful at a certain level, but that all pollution is bad and that, because this gas station -- like all gas stations -- will create some pollution, it, too, is bad, and should be denied. Dr. Jison testified that “[a]ny development that would increase pollution levels this close to the neighborhood and the sensitive populations contained within it would not be a *good idea*.” (Tr. 2/25/14 at 84). (emphasis added). She testified that all gas stations pose a threat because “I mean, an added source of pollution, in general, is not a good idea.” (Tr. 2/25/14 at 85). In her view -- all additional pollution is unacceptable. (Tr. 2/25/14 at 85). Under this theory any gas station in the County would be impermissible. Dr. Jison’s testimony establishing no non-inherent health risks from the proposed Station, and offers no workable alternative to the NAAQS.

**F. Montgomery County Public Schools.**

The Opposition also emphatically argues that the gas station will cause pollution that will harm students at Stephen Knolls. It is significant, however, that the school itself expressed no opposition to the gas station during the lengthy hearings. No official representative of the Stephen Knolls School or the Montgomery County Public Schools (“MCPS”) participated or testified in these proceedings. Nor did they even submit any letter in opposition to the gas station. The Stephen Knolls School is just one of two MCPS facilities for special needs children in the County. Given the importance of this facility, if MCPS truly believed that the gas station would threaten the student population, it would have weighed in on this matter. Similarly, the Opposition argues that the gas station will harm workers at the Mall but no worker or business at

the Mall expressed that view during the proceedings, despite the Opposition's aggressive and public efforts to stop the proposed station.

**G. The Costco gas station is safe and will not adversely affect safety.**

The Costco gas station will also be safe from physical and operational perspectives. For 20 years, Costco has designed and operated safe filling stations. Mr. Hurlocker testified about the steps Costco takes to ensure public safety and emphasized that the "first step" in designing gas stations "is to make sure our members are safe." (Tr. 5/23/13 at 65). Costco understands that in order to sell large volumes of gasoline it is imperative that its operations be safe, clean, and efficient. Costco sells large volumes of gas and understands that it must protect its members, the public, and the environment. As Mr. Hurlocker testified, "with great volumes, comes great responsibility." (Tr. 5/23/13 at 101).

Mr. Hurlocker further testified that the most important aspects driving the zoning and operational aspects of a Costco gas station are "safety, environmental safety and health, and human safety." *Id.* Accordingly, Costco employs certain technologies above and beyond what is required. For example, Costco designs its fueling storage and deliver system to ensure that "everything underground is double-walled and the space between the double walls continuously monitored" so that any leaks are detected before they reach the environment. (Tr. 5/23/13 at 65). The whole system is designed "to make sure that there are no leaks underground." (Tr. 5/23/13 at 66). For this reason, "all the piping is secondarily contained," i.e., "double-walled," (Tr. 5/23/13 at 66) and "the pressure in the tank is regulated." (Tr. 5/23/13 at 66).

In addition, in compliance with Maryland law, the proposed gas station, as with the eight other Costco gas stations in Maryland, will have "stage two vapor recovery, which entails an entirely separate set of pipes returning to the tanks to return vapor that's displaced from the car's

tank as it's filled. That's routed back to the underground storage tank so it's not released to the atmosphere." (Tr. 5/23/13 at 66). This technology too results in lower emissions rates.

Moreover, the gas station always has at least one attendant on site. Mr. Hurlocker testified "[w]e specifically do not allow the station to operate without a certified trained attendant out on the fuel islands. In certain cases, we will have more than one and, of course, the building has, you know, a hundred people there, many of them cross-trained, and so they can rotate another person out if there's unusual traffic congestion or any other thing at the judgment of the warehouse management they think additional help is out there, needs to be there." (Tr. 5/23/13 at 89).

While this gas station may be unique to Montgomery County, it is not unique to Costco, to Maryland or to the United States. Costco has a strong track record of operating clean, convenient and safe stations that provide customers with high-quality fuel at a good value. Costco sells large volumes of fuel, its members are satisfied and loyal, and its environmental record is impeccable. In addition, the proposed gas station here will benefit from Costco's past success and – like all of Costco's gas stations – will employ state of the art technology to reduce and minimize any potential impacts on the surrounding community and on the environment.

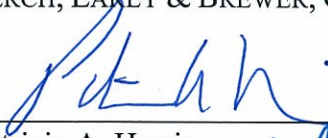
Costco operates filling stations as a service to its many members. There is no reason to think it would place a gas station at this particular location if it believed that to do so would create adverse health, safety or general welfare issues for its members or other visitors who work, or live in the general neighborhood. Costco will neither create nor tolerate a situation that makes its members feel unhealthy or unsafe. Costco is a good citizen: it has a vested interest in making the gas station not only commercially successful, but also a pleasant shopping experience with minimal inconvenience.

**X. CONCLUSION**

For all the reasons set forth above and those addressed during the hearings, Costco respectfully requests that the Hearing Examiner recommend in favor of the Special Exception Petition.

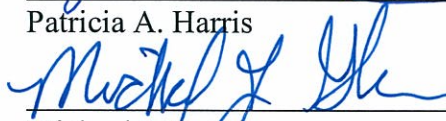
Respectfully submitted:

LERCH, EARLY & BREWER, CHTD.



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